THE COURT JURISPRUDENCE ON THE INTERPRETATION AND APPLICATION OF ARTICLE 126(2)(e) OF THE 1995 CONSTITUTION: A CASE FOR THE DESECRATION OF THE NEW CONSTITUTION.

MOHMED MBABAZI*

INTRODUCTION

What could the Constituent Assembly Delegates have intended by enacting Article 126(2)(e)[1] in the 1995 Constitution of Uganda? For a practitioner and generally lawyer this question, would be like asking a truism as authorities abound on the interpretation and application of the Article. But to a layman, who constitutes the sovereign, wasn't the Article enacted following his views on the administration of justice? Or put the other way wherein is the sovereignty of the people with a judicial power exercisable in their name and in conformity with law, the values, norms and aspirations of the people[2]?

***Advocate and Partner, Ms Nyanzi, Kiboneka and Mbabazi Advocates.**

[1] Article 126 of the Constitution of the Republic of Uganda, 1995 reads as follows:-

126 (1) Judicial power is derived from the people and shall be exercised by the Courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people.

(2) In adjudicating cases of both civil and criminal nature, the courts shall subject to the law, apply the following principles:-

a) justice shall be done to all irrespective of their social and economic status;
b) justice shall not be delayed;
c) adequate compensation shall be awarded to victims of wrongs;
d) reconciliation between parties shall be promoted;
e) substantive justice shall be administered without undue regard to technicalities.

[2] On the 22nd September, 1995 the Government of the Republic of Uganda enacted a new Constitution. This was after extensive consultation by the Uganda Constitutional Commission appointed under the Uganda Constitutional Commission Statute No. 5 of 1988, which submitted its report together with a draft Constitution to the President on 3rd December 1992. Chapter 17 of the report dealt with the Judiciary and the administration of justice. From the concerns and recommendations of the people about the administration of justice, the new Constitution especially made provision for the administration of justice as hereunder:-

a) Formulated National objectives and Directive principles for the guidance of all organs and the people in applying or interpreting the Constitution or any other law for the establishment and promotion of a just, free and democratic society. Accordingly, objective iii (iv) provides for the establishment and nurturing of institutions and procedures for the resolution of conflicts fairly and peacefully.
b) Dedicated Articles 126, 127 and 128 to the administration of justice.

In this paper I shall make a critique of the decisions given by the Supreme Court interpreting or applying Article 126(2)(e). I shall also make a comparative analysis of the approach given to the application and/or dispensation of technicalities by other systems of justice administration. In this regard I shall derive corresponding instances and circumstances wherein the issue of technicalities was addressed but with diametrical court decisions. My choice of England as a reference point is not based on Uganda's colonial legacy of the English common law but more because of the contrasting system of democracy and resultant constitutional jurisprudence[3]. I shall in conclusion urge for the re-engineering of our infant and already crippled constitutional jurisprudence on the exercise of judicial power coupled with the reordering of the civil justice machinery and process. It is hoped that this paper shall breathe life into Article 126(2)(e) and pave the way for an effective, rational and accessible system of determination and enforcement of legal rights consistent with the values and aspirations of the people envisaged by the Delegates of the Constituent Assembly. And to apply mutatis mutandis the statement of Lord Denning in Harkness[4] it can at last be asserted that "it is not possible for an honest litigant in the Uganda courts to be defeated by any mere technicality, any step, any mistaken step in his litigation".

LITERATURE REVIEW

Trial process comprising of court procedures and practices or otherwise called the civil justice system is the most important contact through which the ordinary person enforces his substantive legal rights in the courts of justice. The trial process governed by the civil procedural law in the words of Sir Jacob[5] constitutes the machinery for obtaining what Lord Brougham called;

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c) Gave an interpretation of judicial power in Article 257 as meaning the power to dispense justice among persons and between persons and the state under the laws of Uganda.

[3] The United Kingdom is a parliamentary democracy as opposed to being a constitutional democracy meaning that it has no written constitution and a bill of rights wherein the people are sovereign. And because parliament exercises the powers of the sovereign then it is the judge of the constitutionality of its own laws. Therefore courts cannot declare a legislation as unconstitutional because the law is sacred. In a constitutional democracy the Constitution is supreme and the courts interprete the Constitution and can declare unconstitutional a legislation. In effect constitutional litigation and jurisprudence in a parliamentary democracy is much absent as it is abundant in a constitutional democracy.

[4] Harkness Vs Bell's Asbestos and Engineering Ltd. [1967]2 QB 729/36. Lord Denning therein quoted the statement of Lord Bowen cited in Pontin v Wood [1962]1 WLR after the enactment of R.S.C Order 2 rule 1(1) in order to get over the decision of In re Prichard, decd. [1963]Ch 504.

[5] Sir Jack I.H. Jacob "*The Reform of Civil Procedural Law*" in "The Reform of Civil Procedural Law and other Essays in Civil Procedure", (1982),p1

> "`Justice between man and man'. It manifests the political will of the state that civil remedies be provided for civil rights and claims, and that civil wrongs whether they consist of infringements of private rights in enjoyment of life, liberty, property or otherwise, be made good so far as practicable by compensation and satisfaction or restrained if necessary by appropriate relief. It responds to the social need to give full and effective value to the substantive rights of members of society which would otherwise be diminished or denuded of worth or even of reality".

Such is the importance of procedure that it is said to lie at the heart of the law[6] by providing the necessary armory to the parties for presenting and conducting their cases. In the graphical exposition of Sanghi[7] he analogises the importance of procedure to justice to that of a human body and soul. The body viz. the procedure vibrates with life because of and to the extent it protects justice and justice depends upon and cannot be achieved without the body viz. the proper and health procedure. It thus goes without saying that in order to operationalise the elements of civil justice, the civil justice system must be able to effectively give just solutions for substantive law disputes by applying appropriate rules of procedural law. The procedural law must therefore have the capacity to ensure that the rights guaranteed are enforced at law without any imbalance between the rights that people enjoy at law and the rights that they enjoy in practice.

To understand the relationship between procedural and substantive law, one has to contextualise the two within the common law adversarial system. The object of the system is to search for the truth and hence justice through the parties acting as adversaries before an impartial judge. In effect court proceedings are a kind of civilised violence to prevent parties to conflicts of a juridical nature from resorting to physical violence as a means of conflict resolution. Couture[8] gives the development of this historical necessity in the following exposition that "primitive man's reaction to injustice appears in the form of vengeance. The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities. A civil action in final analysis, then is civilization's substitute for vengeance. In its present form, this civilized substitute for vengeance consists in a legal power to resort to the court praying

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[6] Sir Maurice Amos "A Day in Court at Home and Abroad"(1926) 2 Cambridge Law Journal, p340.
[7] G.L Sanghi, "*Trial and Procedures in India*" in "Trial and Procedures Worldwide"(Ed) by Charles Platto.
[8] Edward J. Couture, "The nature of the judicial process" 25 Tulane Law Review, p13

for something against a defendant. Whether the claim is well founded or not, is a totally different, and indifferent, fact. During the litigation uncertainty reigns which only ends with the decision. If the decision declares that the plaintiff is not in the right, that the complaint is without foundation, matters revert to their prior status, but the drama has been played out".

Today in this era of constitutionalism there has emerged the idea of social justice, which has created more, rights guaranteed and enforceable at law. Thus the need for a more accessible and effective legal machinery for the effectuation of the substantive rights. In this respect the character of the courts as a citadel of justice has become a constitutional function to dispense justice through the judicial pacification of warring parties. And to the citizen it is now a fundamental constitutional right to have access to justice through the courts of justice established by the state. This constitutional function of the courts of justice has been clearly stated by Lord Diplock[9] that: -

> "Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain a remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute".

The above is of course the cherished ideal of any legal system analogised by Sanghi in the metaphorical cathedral of justice[10]. Sir Jacob[11] explains this trend in the following words:

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[9] Bremer Vulkan v South India Shipping Corp Ltd. [1981]AC 909/977

[10] G.L Sanghi, Op cit., P.21 recounts an Indian story of three stone cutters who are asked by a passerby what they are doing. The first replied that he "cutting stone". The next replied that he "was earning a livelihood". And the third replied that he was "building a cathedral". And he concludes from the answers given that the ideal objective of any trial procedure is to build a cathedral of justice which everyone knows is an ideal that is rarely reached as the actors and workers involved in the process quite often end up in "cutting stones" or "earning a livelihood".

[11] Sir Jack I.H Jacob, "The Fabric of English Civil Justice" (1987) (hereinafter cited Fabric) p284.

> "The traditional tendency in England is to avoid thinking of reasoning 5in terms of principles but rather to look instead to down-to-earth, workable, flexible measures for resolving new problems. The field of civil justice and particularly civil procedure is sewn with solutions which are not logical or coherent or based on principles, but which, nevertheless, work in practice according to methods and usages which have become part and parcel of the habits and customs of both lawyers and layman. The technicalities and complexities of the law have arisen and still hold sway, not because they respond to the needs of justice, but precisely because they have been for ages and still are acceptable practices irrespective of whether they serve the cause of justice".

In effect therefore civil procedure law must be applied in accordance with the precepts of civil justice.[12] And the relationship between the substantive and procedural law must be governed by the constitutional principles of a fair trial and the role of the courts as courts of justice. Collins M.R.[13] has succinctly expressed the "relation of the rules of practice to the work of justice as intended to be that of a handmaid rather than mistress, and the courts ought not to be far bound and tied by the rules, which are after all intended as general rules of procedure, as to be compelled to do what will cause injustice in a particular case".

Against the above theoretical frame work, I shall in the next chapter make an evaluation of the Uganda civil justice system to find out the extent it has effectively applied procedural law as a handmaid of justice and avoided applying it to defeat or cause a miscarriage of justice.

CURRENT JURISPRUDENCE ON PROCEDURAL TECHNICALITIES IN UGANDA

The enactment of Article 126(2)(e) in the 1995 Constitution of Uganda was seen by all or at least the sovereign electorate as revolutionary, ground breaking and establishing a new direction in the civil justice machinery. It is important to note that the wording of Article 126(2)(e) has a historical origin derived from Section 20[14] of the East Africa Order-in-Council, 1902. And in

[12] Jeremy Benthan defined civil justice as "the effectuation of well grounded claims"; Mary P. Mack, Jeremy Benthan, (1962) p87.
[13] In re Coles and Ravensheer [1907] 1 KB 1/4
[14] Section 20 of the East Africa Order-in-Council, 1902 reads:-

"In all cases, civil and criminal, to which natives are parties, every court:

applying Section 20 in 1971, Saldanha J, in Yokonia Ofwono[15] stated as hereunder:

> ".......is it really necessary for the purpose of determining an appeal that a decree should be drawn up......would I be doing justice in insisting upon the technicality that that a decree should be drawn up before the Chief Magistrate can hear the appeal? The question is not purely academic. I understand that there are some 50 appeals pending in the Chief Magistrate's Court in which decrees have not been drawn up. If I were to hold that decrees must be drawn up before a Chief Magistrate can assume jurisdiction, it would mean that applications for leave to appeal out of time would have to granted - decrees drawn up, fresh memoranda of appeal filed. This would involve unnecessary delay and needless expense. It would make a mockery of the administration of justice and provide justification for the well-known jibe that the law is an ass.
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> If ever a case warranted the application of section 20 of the East Africa Order-in-Council, 1902, this case does."

Unfortunately the interpretation of the Article by the courts of justice has been contrary not only to the expectations or aspirations of the people but also to their constitutional function as courts of justice. The effect of the courts' decision in interpreting Article 126(2)(e) has been to give procedure the dominating influence instead of making it subservient to substantive law. Additionally this interpretation has now become part of our constitutional jurisprudence or so to say constitutionalised through the cases of Tinyefuza [16] and Rukundo[17].

It is moreover intriguing to note that this absurd and bizarre state of affairs began in the Supreme Court with the case of Stephen Mabosi[18]. In that case the respondent in an application to strike out its notice appeal for failing to take certain essential steps within the prescribed time, sought in aid Article 126(2)(e) urging that the objections of the applicant were mere technicalities meant to defeat substantive justice. The Supreme Court did not in its decision consider Article 126(2)(e) but

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a) Shall be guided by native law so far as it is applicable, and is not repugnant to justice and morality or inconsistent any Order-in-Council or Ordinance, or any regulation or rule made under any Order-in-Council or Ordinance; and
b) Shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

[15] Yokonia Ofwono V Leya Akongo ULR 1972 (1) 28

[16] Attorney General v Major General David Tinyefuza Supreme Court Constitutional Appeal No.1 of 1997(unrep)

[17] Serapio Rukundo versus Attorney General Constitutional Court case No.3 of 1997.

[18] Stephen Mabosi versus Uganda Revenue Authority SCCA No.16 of 1995.

proceeded to construe and apply the rules liberally in order to give a just decision lest it would be unjust to drive the respondent away from the judgment seat. It can be seen from this judgment that it could after all have been better not to have Article 126(2)(e) as the court did not rely on it but yet came to a just decision by ignoring the procedural technicalities. Additionally, the same court had earlier in the case of Makula International Ltd.[19] given pride of place to justice rather the procedural technicalities. In that case, even after the court had ruled that the appeal was incompetent, it proceeded to determine the appeal on its merits. Although the appeal was dismissed, however, the court set aside the award of the lower court which it found as excessive and substituted the same with an award consistent with the law. It is important to note that in arriving at its decision the court invoked its inherent powers to prevent abuse of its process where the abuse entails making orders contrary to law. The law in question was the substantive law.

The Makula case may have been in line with and an echo of the prior decisions dealing with technicalities. In the case of The Iron and Steelwares Ltd.[20] the court invoked its inherent jurisdiction to control its procedure by waiving the strict application of the rules of procedure in order to ensure that procedural rules did not defeat justice. It may be said that at the time of the said decisions then the common law of England was very much omnipresent as to guide the courts in carrying out its primary objective of doing justice between the parties by applying the rules to yield to the merits of the case. The statement of Lord Bowen[21] that was being recast deserves mention in this regard to the effect that: -

> "It is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights....I know of no kind of error or mistake which if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy"

And Sir Jacob[22] while commenting on the outstanding contribution of the Judicature Acts of 1873-1875 which embodied the Rules of Court

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[19] Makula International Ltd V His Eminence Cardinal Nsubuga and another Uganda Court of Appeal Civil Appeal No.4 of 1981 reported in [1982]HCB 11

[20] The Iron and Steelwares Ltd. v C.W Martyr company (1956) 23 EACA 175.

[21] Cropper V Smith (1884) 26 Ch D 700/710.

[22] Sir Jack I.H. Jacob "*The Judicature Acts 1873-1875 Vision and Reality*" in "The Reform of Civil Procedural law and other Essays in Civil Procedure", (1982) p309.

in their Appendix, quotes Lord Bowen as saying that: -

> "It is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any step, any mistaken step in his litigation. Law has ceased to be a scientific game that may be won or lost by playing some particular move".

What then could have gone wrong, while in the same session, the Supreme Court was making giant strides towards effectuating the words of Lord Bowen. I shall for purposes of comparison refer to the case of Shell versus Agip[23] wherein the court departed from the common law adversarial principle and proceeded to determine the case in order to arrive at a just decision.

In this case both counsel for the parties made submissions before the court quoting cases leaving the judge with a different impression which was however changed on a further reflection and decided otherwise. This was after the judge had made his own private judicial researches on cases not cited by both counsel but which he considered persuasive on the matter. Although such has been criticised as offending the rule of *audi alteram partem*[24], it however, represents the emerging role of a modern pro-active judge.

The decisions of the Supreme Court regarding the interpretation and application of Article 126(2)(e) have however denuded the giant stride taken in the Shell versus Agip case. As I shall show later, the court did not at all engage in any private judicial researches, which would have led them to decide otherwise. Additionally the court assumed the jurisdiction to interpret Article 126(2)(e) without any commitment as a Constitutional Court and thence their decision.

In the case of Utex Industries Ltd.[25], the Supreme Court after deciding that compliance with Rules 81(1) and (2) were mandatory, proceeded to discuss the interpretation and applications of Article 126(2)(e). It can therefore be said that the decision of the court regarding Article 126(2)(e) was an *obiter dictum* as the application had already been disposed of. And for that purpose I would like to quote in extenso the statement of the court as hereunder: -

> "Regarding Article 126(2)(e) and the Mabosi case we are not persuaded that the Constituent Assembly Delegates intended to wipe out the rules of procedure of our courts by enacting

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[23] Shell (U) Ltd. v Agip (U) Ltd. SCCA No.49 of 1995.

[24] Goldsmith v Sperring Ltd. [1977]1 WLR 478. Also see Neil Andrew, Principles of Civil Procedure (1994) Para 3-017.

[25] Utex Industries Ltd. v Attorney General SCCA No.52 of 1995

Article 126(2)(e). Paragraph (e) contains a caution against undue regard to technicalities. We think the Article appears to be a reflection of the saying that rules of procedure are handmaids to justice - meaning that they should be applied with due regard to the circumstances of each case. We cannot see how in this case Article 126(2)(e) or the Mabosi case can assist the respondent who sat on its rights from 18th August, 1995 without seeking for leave to appeal out of time. It is perhaps pertinent here to quote paragraph (b) of the same clause (2) of Article 126. It states

'justice shall not be delayed'

Thus to avoid delays rules of court provide a timetable within which certain steps ought to be taken. For any delay to be excused, it must be explained satisfactorily"[26].

In appreciating this decision of the Supreme Court, it is important to understand the facts of the case, as they constituted the circumstances. The Attorney General was the respondent in an application to strike out his notice of appeal filed against a judgment delivered on 4th August 1995. Thereafter on the 7th September 1995 the respondent filed a letter to the Deputy Registrar requesting for the preparation of the record of proceedings. This copy was not copied to the applicant nor was it served on to it. There was also no evidence or certificate of the Deputy Registrar certifying the time when the record was ready and delivered to the respondent. The court after construing the rules of court and applying them to the facts proceeded to hold the respondent could not rely on the proviso of rules 81(1) and (2) as he had failed to comply with the mandatory requirements therein that the intended appellant had to make a written request within 30 days of the date of the decision appealed against and that a copy of such request must be sent to the intended respondent. Further, it was held that Rule 81(2) requires the intending appellant to deliver a copy of the written request to the intended respondent who on the face of it was expected to indicate that it had been copied to the intended respondent. Regarding the Deputy Registrar's certificate, it was held that it was the bounden duty of an intending appellant to ask for such certificate in as much as it was his duty to actively take steps necessary to prosecute the appeal.

From the facts of the case it is clear that the respondent had not complied with the rules. And further the court had been presented with a number of authorities wherein such non-compliance has resulted in striking out appeals as incompetent, which were clearly

[26] Ibid.

against the respondent. But it will be noted that Article 126(2)(e) had not yet been enacted and therefore it was never considered in the authorities relied on by the Supreme Court as the basis for their decisions. Worsestill, the court did not in this case engage in private judicial researches.

In the case of Haji Nurdin Matovu[27] the Supreme Court had this to say: -

> "On one hand, one has the necessity of following the rules, and on the other hand there is need for the courts to control their proceedings and not be stultified by the rules of procedure. As Georges C.J said in Essaji v Solanki [1968] EA 218/224 to which the learned single judge referred, the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights. Unless a lack of adherence to the rules really renders the appeal process difficult or inoperative, it would seem that the main purpose of litigation, namely the hearing of disputes should be fostered rather than hindered. We would therefore respectfully follow the lead of Odoki J.S.C. in the Tebajukira case and hold that technical or mechanical operation or rules, may be accompanied by reasonable steps allowing applications to be taken whereby a defect may be cured according to the circumstances of the case".

In the same case above quoted, the full bench of the Supreme Court commended the approach of the single judge in the following words that:-

> "The learned Judge exercised his discretion in favour of allowing issues in this litigation to be finally determined, and it appears to us to be consonant with the modern approach to this subject, whereby as far as possible, mistakes and blunders of the legal profession should not be permitted to interfere with the main aim of the judicial service which is to provide for the orderly consideration of disputes on their merits"[28].

Even if the court had not undertaken private judicial researches the tenor of the Supreme Court, which was very clear, represented its approach towards procedural technicalities. The Supreme Court reinstated its role as a court of justice whose primary objective was to do justice between the parties. Additionally it expounded

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[27] Haji Nurdin Matovu v Ben Kiwanuka SCCA No. 12 of 1991

[28] Ibid.

its authority to allow meritorious claims to be duly effectuated without allowing the operation and application of procedural rules to overwhelm the merits of the case.

Whichever option the court would have chosen in deciding the case of Utex Industries Ltd. (either to engage in private judicial researches or to exercise its jurisdiction as a court of justice), the result in the said case would have been different. What then were the pertinent questions the court ought to have addressed itself to, in order to arrive at a just decision of the substantive law disputes? The first question would have been whether the respondent's non-compliance with the rules had rendered the appeal process difficult or inoperative? The respondent had failed to copy and send a copy of the letter requesting for proceedings to the appellant. What then is the rationale behind the intending appellant writing a letter requesting for proceedings from the Registrar with a copy being sent to the intended respondent? I shall not in this article go behind each rule to find out the basis for its enactment. But suffice it so say that generally rules provide the machinery, manner and means by which legal rights and duties are to be enforced or recognized by the courts of law by ensuring that there is procedural fairness. In effect the rules are not an end in themselves but a means of achieving the objectives laid down in substantive law.

The second question then, would be whether the decision of the court achieved or was consistent with the objectives laid down in substantive law? The respondent was seeking to appeal against a judgment delivered against it in the trial court, as a matter of right. The interest of the respondent was to get a final determination as to his liability, which he was contesting.

The third question the court ought to have addressed itself on would have been whether its decision finally determined the dispute between the parties? If legal rights are not to be merely and abstractly acknowledged then they ought to be adequately protected and enforced. Striking out the appeal as incompetent meant that the respondent could go back and comply with the rules and then have his appeal heard on merit. But this would also be subject to the court being satisfied that there were sufficient reasons for non-compliance by the respondent. This would in turn open up a spiral of applications to have the respondent heard on merits. Even without arguing the merits of such applications, it is already clear that the decision of the Supreme Court instead of finally determining the controversy and dispute between the parties would only result in a multiplicity of legal proceedings.

On the other hand, if the respondent was a private litigant other than the Attorney General, instead of pursuing the appeal through

applying for the extension of time, he still had the alternative of suing the advocate for damages. As to whether the respondent as a litigant would have a cause of action against his advocate would depend on whether the non-compliance with the rules constituted a blunder or mistake of counsel. It is true that counsel requested for the proceedings outside the prescribed time. Further, he did not copy and serve the letter to the respondent. The advocate did not also extract a copy of the Registrar's certificate certifying the time when the record was completed. But supposing all this had been done, would the preparation of the record have been completed earlier and advanced the appeal to an earlier completion? The same court in the case of Rukuba versus Kazzora[29] took judicial notice "of the great difficulties and shortage of logistics in the preparation of records". Could it be that in the case of Utex the causes of delay had been overcome?

The last question that the court ought to have addressed itself on would have been the interpretation of Article 126(2)(e). I have already said that this being a matter of interpretation of the Constitution then the competent court to make any authoritative interpretation would have been the Constitutional Court. Thus the Supreme Court ought to have made a reference of the issue to the Constitutional Court. Instead it engaged in speculation of the intention of the Constituent Assembly and ruled that the intention was not to wipe out the rules of court. Given the material available on the court record it is highly doubtable that the Supreme Court could discern the intention of the Constituent Assembly. To say that the Constituent Assembly could not have meant to wipe out the rules of court means that the Article was subject to the rules. Or put the other way, one can interpret the said statement to mean that the rules of court were supreme to the constitutional enactment.

But the Constitution is the supreme law and can wipe out the rules of court by rendering them void for being inconsistent with any of its provisions. The Supreme Court in order to give effect to its meaning stated that the Article was "a reflection that the rules of procedure are handmaids of justice meaning that they should be applied with due regard to the circumstances of each case"[30]. With due respect to the Court the quotation of rules of procedure being handmaids of justice and meaning given thereof was out of context. The statement that rules of court are handmaids of justice was first made by Collins M.R in re Coles and Ravenshear[31]. The same statement was quoted in The Iron and Steelwares Ltd.[32] and in order

[29] M.L.S. Rukuba v J.W.R Kazzora SCCA No. 11 of 1991
[30] Utex Industries Ltd Op cit.
[31] In re coles and Ravensheer [1907] 1KB 1/4
[32] (1956) 23 EACA 175. See note 13.

for the handmaid not to defeat justice, the court in that case waived the strict application of a rule in order to do justice. Accordingly if the court had really meant to intepret Article 126(2)(e) using the said quotation, it would have read the full quotation and applied it to the facts. No better and just decision would have been made than to waive the strict application of the rules that had not been complied with by the respondent.

It will be noted that in order to validate their decision as to the inapplicability of Article 126(2)(e), the Supreme Court relied on Article 126(2)(b) to the effect that "justice shall not be delayed". Whereas the provision sought to be applied is all well meaning, but with due respect to the Court it was misapplied in the circumstances. The effect of the decision of the court was to strike out the notice of appeal and not to end the dispute and controversy between the parties. If what had already happened had delayed justice then the decision striking out the notice of appeal delayed justice the more. There was nothing to stop the respondent from going all over again to start the appeal process. Only a disappointed litigant and with no confidence in the justice system would give up. Although the award of costs against such a litigant as was done would debar him from pursuing his right of appeal to final conclusion, one would, however, wonder whether that was the justice that was envisaged to be accelerated and done expeditiously for the parties?

After the Utex case one would have expected an act of remorse by the Supreme Court by way of amending the rules. Unfortunately there was no such remorse instead the Chief Justice has under S. 51(2)(b) of the Judicature Statute, 1996 modified rule 81(2) to the effect that the appellant has to retain proof of service of the letter requesting proceedings. Additionally in the case of Kasirye, Byaruhanga and Co. Advocates[33], the Supreme Court went ahead to reinforce their decision in Utex Industries and set a *locus classicus*. In the case of Kasirye, Byaruhanga the appellant had complied with all the other rules save serving the letter of request on the respondent. Counsel for the appellant even conceded the lack of service of the written request but sought in aid Article 126(2)(e) contending that no injustice had been occasioned to the respondent.

The Supreme Court in upholding the preliminary objection had this to say after quoting Article 126(2)(e) and underlining the words “subject to the law”.

> "We have underlined the words <u>subject to the law.</u> This means that clause (2) is no license for ignoring existing law. Rules

[33] Kasirye, Byaruhanga and Co Advocates v Uganda Development Bank SCCA No. 2 of 1997

81(1) and 81(2) are existing laws......
Clearly sub-rule (2) of rule 81 disentitled the appellant from relying on the proviso to sub-rule (i) if such appellant fails to serve the respondent with a copy of the request for proceedings. There are many decided cases on this point[34].

And after quoting their interpretation of Article 126(2) (e) made in Utex, the Supreme Court further held that:

> "We adopt the same reasoning here and say that a litigant who relies on the provisions of Article 126(2)(e) must satisfy the court that in the circumstances of a particular case before the court it was not desirable to pay undue regard to a relevant technicality. Article 126 (2)(e) is not a magic wand in the hands of defaulting litigants".

In this case again the Supreme Court undertook the role of a Constitutional Court. And even if they would have had the constitutional mandate to interprete this particular provision, I must say they did not apply the correct principles.

It will be noted that in Uganda there is a dearth of authority setting out the principles of constitutional interpretation for very well known reasons.[35] And in the circumstances we have to rely on principles developed in other constitutional democracies and possibly with a track record in constitutional jurisprudence. In the case of State of South Dakota v State of North Carolina[36], Justice White stated the principles in the following words: -

> "I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument. If, in following this rule, it be found that an asserted construction of any one provision of the Constitution would, if adopted, neutralize a positive prohibition of another provision of that instrument, then it results that such asserted construction is erroneous, since its enforcement would mean not to give effect to the Constitution but to destroy a portion thereof".

[34] The Supreme Court cited the following cases Robert Kitariko v Twino - Katama, Court of Appeal Civil Application No. 6 of 1982; P. Nakiwala v The Libyan Arab Uganda Bank SCCA No. 6 of 1986, Almeida v Almeida SCCA No. 15 of 1990 and Utex Op cit.

[35] There have been very few constitutional cases under the previous Constitution. And even then most of the cases were aimed at challenging the constitutionality of the sitting government.

[36] State of South Dakota v State of North Carolina, 192 U.S 286 (1904) at p328

Under Article 126(1), the courts are empowered to exercise judicial power, which is derived from the people in the name of the people and in conformity with law and with the values, norms and aspirations of the people. Under Article 257 judicial power is defined to mean power to dispense justice among persons and between persons and the state under the laws of Uganda. What law is then meant as the basis for dispensing justice? To my mind the law in question would be substantive law i.e. the law which defines, creates, confers and imposes legal rights. Or was it as the court decided procedural law i.e. the law, which provides the machinery, manner and means by which legal rights and duties are enforced or recognized by the law? To say that subject to the law meant procedural law would mean that procedural law exists independent of substantive law. And in effect procedural law is given supremacy and a dominating influence over substantive law with the outcome that legal rights are enforced in the abstract.

I shall make an analysis of the Supreme Court's decision using a hypothetical case. Supposing X is duly indebted to A and A in order to recover his money from X brings an action in court by notice of motion. X having been duly served comes to court and argues that the action for recovery is not properly before court and therefore ought to be dismissed. Of course the procedure is by and large wrong. What then would be the effect, if court went ahead and dismissed the action for recovery on the basis of not being properly before court? First of all A would have been denied his legal right to enforce his claim to recover his debt from X. Also X would not have been given an opportunity to explain whether A's claim is well founded or to assert his claim of ownership on the amount in dispute. Instead the court would have decided on the method the parties have to employ in order to enforce such claims as A's. But then what was A's objective in coming to court - to learn the procedure or enforce his rights?

On a closer scrutiny of the decision in Kasirye, Byaruhanga, it will be noted that the court foreclosed its inherent powers and jurisdiction to make orders that may be necessary for the ends of justice or prevent the abuse of its process. In the said decision it became incumbent upon a litigant who sought to rely on Article 126(2)(e) to satisfy court that in the circumstances of the particular case, it was not desirable to pay undue regard to a relevant technicality. But this position of the court seems irreconcilable with the court decisions on when it may exercise its discretion and invoke its inherent jurisdiction. In the case of National Union of Clerical, Commercial Professional and Technical Employees[37] the Supreme Court stated that in exercise of courts'

[37] National Union of Clerical, Commercial Professional and Technical Employees Vs National Insurance Corporation SCCA No. 17 of 1993.

inherent jurisdiction the court is given wide residual powers to prevent or correct any injustice and the question whether the court should invoke those powers is a matter for the courts' discretion which should be exercised judicially. If the court has to be satisfied in a particular case, can it then exercise its discretion to prevent or correct any injustice? Would it not be a proper case for the exercise of the courts' discretion when and if the effect of the application of rules in a particular case would result and occasion a miscarriage of justice? And is there a better case for a miscarriage of justice than the failure of court to reach a just decision for a substantive law dispute by denying a litigant the right to be heard on the merits?

The above notwithstanding, even if the Supreme Court were to insist that the rules had to be complied with, in the Kasirye, Byaruhanga case the rules were not complied with. The decision therein was as a result of a preliminary objection, which was raised informally. This was itself contrary to rule 101(b)[38]. I will assume that the appeal must have been struck out under rule 80[39]. Under rule 42[40] all applications to the court are to be by motion save for informal applications made in the course of hearing or by consent of all parties. It would seem that an application which seeks to strike out an appeal under rule 80 can only be a formal one by motion, before the appeal is instituted or after, but not during the hearing. This is reinforced by a later decision of Wambuzi C.J in Prof. Syed Huq[41].

Not to have followed the procedure of requiring the respondent to raise the objection formally caused an injustice to the appellant If a formal application had been made, then the defaulting litigant would have relied on the case of Haji Nurdin Matovu Kiwanuka[42]

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[38] Rule 101 (b) of the Court of Appeal Rules Directions, 1996 made under legal notice No. 11 of 1996 reads as follow:- At the hearing of an appeal in the Court a respondent shall not, without leave of the court, raise any objection to the competence of the appeal which might have been raised by application under rule 81;

The same text was in the previous rule 101(b) of the Supreme Court Rules which were also an amendment of the East African Court of Appeal Rules by S.1.19 of 1991, The Court of Appeal for East Africa (Amendment) Rules, 1991.

[39] Rule 80 in the Court of Appeal Rules Directions, 1996 reads:

> "A person on whom a notice of appeal has been served may, at any time, either before or after the institution of the appeal, apply to the court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time".

[40] Rule 42 of the Court of Appeal Rules Directions, 1996, reads as follows:-

> "subject to sub rule (3) and to any other rule allowing informal applications all applications to the court shall be by motion, which shall state the grounds of the application. This rule shall not apply
> a) to applications made in the course of a hearing which may be made informally; or
> b) to applications made by consent of all parties, which may be made informally by letter.

[41] Prof. Syed Huq v The Islamic University in Uganda SCCA No. 47 of 1995.

[42] Haji Nurdin Matovu Op cit.

which cited with approval the case of Kiboro[43] and wherein a new procedure was invented to the effect that although an appeal may appear to be incompetent, the court would adjourn the matter to give time for the extension of time to be taken. In the case of Kiboro the court heard the application to strike out the appeal alongside the application for extension of time and further heard the appeal *de bane esse*. Similarly in the case of Mukula International Ltd.[44] the court heard the objection on the competency of the appeal which was upheld but also proceeded to decide the appeal on merits.

UNPRECEDENTED PRECEDENT

After the decisions in Utex and Kasirye, Byaruhanga, the Supreme Court had not only tied its hands by extinguishing its inherent powers but had also established a precedent to be followed by the lower courts. And regrettably the Court of Appeal constituted as a Constitutional Court followed the precedent of the Supreme Court. One wonders whether the decision of the Supreme Court not constituted as an appellate and final court on a constitutional matter would constitute a precedent for the Constitutional Court. The answer to this involves a lot of jurisprudential debate that on their own would be sufficient material for another paper. I therefore will not venture into such discussion but suffice it to say that the Constitutional Court did apply a decision of the Supreme Court sitting in an ordinary civil appeal as a precedent!

In the Supreme Court Tsekooko, JSC[45] found his hands tied by the previous decisions and had only to state: -

> "I think, therefore, that documents drawn by an advocate without a practicing certificate should not be regarded as illegal and invalid simply because the advocate had no practicing certificate when he drew or signed such documents. In my opinion Article 126(2)(e) of the Constitution would be infringed if a pleading is declared invalid because it is signed by an advocate who does not possess a valid practicing certificate"

Even after having made such a remark, Tsekooko, JSC did not go ahead to dissent from his brothers whose decision was that an advocate who practices without a valid certificate after February in any year commits an offence and the document prepared, signed or

[43] Kiboro v Posts and Telecommunications Corporation [1974]EA 155 (CA).
[44] Makula International Ltd Op cit.
[45] Prof. Syed Huq Op cit.

filed by such an advocate are invalid and of no legal effect.

In the Constitutional Court, Article 126(2)(e) had been given a generous and purposive construction in the case of Major General David Tinyefuza versus Attorney General[46]. In that case all the judges cited and applied with approval the case of Uganda versus Commissioner of Prisons Exparte Matovu[47] and in the interest of justice decided to jettison formalism to the wind and overlook the several deficiencies in the application by proceeding to determine the substantive issues referred to the court. It will be noted that this position of the Constitutional Court was a reassurance of the courts performing effectually their constitutional role as courts of justice. And it possibly would have been in reliance on this decision that it was invoked by counsel in the cases of Utex and Kasirye, Byaruhanga. As I have already said the Supreme Court gave its interpretation Article 126(2)(e). It is also important to note while the Tinyefuza case was on appeal, the Constitutional Court then made a turn about and overruled itself. In the case of Serapio Rukundo[48] the petitioner therein sought to challenge the appellate decision of the Court of Appeal in an election petition as being inconsistent with Article 126(2)(e) of the Constitution. Unfortunately, the Constitutional Court struck out the Rukundo case and killed in the bud this would-be landmark case on the interpretation of Article 126(2)(e). Additionally, the Constitutional Court in the said case put a seal on all further claims that would have arisen challenging the courts failure to apply Article 126(2)(e). The Constitutional Court in its decision flagrantly abdicated its constitutional role and stated that: -

> "In our view, if the public feels that the application of the law as interpreted by the courts causes injustice or that it runs contrary to a provision of the Constitution, the remedy does not lie in petitioning the Constitutional Court for a declaration. The remedy lies with parliament which has power to amend the relevant law"[49].

The Constitutional Court further created an escape route by distinguishing the Tinyefuza case in the following words:

> "We think that Tinyefuza's case as it stands now (it is on appeal) is distinguishable from the present petition in that the objection therein was mainly on irregularities pertaining to the supporting affidavit and the petition was in respect of violation of a fundamental right of an individual. In the

[46] Major General David Tinyefuza v Attorney General Constitutional Court petition No 1 of 1996(unrep).
[47] Uganda versus Commissioner of Prisons Ex parte Matovu [1966] EA 514/521.
[48] Serapio Rukundo Op cit.
[49] Ibid.

instant petition the objections touched on a fundamental point of law, which go to the root of the case. For example limitation of time, proprietary of parties and question of cause of action......"[50]

Following immediately after the case of Rukundo, the Constitutional Court delivered the judgment in Dr Rwanyarale and Another versus Attorney General[51] and stated that: -

> "We do not see that Article 126(2)(e) has done away with the requirement for litigants to comply with rules of procedure in litigation. The Article merely gives constitutional force to the well-known and long established principle at common law that rules of procedure act as handmaidens of justice. We do not see how justice can be properly administered without following important rules of procedure. The framers of the Constitution were alive to this point hence the requirement in Article 126 that the principles, including that of not paying undue regard to technicalities, must be applied subject to the law. Clearly such law would include fundamental rules of procedure".

Thereafter the Constitutional Court cited with approval the cases of Utex and Kasirye, Byaruhanga and admitted that although the Supreme Court was dealing with an ordinary civil case, they however thought the principle stated there equally applies to constitutional cases.

What then are fundamental or important rules of procedure as opposed to irregularities? And when does non-compliance with such rules go to the root of the case as to raise fundamental points of law? Can there be instances when the application of procedural rules can take priority over the effectuation of legal rights by the courts of justice? Alternatively, are the rules of procedure an end in themselves, whereby their application alone to a particular controversy leads court to arrive at a just solution for substantive law disputes? Taking the example of the Kasirye, Byaruhanga case, the appellant therein failed to serve a letter of request on the respondent and the Supreme Court struck out the appeal as incompetent. Does this case then provide the standard of the fundamental rules of procedure that have to be complied with? In the case of Rukundo and Dr Rwanyarare if the rules were so fundamental as to go to the root of the case, then why didn't Constitutional Court dismiss the petition as an act of finality? The Constitutional Court relied on the case of Everett versus

[50] Ibid.

[51] Dr James Rwanyarale and and another versus Attorney General Constitutional Court Petition No. 11 of 1997.

Ribband[52], which decided that the point of law must be such that if decided in one way would be decisive of litigation. And moreover, Everett v Ribband was decided under our Uganda equivalent of 0rder 6 rules 27 and 28[53].

The deathblow on Article 126(2)(e) was finally given by the Supreme Court in the case of Attorney General versus Major General David Tinyefuza.[54] Although, this point was not appealed against, two of the Judges viz. the Wambuzi C.J and Karokoora J.S.C made a decision thereon. Wambuzi C.J stated as follows: -

> "..... in my view as there is no appeal against the decision of the Constitutional Court on irregularities the complaint against the application of the case of Uganda versus Commissioner of Prisons Exparte Matovu cannot be sustained. In these circumstances Iam unable to see any departure from the holding of this court in the cases of Kasirye, Byaruhanga and Co Advocates versus Uganda Development Bank Civil Appeal No. 2 of 1993 and Utex Industries Ltd. versus Attorney General Civil Appeal 55 of 1995 (unreported) in their reference to the provisions of Article 126(2)(e) of the Constitution to the effect that: -
>
> > "Substantive justice shall be administered without undue regard to technicalities"
>
> is not a license to ignore the rules of procedure and the law."

THE ENGLISH APPROACH TO TECHNICALITIES

Sir Jacob[55], while giving a general view of the English Civil Procedure in 1800, stated thus:

> "It may be said without exaggeration that in 1800 the system of civil justice in England appeared to be in a state in which there was very little system and precious little justice. It

[52] Everett versus Ribband and another [1952]2QB 198

[53] Order 6 rules 27 and 28 read as hereunder:-

> 27. Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing:
>
> Provided by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the hearing.
>
> 28. If, in the opinion of the court, the decision of such point of law initially disposes of the whole suit, or of any distinct cause, ground of defence, set-off, counterclaim or reply therein, the court may thereupon dismiss the suit or make such other order therein as may be just.

[54] Supreme Court Constitutional Appeal No.1 of 1997 Op cit.

[55] Sir Jack I.H Jacob, "Civil Procedure Since 1800" in "The Reform of Civil Procedure Law and other Essays" (1982), P.194/5.

presented an incredible picture of institutional and procedural complexities and technicalities, anomalies and absurdities, archaic and even feudal practices which operated in large measure to produce gross and palpable injustices in the sense that meritorious claims were delayed or denied or inhibited from being brought, and many meritorious defenses went unheard. Apart from the fact that access to the courts was in practice out of reach of the great majority of the people of the country, those who were able or were compelled to resort to the courts were subject to endless delays, fruitless wrangling, burdensome expenses and mortifying vexations".

And Jeremy Bentham[56] said of the existing system as "being a fathomless and boundless chaos, made up of fiction, tautology, technicality and inconsistency and the administrative part of it a system of exquisitely contrived chicanery which maximises delay and the denial of justice". The cumbrous procedures and pedantic technicalities experienced by the litigants in the superior courts which then were the Court of the King's Bench, the Court of Common Pleas and the Court of Exchequer was summarised by Sir Jacob[57] as follows:

> "Their procedure was based upon the system of special pleading, which however admissible as a species of dialectic, inevitably promoted excessive technicality and absorption in mere forms. Just claims were liable to be defeated by trivial errors in pleading, by infinitesimal variances between pleading and proof and by the non-joinder or misjoinder of mere nominal parties. The arbitrary classification of actions into" forms of action" was another pitfall into which the most wary sometimes fell".

The above system, which represents the old system, was however revolutionized and effected with fundamental changes mainly during the period of 45 years from 1830 to 1875[58]. The fundamental changes from the old system were geared towards the elimination or at least the reduction of vexation, delay and expense and to provide unhindered access to the courts to all persons for the resolution of their civil disputes whether large or small by removing the sense of fear and alienation of the masses of people at the prospect of resorting to legal machinery, lifting the nightmare burden of the costs of litigation, freeing the procedures and practices of the courts from the fetters of technicality and

[56] Sir Jack I.H Jacob, "*The Judicature Acts 1873-1875 Vision and Reality*" in "The Reform of Civil Procedure etc" op cit p302

[57] Sir Jack I.H Jacob,"Civil Procedure since 1800" in "The Reform of Civil Procedure etc" op cit p197

[58] Ibid., P 204/5

formalities, and increasing simplicity and flexibility in judicial administration in place of complexity and rigidity. The passage of the Judicature Acts 1873 and 1875 marked a turning point in the English civil procedure law through providing the common code of procedure of the Supreme Court of Judicature[59] i.e. both the High Court and the Court of Appeal, by enacting the Rules of Court.

It will be noted that in the Judicature Acts the court was struggling to free itself from the fetters of technicalities, which had marred the achievement of civil justice. It was envisaged that the rules of court would provide a machinery to enable courts carry out their primary objective of doing justice between the parties with the procedural rules yielding to the merits of the case. In the rules there was the fundamental provision in 0rder 59 which later became Order 70 in the 1883 rules[60]. And in reliance on Order 70, Bowen L.J[61] in 1887 made his most often quoted and famous declaration of the English system of civil justice that: -

> "It is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any step, any mistaken step in his litigation. Law has ceased to be a scientific game that may be won or lost by playing some particular move".

Even then it cannot be said that technicalities of procedure ceased in the determination of legal rights between parties by the courts. There were matters related to the operation of the Limitation Act that foreclosed the party's legal rights. The trend culminated in the decision of Re Prichard[62], which was pronounced as a lunatic decision.[63] But immediately after the said decision, the Rules were amended and Order 70 was replaced with Order 2. And Sir Jacob[64] remarked in relation to the said provision as hereunder: -

> "The nearest we have come to in relation in giving concrete life to the vision of Lord Bowen is the new Order 2 of the Rules of the Supreme Court which deals with procedural nullities, which was made in 1962 as a result of the decision of the majority of the Court of Appeal in the case of Re Prichard, which an Australian lawyer, Professor Sawyer, pronounced as being a lunatic decision. The new Order 2 is perhaps the most radical change made in procedural rules in

[59] Sir Jack I.H Jacob "The Judicature Acts 1873-1875..." Op cit p308/9
[60] Ibid., p309
[61] Ibid., p309
[62] In re Prichard, Decd. [1963]1 Ch 502 (CA)
[63] Australian lawyer, Professor Sawyer quoted by Sir Jack I.H Jacob in "The Judicature Acts 1873-1875....." Op cit, p309
[64] Ibid. p309/10.

recent times. Its effect is to prevent every non-compliance with the requirements of the rules from producing a nullity and compelling it to be treated as an irregularity. The result is that judges can no longer explain that they have no power to cure or save or assist in putting right an irregularity in procedure on the basis that it amounts to a nullity, but they must themselves as a duty decide whether they should treat the matter as something which can be cured or saved or ought to be set aside wholly or in part".

In the same vein Lord Denning[65] had this to say of Order 2:-

"This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity, which the court can and should rectify so long as it can do so without injustice. It can at last be asserted that "it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by a mere technicality, any step, any mistaken step in his litigation. That could not be said in 1963. See in Re Prichard, decd. But it can be in 1966. The new rule does it."

With such an assertion, one would have thought that all is well with the English civil justice system. Unfortunately, that has not been the case as the call for procedural reform and greater access to civil justice has grown louder and continues.

In 1994 the Lord Chancellor appointed Lord Woolf[66] to review the current rules and procedures of the civil courts in England and Wales in order: -

- to improve access to justice and reduce the cost of litigation;
- to reduce the complexity of the rules and modernise technology;
- remove unnecessary distinctions of practice and procedure.

In June 1995 Lord Woolf published his Interim Report[67] under the title Access to Justice. In the said Interim Report, Lord Woolf

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[65] Harkness v Bell's Asbestos and Engineering Ltd [1967]2 QB 729/736.
[66] Lord Chancellor's Department Press Notice 61.94 of 24/3/94
[67] Lord Woolf, Access to Justice: Interim Report to the Lord Chancellor on the civil justice system in England and Wales (June 1995), HMSO.

approached the problems of the civil justice system by stating the basic principles[68] that should be met by a civil justice system in order to ensure access to justice as being: -

- It should be just in the results it delivers
- It should be fair and be seen to be so by ensuring that litigants have an equal opportunity, regardless of their resources, to assert or defend their legal rights.
- Providing every litigant with an adequate opportunity to state his own case and answer his opponents.
- Treating like cases alike.
- Procedures and costs should be proportionate to the nature of issues involved.
- It should deal with cases with reasonable speed.
- It should be understandable to those who use it.
- It should be responsive to the needs of the people who use it.
- It should provide as much certainty as the nature of particular cases allows.
- It should be effective, adequately resourced and organised so as to give effect to the previous principles.

And alongside the Interim Report, a draft set of Civil Proceedings Rules[69] was prepared to give effect to the substantive reforms proposed in the report. While advising on the approach to be taken by the judges while applying the rules, Lord Woolf stated thus: -

"Instead of the over-technical way the rules have been applied in the past, the new rules will have to be used in a different way: they will have to be read as a whole, not dissected and viewed word by word under a microscope. The new rules are being deliberately framed so that the approach of those construing them can be more purposive and less technical. It will thus be the responsibility of the judiciary to make the

[68] Ibid., Chapter 1
[69] Lord Woolf, Access to Justice - Draft Civil Proceedings Rules, HMSO

new system work[70].

Lord Woolf in order to support his approach of applying a purposive construction cited with approval the statement of Lord Denning in James Buchaman and Co Ltd. versus Babco Forwarding and Shipping (UK) Ltd.[71] that: -

> " Adopting this method.....means.... that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose behind it. When they come upon situation, which is to their minds within the spirit but not the letter of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect it was sought to achieve. They then interprete the legislation so as to produce the desired affect. This means they fill gaps, quite unashamedly, without hesitation. They ask simply; what is the sensible way of dealing with this situation so as to give effect to the presumed purposed of the legislation".

And accordingly in order to give effect to this new approach of interpretation and application of the rules of procedure and to identify the purpose at the outset, Lord Woolf deliberately proposed the enactment of the statement of their overriding objective as the opening provision of the new rules[72]. The overriding objective of the rules read as follows: -

1.The overriding objective of these Rules is to enable the court deal with cases justly.

2.The court must apply the rules so as to further the overriding objective.

3.Dealing with a case justly includes: -

a)Ensuring, so far as is practicable, that the parties are on an equal footing.

b) Saving expense.

c) Dealing with the case in ways which are proportionate

i) to the amount of money involved.

ii) to the importance of the case

[70] Interim Report, Ibid. chapter 26 para 25
[71] James Buchanan and Co Ltd. v Babco Forwarding and Shipping (UK)Ltd. [1977] QB 208
[72] Draft Civil Proceedings Rules, Op cit, Rule 1.1

iii) to the complexity of the issues

iv) to the parties' financial position.

d) Ensuring that it is dealt with expeditiously; and

e) Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

It will be noted that under the Draft Rules, there is no provision equivalent to the RSC Order 2. This would mean that courts when applying the rules would have to effectuate the overriding objective of the rules and any issue arising under the rules in respect to their meaning or application or non-compliance has to be resolved by reference to the overriding objective.

After the Interim Report which was based on wide consultation and thereafter greatly discussed[73], Lord Woolf presented a Final Report in July 1996[74]. And currently the recommendations therein are being implemented. And commenting on the process of implementation Lord Woolf had this to say:

> "If my recommendations are implemented the landscape of civil litigation will be fundamentally different from what it is now. It will be underpinned by Rule 1 of the new procedure code, which imposes an obligation on the courts and the parties to further the overriding objective of the rule so as to deal with cases justly.................... The requirement of procedural justice operating in the traditional adversarial context, will give effect to a system which is substantively just in the results it delivers as well as in the way in which it does so"[75].

THE RIGHT TO ACCESS TO JUSTICE

Given the above approach of the Supreme Court towards procedural technicalities, one may then wonder whether our 1995 Constitution guarantees the right to access to justice. In this paper I shall not go into the jurisprudential definition and meaning of justice, but I shall give it a practical definition from the viewpoint of a litigant. What does a citizen who comes or is brought to a court

[73] The Reform of Civil Procedure: Essays on Access to Justice Ed by A.A.S.Zuckerman, Ross Cranston.
[74] Lord Wolf, Access to Justice. Final Report, HMSO
[75] Ibid. Section 1 Para 8.

of justice as a litigant want or expect to get as the end result? Jerry Mashaw[76] attempts to give an answer to the above question by quoting an ancient Egyptian literature as hereunder: -

> "If you are a man who leads,
> listen calmly to the speech of one who pleads;
> Don't stop him from purging his body
> Of that which he planned to tell.
> A man in distress wants to pour out his heart
> more than his cause be won.
> About him who stops a plea
> One says:"Why does he reject it?"
> Not all one pleads for can be granted.
> But a good hearing soothes the heart."
>
> The Instruction of Ptahhotep
> (Egyptian, 6th Dynasty, 2300-2150 B.C.)

Going by the above quotation, then the right to access to justice goes or assumes other labels such as the right to a fair hearing or an effective remedy or just decision. Put the other way round, when one goes or is taken to court he is searching or expects the dispute to be determined fairly and justly. Additionally, the litigant who comes to courts expects an effective remedy to his complaint. As a bearer of legal rights the litigant who originates the complaint wants his legal rights determined Vis a Vis the obligations of the other party against whom he is complaining. Similarly the litigant who is brought to court and against whom a complaint is brought, is interested in having his obligations if any towards the other party determined.

In effect therefore justice in this paper shall be taken as synonymous to an effective and final determination of the individual's legal rights or obligation through a fair trial rendering a just decision or an effective remedy. Accordingly, the right to access to justice is a set of interrelated rights, which make up a single right. And it is the role of the courts to administer justice by making it accessible to the citizens.

Under the 1995 Constitution, Chapter 4 contains a Bill of Rights guaranteeing the fundamental rights of the citizens. The rights can be enforced either through criminal or civil proceedings where the legal rights of the victim of the alleged violation and the obligations of the violator are determined. In criminal proceedings the government undertakes the responsibility to prosecute the suspect indicating the wrong was against society as a whole and

[76] Jerry L. Mashaw,"Administrative Due Process: The Quest for a Dignitary Theory" (1981)p885

therefore requires a punishment by way of a rational deterrent. In civil proceedings, the individual seeks to enforce his private rights that have been violated in the enjoyment of the rights guaranteed under the Constitution. Thus what is a criminal offence for obtaining money by false pretences is at the same time a civil claim for breach of contract. And whereas the State's interest in prosecuting the perpetrators of such criminal offences is in protecting society as a whole, to the individual this act constitutes deprivation of property as the money swindled may be all the individual's life savings. Therefore the individual's right to the vindication of his private rights through a civil action determining his legal rights and the obligations of the alleged violator in a court of law should have the same value as the State's responsibility in prosecuting criminals.

In a criminal trial the desired outcome is that the accused should be convicted of and only if he committed the offence in question after proving him guilty beyond reasonable doubt. And accordingly, only those who are proven guilty are convicted meaning that they breached their obligations and duty towards Society as whole and in the upholding of the Constitution. If the system were otherwise as to have instances of convicting an innocent man or setting free a guilty man, then not only would there be a miscarriage of justice but also a fundamental prejudice to the citizens in the enjoyment of their human rights. In this respect the innocent man who is convicted unjustly would have his rights violated much as the victim of the crime would have his rights not protected. A much worse situation would prevail if there were no convictions or acquittals for those prosecuted for violating and depriving others of their rights.

If one were to analogise criminal proceedings to civil proceedings, then the same arguments would apply. From my analysis of the court jurisprudence on procedural technicalities it would then appear that the outcome of the civil process is neither a guilty or acquittal verdict. The determination of the litigants' legal rights and obligations is superseded by the determination on whether the parties have complied or not complied with the court procedures. And a verdict of guilt or acquittal is implied by determining who of the parties benefited from the determination on good compliance procedure. Ordinarily, the person who is condemned to pay the costs would be the loser. It is therefore no wonder that most cases that would otherwise be settled or would not have come to court are defended vigorously because there is sufficient protection from procedural skirmishes and technicalities that would defeat such cases.

It is on the above considerations that there has evolved a right to a fair hearing to ensure equal justice, just treatment or any other

labels attributable to an outcome of a procedure set for a determination of the truth. As regards the private rights, the 1995 Constitution makes provision for this right in Article 28(1)[77]. And in order to have a fair hearing of the determination of one's legal rights and obligations then the machinery for such determination has not only to be accessible but fair in its results. A fair outcome is a just decision. And to arrive at a just decision then the parties have to be heard. This spiral of "ifs" in effect make the right to access to justice implicit not only to a fair hearing but also the whole machinery for the enforcement of human rights. This is because in the enforcement of human rights there has to be a fair determination of the individuals' legal rights and obligations enshrined in the Bill of Rights. The wheels then would come full circle.

Under Article 8 of the Universal Declaration of Human Rights, it is provided that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law". In Uganda we don't have a similar provision but one may argue that it is protected under Article 45[78]. Additionally, Article 21[79] provides for equality before the law and equal protection of the law. If people who are similarly circumstanced obtain different results, then one may argue that he has got unequal protection of law. A case in point would be of litigants with similar causes of action but one of which because of non-compliance has his claim struck out while the other gets judgment on the merits because of compliance. In such circumstances it can be said that there is discrimination against one of the litigants in the application of civil justice or in availing of civil remedies for the enforcement of his rights. And the cause of this is none other than the knowledge of the procedure to enforce one's rights before the court of justice. It can therefore be asserted that there has been a failure to provide equal civil justice to the citizens - the knowledgeable and the ignorant.

Sir Jacob[80] has likened the concept of access to justice to "the

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[77] Article 28(1) reads as follows:-

> "In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law"

[78] Article 45 reads as follows:-

> "The rights, duties, declarations and guarantees relating to the fundamental and other human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned."

[79] Article 21(1) reads as follows :-

> "All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law".

[80] Sir Jack I.H. Jacob, "Access to Justice in England" in "The Reform of Civil Procedural Law etc" op cit, p125

clarion call to make the administration of justice available to all on the basis of equality, equity and fairness". He further stated that: -

"Underlying the concept is the notion that justice should be accessible to all equally and effectively, and conversely, that no one should suffer an injustice simply because he cannot afford to have or is deterred from seeking due access to justice. The need for access to justice may be said to be two-fold; first, we must ensure that the rights of citizens should be recognised and made effective, for otherwise they would not be real but merely illusory; and secondly, we must enable legal disputes, conflicts and complaints which inevitably arise in society to be resolved in an orderly way according to the justice of the case, so as to promote harmony and peace in society, lest they fester and breed discontent and disturbance. In truth, the phrase itself, "access to justice," is a profound and powerful expression of a social need which is imperative, urgent and more widespread than is generally acknowledged"[81].

It will be noted that the courts constitute one of the organs of the state whose function is clearly stated by Lord Diplock[82] as: -

> "in every civilised society it is a function of government to maintain courts of law to which its citizens can have access for the impartial decision of disputes as to their legal rights and obligations towards one another individually and towards the state as representing society as a whole. The provision of such a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with another".

It can therefore be said without any reservation that the right to access to justice is an essential feature of a civilised society or in common parlance democratic society. And a democratic society is by necessity predicated on the principle of the rule of law where the rights and obligations of the people are determined under the law through an independent judicial process. In effect therefore there is no worse sin to democracy than to deny the people access to justice.

If the courts of justice, therefore, have to perform their role effectually, they then ought to design their procedural rules as to

[81] Ibid.

[82] Attorney-General and Times Newspapers Ltd. [1974]A.C.273/307

always yield to justice in any particular case. Ethan Katsh[83] recounts Kafka's story of a priest telling the main character in his book "The Trial" that: -

> "before the law stands a doorkeeper on guard. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment...... The doorkeeper gives him a stool and lets him sit down at the side of the door. There he sits waiting for days and years."

At the end of the story, the priest relates that the man dies, never having attained access to the law. By analogy if the courts have to allow procedure in anyway to stand as the doorkeeper to access to justice, then such courts have not fulfilled themselves as courts of justice or upheld the peoples' right to access to justice.

Kafka's story has so much relevancy in Uganda as most people are like the countryman who came to justice and their access is blocked by procedure. A case in point is where a defendant is served with summons to enter appearance makes a physical appearance in court instead of the appearance envisaged by the rules. Such defendants go to court as in the summons, it is stated that "you are required to enter appearance in the said suit within fifteen days from the date of service of the summons on you....." After the fifteen days from the date of service, the defendant goes to court in answer to the summons. And on getting to court for the said purpose he is referred to the notice board where the cause list is pinned to find out whether his case is on the list. Of course such cases are not causelisted and the defendant ends up going back anticipating to be called on a later date. Afterwards he is woken up by a court broker with a warrant of attachment issued in execution of an exparte judgment and decree. Such occurrences are a daily experience of the Ugandan citizens as is even evidenced by the Supreme Court decision in an action by lawyers[84] - who are supposed to be foresters in the jungle of the law! And inevitably such a machinery of civil justice administration commands no public confidence but is a mysterious sphinx.

The courts recognising their constitutional role have at their disposal a summary remedy to punish any act that prejudices their due administration of justice or undermines the public confidence in the courts. Likewise, in case of a likely abuse of their process or a miscarriage of justice, they have retained for themselves inherent powers to prevent such occurrences. And this

[83] M.Ethan Katsh, "The Electronic Media and Transformation of Law",(1989), p107
[84] Kasirye, Byaruhanga and Co Advocates, Op cit

is all because "the due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; Secondly, that they should be able to rely upon obtaining in the courts arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of the court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court"[85].

In our case the conduct that has prejudiced the three requirements and undermined the public confidence in the courts is an act of the courts themselves! Additionally they have transgressed upon the supreme law and even failed to interprete their acts or perform their functions in accordance with the purpose and design of the Constitution that establishes and confers upon them such significant functions of exercising judicial power!

CONCLUSION

Where then can the sovereign electorate find a remedy? In the case of Rukundo[86], the Constitutional Court gave the remedy as being Parliament, which has power to amend the law. But should Parliament go as far as enacting the rules of procedure of the courts? What then would be left of the doctrine of separation of powers upon which the rule of law is predicated? But hasn't the legislature done enough already? First, there is Article 126, followed by Section 35[87] of the Judicature Statute, 1996 and then Section 101[88] of the Civil Procedure Act. Or is our only and

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[85] Attorney-General versus Times Newspapers, op cit,p309

[86] Serapio Rukundo v Attorney General, op cit

[87] Section 35 of the Judicature Statute, 1996 provides as hereunder:

> 35. The High Court shall in the exercise of the jurisdiction vested in it by the Constitution, this Statute or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible, all matters in controversy between the parties determined, and all multiplicity of legal proceedings concerning any of those matters avoided.

[88] Section 101 of the Civil Procedure Act, Cap 65 reads as follows:-

> 101. Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary to the ends of justice to present abuse of the process of the court.

last hope in Article 127[89] where Parliament is empowered to make law providing for the participation of the people in the administration of justice. It is hoped that when such law is enacted by Parliament then the provision “subject to the law” under Article 126 shall mean the law enacted under Article 127. And I would propose that the law enacted should contain the following provisions: -

1-That the Act/Statute shall prevail over all other existing laws relating to the administration of justice by the courts and shall be interpreted and applied by the courts with the objective of arriving at justice in the determination of disputes as to the citizens legal rights and obligations towards one another or society as a whole.

2-Justice in the determination of disputes shall mean:

a) rendering a just solution to the dispute.

b) resolving the dispute fairly in order to promote peaceful association of the citizens.

c) unhindered access to the courts free from technicalities or formalism.

d) substantial truth based on the facts proved and evidence adduced.

e) giving an effective remedy to the parties.

f) effectuation of meritorious legal claims by determining the legal rights and obligations of the parties.

3-In all cases before the courts, the courts shall apply rules of procedure and practice with the object of yielding to justice.

END

[89] Article 127 of the 1995 Constitution reads as follows:-

127. Parliament shall make law providing for participation of the people in the administration of justice by the courts.