

DECLARATION

This project is my original work and it has not been submitted and it is not currently being submitted for a degree in any University or institution.

Name: **INGONGA RENSON MULELE**

Registration No: **G62/88438/2016**

Signature

Date.....

This thesis has been submitted for review and approval as the University supervisor.

Name: **DR JACKSON BETT**

Department:

Signature.....

Date.....

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Thanks to the Most High God for strengthening me and giving me good health and opportunity to successfully complete my master's program.

DEDICATION

I dedicate this project to my guardian/parents Aggrey Shitsama and the late Margaret Shitsama

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LIST OF LEGISLATIONS

Government of Kenya, *Civil Procedure Act* (Government Printers 2010).

Government of Kenya, *Civil Procedure Rules* (Government Printers 2010).

Government of Kenya, *Competition Act* (Government Printers 2010)

Government of Kenya, *Constitution of Kenya* (Government Printers 2010)

Government of Kenya, *Income Tax Cap 470* (Government Printers

Government of Kenya, *Kenya National Prosecution Policy*(Government Printer 2007).

Government of Kenya, *Land Act No.6 of 2012* (Government Printers, 2012).

Government of Kenya, Security of Laws (Amendment Act) (Government Printers 2014)

LIST OF CITED CASES

Kenyan cases

Cecilia KaruruNgayu v Barclays Bank of Kenya & another [2016] eKLR, Civil Case No 17 of 2014.

EL-Busaidy v Commissioner of Lands and 2 others, (2002) IKLR (E&L)

Harun Mwau and Others v. Attorney-General and Others Nairobi High Court Petition No. 65 of 2011

Hon. Raila Odinga vs Hon. Justice Abdul Majid Cockar, HC.Misc Application No.58 of 1997

John Mining Temoi & Another vs Governor of County of Bungoma & 17 others Petition No. 58 of 2014

John Wekesa Khaoya (Wekesa Case) V Attorney General, Petition No. 60 of 2012 [2013] eKLR

Peter MakauMusyoka & 19 others vs Permanent Secretary Ministry of Energy & 14 others, Constitutional Petition 305 of 2012 [2014] eKLR

Priscilla NyokabiKanyua vs Attorney General and the IIEC Constitutional Petition 1 of 2010 eKLR 2010.

Priscilla NyokabiKanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010

Wangari Maathai v. Kenya Times Media Trust Limited, eKLR [1989].

Other Jurisdictions

ADM. Jabalpur v. Shivakant Shukla 1976 SCR 172.

Bihar Legal Support Society v Chief Justice of India, (1986) 4 SCC

Brown vs. Board of Education, 347 US 483 [1954]

Janata Dal vs H.S Chowdhry & Others AIR (1993) SCV 892

JJ Campos and L. D'Cruz vs A.C.L. De Souza and Others, [1933] KLR 86 – Vol. XV 2002)

IKLR (E&L)

Maneka Gandhi v. Union of India AIR 1978 SC 597

Minister of Health vs. Treatment Action Campaign (TAC) (2002[5] SA 703)

Affordable Medicines Trust and Others v Minister of Health and Another, [2005] ZACC 3

eKLR [1989].

Osman v Minister of State for Provincial Administration, Petition No. 2 of 2011 HCCC.

Pauli vs ACE INA Insurance Co by the Court of Appeal in Alberta. 2004 ABCA 253

People's Union for Democratic Rights (PUDR) & others v Union of India & Others in 1982,
(1982) 3 SCC 235

R v Greater London Council; Ex parte Blackburn [1976] 3 All ER 184

Rural Litigation and Entitlement Kendra vs State of UP, 1989 Supp (1) SCC 504

S.P. Anand v H.D. Deve Gowda (1996) 6SCC 734

Sachidan and Pandey vs State of West Bengal (1987) SCC 295 and 331.

Sachidanand Pandey v State of WB, AIR 1987 SC 1109

Sheela Barse v Union of India AIR 1988 SC 2211

Sierra Club of Western Canada v. British Columbia (Chief Forester) (1994), 94

Upendra Baxi vs State of UP, 1976 2 SC 521.

ABBRIEVATIONS

AFRICOG	Africa Centre for Open Governance
AG	Attorney General
CJ	Chief Justice
CoK	Constitution of Kenya
CORD	Coalition of Reforms and Democracy
CREAW	Centre for Rights Education & Awareness
KPTJ	Kenyan for Peace with Truth and Justice
KRC	Kenya Railways Corporation
ODPP	Office of Director of Public Prosecutions
PFMA	Public Finance Management Act
PIL	Public Interest Litigation
PPOA	Public Procurement Oversight Authority
SGR	Standard Gauge Railway (SGR)
UK	United Kingdom
US	United States

ABSTRACT

The promulgation of the 2010 Constitution of Kenya (CoK), has firmly entrenched public interest litigation (PIL). It has further liberalised the rule of standing in PIL. What the litigants need to show is that, they have no personal gains in the matter. It is solely public interest. However, the CoK and the various legislations in which public interest is referenced does not define public interest neither do they provide what constitutes public interest. The interpretation of what constitutes public interest is solely left to the interpretation of the courts.

Since, the promulgation of CoK, litigants have continued to approach the Kenyan courts on the ground of PIL to enforce human rights and the Constitution. While PIL is a noble tool in enhancing justice, the court has to ensure that it guards itself against litigation that is frivolous and meant to pursue personal interests in the disguise of PIL. PIL cases must be genuine and legitimate.

1.0 INTRODUCTION

1.1 Study Background

Public interest litigation (PIL) has become a topic of increased concern in the attainment of and access to social justice. It relates to the litigation of issues relating to the public referred to as 'public interest'.¹ Public interest is usually related to the common good of a given society or a group of members. It extends from the interest of the individual to the interests of the public. A person approaching the court on ground of PIL must establish a legitimate public interest based on good faith.² However, what constitutes public interest is complex and inevitably subjective.³

The famous *case of Brown vs. Board of Education (Brown Case)*,⁴ is an exemplary example of a PIL case in the US that led to social justice against racial discrimination. In this case, the US Supreme Court struck down public school segregation policy as an infringement of equal protection of the law.

Unlike in the US where PIL was spearheaded by civil rights organization, in India PIL was spearheaded by the Court itself. In India, the concept of PIL was for the first time established in the case of *People's Union for Democratic Rights (PUDR) & others v Union of India & Others* in 1982.⁵ The Indian Courts restructured its procedures, removed the strict rule of *locus standi* and introduced what is referred to as epistolary jurisdiction.⁶ In epistolary jurisdiction a court suit would be initiated by a mere letter by marginalised and vulnerable persons of the society. The objective is to eliminate procedural technicalities.

¹Brayan A Garner (ed), *Black's Law Dictionary*, (9th edn, West Publishing Company 1999) 1350.

²Sarban Sen, 'Public Interest Litigation in India: Implications for Development' (Mahanirban Calcutta Research Group 2012).

³Ibid.

⁴ 347 US 483 [1954].

⁵ (1982) 3 SCC 235

⁶ Ibid.

The concept of PIL is now well established in legal adjudication.⁷ Litigants who could not have approached the courts to litigate on issues that they had no personal interest can now approach the court on behalf of other people. PIL is deemed important as it has the potential of altering the law and enforcing the rights of the people. It advances constitutional guarantees and social welfare legislations.⁸ It offers the minority and vulnerable in society a chance to be part of the social and economic entitlements. If well advanced, PIL is a form of public participation where sectors of the community or disadvantaged groups with social and economic inhibitors can access court and seek relief.

Every democratic state must ensure that it puts in place mechanisms that would enhance PIL. Litigation in itself is costly and the poor may be denied access to justice because they cannot afford it.

Since the promulgation of the CoK in 2010, Kenyans became more aggressive as various individuals and organizations approached the court to represent the interests of the public and the constitution. PIL in Kenya in the CoK, is not a new concept. It existed in the old Constitution but was limited on the basis of *locus standi* in which a litigant had to prove a direct interest in any judicial proceedings.⁹ Before the promulgation of the CoK, PIL was almost hard to sustain because of the strict rule of standing and courts interpreted PIL cases contextually using restrictive approach. In the most famous Kenyan Case of *Wangari Maathai v. Kenya Times Media Trust Limited*, the plaintiff sought to stop the construction of a multi-story building at Uhuru Park.¹⁰ The court held that, even though the Plaintiff argued that the construction of the building should not take place because the people had not been consulted, she had no right of action against the company defendant as she had no *locus standi* and matters of public interest could only be instituted by the AG.

⁷ Bihar Legal Support Society v Chief Justice of India, (1986) 4 SCC p 768.

⁸ Sen (n 9).

⁹ Onyango (n 14).

¹⁰ eKLR [1989].

Despite the holdings in the above cases, it did not derail Kenyans quest to access justice. It was not until in the case of *Priscilla NyokabiKanyua vs Attorney General and the IIEC*,¹¹ that the court recognised the need to lessen the strict requirement of standing in PIL cases and adopt liberative approach in its interpretation borrowing heavily from the Indian and United Kingdom (UK) jurisprudence. In this case the applicant argued that the exclusion of prisoners to vote in the referendum that led to the enactment of the 2010 CoK was unconstitutional and a matter of public interest. The court recognised that, ‘the issue of *locus standi* (standing) had shackled public law litigants for a long time’ and called for liberalization of the same. The court for the first time before the enactment of the CoK had recognised that PIL is a tool, if used well, will foster access to social justice. This recognition in itself was very fundamental.

Since the promulgation of the CoK, Kenyans have been vigorous in approaching the courts to address societal problems such as corruption, rights of the minorities, accountability and governance issues.¹² The promulgation of the CoK now affirms PIL as part of Kenyan governance and access to justice. PIL reflects the judicial authority principles as articulated under Article 159 of the CoK. Specifically, the principle that, ‘justice shall be done to all, irrespective of status’. The CoK is transformative and liberative. It has expanded the avenues of approaching the court by removing the requirement of *locus standi* in order to enhance access to justice by all Kenyans.

Despite the potential of PIL in addressing social and economic challenges, in some instances, it is argued, PIL can be misused for private interests or gain instead of public interest.¹³ A public interest litigant, should only further the interests of the public. This what the concept of PIL seeks to foster. PIL as a weapon must be used with great care so that it is not used as an

¹¹ Constitutional Petition 1 of 2010 eKLR 2010.

¹² Ibid.

¹³ Deva (n 8).

abuse of the court process, does not waste courts judicial time and does not drag participants into unnecessary litigation.¹⁴What constitutes public interest is relative. Judicial interpretation of what constitutes public interest must be in tandem with the spirit of the CoK guided by the principles of judicial authority. It is therefore the role of the court to set rules to determine the kind of judicial proceedings falling under PIL.

The role of the court as the final arbiter is to make legal pronouncements on various social issues such as discrimination, human rights, political participation among others. The Court has a key role in encouraging bonafide public interest litigation and discourage frivolous and ill motive ones. This role not only rests on the courts but also on public interest litigators. However, the court has the responsibility to ensure that parties do not file petitions in the guise of public interest litigation. On the other hand the court has the responsibility to encourage and promote public interest litigation. The court should reject an application brought in bad faith and which may wish to take advantage of PIL for selfish, parochial, political and private gains. Judge Lenaola expressed his fears in the way the right to institute PIL is being handled under the CoK in the case of *Okiya Omtatah Okoiti & 2 Others vs Attorney General and 3 others*.¹⁵ He stated that:

*...I must express my concern about the way the right of every person to institute a claim for the violation of the Constitution in the name of **public interest litigation** is being handled in Kenya. It is time that **this Court** stated that any person who seeks to institute a claim for the violation of the Constitution must do so based on **a legitimate, bona fide and genuine claim**. It has over the years become increasingly popular **for persons to institute a constitutional case claiming to be acting in the public interest but in fact self-serving and financial interests drive such claims**.*

¹⁴*Janata Dal vs H.S Chowdhry & Others AIR (1993) SCV 892; Sachidan and Pandey vs State of West Bengal (1987) SCC 295 and 331.*

¹⁵Petition No. 58 of 2014, Consolidated with Petition No. 209 of 2014

It is therefore the role of the court to determine the constitutional bounds upon which PIL cases can be entertained. In the case of *John Wekesa Khaoya v. Attorney General*¹⁶, the court went ahead to set out the constitutional bounds upon which a PIL must be constrained. It held that:

...acceptable constitutional bounds which will be used in determining this application should be that the litigation must:-

- a) Be public interest litigation,*
- b) Be brought to advance a legitimate public interest,*
- c) Not be aimed at giving the applicant a personal gain.*

Despite the allegations that PIL can be used to further private interests rather than public interests, the role of PIL in enhancing democracy, human rights and governance in Kenya cannot be overlooked. PIL has been key in shaping important legal precedents on promoting human rights, governance issues, and democracy among others. In the case of *Satrose Ayuma & 11 others vs. The Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others*,¹⁷ the right to housing was litigated upon through PIL.

This study seeks to analyse in detail the judicial enforcement, the scope and the extent of PIL in Kenya as recognised in the CoK. This research analyses the concept of PIL in detail by discussing its justifications, historical development, theoretical foundations and tools for its advancement to inform its judicial enforcement. It focuses on how the court determines the constitutional bound of instigating PIL cases. This study seeks to determine whether PIL fulfils its objective to protect the interests of the public and not individual interests by analysing judicial interpretations.

¹⁶ Petition No. 60 of 2012, [2013] eKLR.

¹⁷ Petition No. 65 of 2010, [2011] eKLR.

1.2 Problem Statement

The need to promote PIL is tantamount to ensure that the vulnerable in society can access justice. However, the misuse of PIL for personal gains is a clear indication that the spirit of PIL may be watered down. There is need to deter frivolous PIL applications in court and encourage legitimate ones. While public interest is referenced in the CoK and various legislations, none defines public interest. This leaves it to the discretion of the court to determine PIL on a case by case basis. Unlike in India where every High Court has adopted PIL Rules, none exists in Kenya leaving every court with the power to evolve its own rules. At the same time, allowing everyone to approach the court without limiting the same to genuine public interest petitions leads to wastage of courts time and resources.

1.3 Justification

If well used PIL has the potential to secure government accountability, rule of law, democracy and protect against bad governance. The CoK has for the first time enlarged the avenues of approaching the court diminishing the *locus standi* requirement in the Independence Constitution. This is a step towards protection of fundamental bill of rights and the constitution. However, the potential of PIL may be deterred if the same is used to pursue personal gains and interest at the expense of public interest.

This study is justified as it interrogates how the courts can detect and bar frivolous PIL cases. It adds to the scarce body of knowledge on PIL in Kenya. It also provides judiciary, litigators and other key stakeholders with information on PIL and tools to use to deter unscrupulous PIL. This study provides discussion on how the court can determine public interest and discourage cases which only protects personal interests of the litigants. In the new constitutional dispensation and the increased interest in protecting public interest in Kenya,

this study is key in providing information for all stakeholders such as the judiciary, lawyers, academia, public, civil society and students with interest in PIL.

1.4 Research Objectives

The main objective of this study is to critically analyse PIL under the CoK and determine issues and concerns arising.

Specific Objectives

The specific objectives that this study seeks to address include:

- a) To analyse the concept of Public interest litigation
- b) To analyse the COK provisions that seeks to enhance PIL in Kenya.
- c) To analyse judicial interpretation of ‘public interest’ visa vis ‘personal interest’ in PIL in Kenya.
- d) To provide recommendations that seek to enhance judicial enforcement of PIL in Kenya.

1.5 Research Hypotheses

This study is based on the hypotheses that:

- a) Public interest litigation is an effective tool in enhancing justice of the underprivileged in the society.
- b) In order to encourage PIL there is need for Kenyan courts to adopt a no-award of costs policy like Canada.
- c) PIL can offer an avenue for busy-bodies with political and personal motives to approach the Court in disguise of PIL wasting Court’s resources and time.

1.6 Research Questions

This research is underpinned on the following research questions:

- a) What is the appropriate judicial interpretation of what constitutes public interest?
- b) What mechanisms should the court put in place to encourage genuine PIL and discourage frivolous PIL?

1.7 Theoretical Framework

It is no doubt that the rationale of PIL is to enhance access to justice of the vulnerable in society and government accountability in the protection of human rights. Indeed, the main justification of PIL is to ensure that members of the public have unhindered access to justice. Justice is done to all irrespective of their status in the society. In cases the minority are not able to access the court and institute judicial proceedings, a person can do so on their behalf to ensure that they access justice and they don't have to prove any direct interest. In this regard, the theory of justice underpins this research. The theory of justice can be attributed to philosophers such as Plato, Aristotle and Rawls.

The theory of justice is relevant in determining the place, extent and justification of PIL in Kenya. Limitation of PIL on grounds of litigation of claims on private gains other than public interest should only be hindered if they are not in pursuit of public interest or justice. Public interest, according to Rawls should supersede personal interest.

If the Courts have to ensure that PIL is effective, its decision must be underpinned on theory of justice. The theory of justice is used in this study to show the justification of PIL. Even though interpretation of PIL is within the jurisdiction of the Courts and is determined by facts of each case, every judge must ensure that justice underpins their administration.

1.8 Literature Review

The Kenyan for Peace with Truth and Justice (KPTJ), Africa Centre for Open Governance (AFRICOG) and Katiba Institute, have published a handbook on *Guide to Public Interest Litigation in Kenya*.¹⁸ This handbook provides a detailed conceptual and practical guidance on various options for public interests litigators to use the law and courts to inform the ongoing and future public policy discourses on pressing social and governance issues in Kenya. The authors argue that the promulgation of the 2010 CoK brings with it open governance, expanded rights for women and marginalised, devolved system of governance, economic and social rights. However the next hurdle is the implementation of the provisions of the CoK.

They argue that embracing PIL as tool for testing, clarifying, shaping law and policy shall help in addressing the challenges facing implementation of the CoK. Future PIL actions can help shape the law in neglected and emerging areas such as environment, energy, food insecurity, violence against women, and child abuse among others. While this book provides a detailed understanding of PIL and contextualization, it focuses on the role of the public interest litigators. For example in its second part it provides a guidance on how to prepare and execute PIL strategies such as case selection, client identification, case preparation, funding among others. While this study recognises the role of public interest litigators in Kenyan new constitutional dispensation, this study focuses on the role of the court in identifying public interest issues and its interpretation. This study limits its scope to judicial enforcement. Specifically how the courts can enhance genuine litigation that enhances public interest vis a vis personal interests.

Gauri,¹⁹ examines PIL in India and identifies the challenges that it faces. He concludes in recent years a number of criticisms have been levelled against PIL such as separation of

¹⁸ KPTJ, AFRICOG and Katiba Institute, *A Guide to Public Interest Litigation in Kenya* (KPTJ 2012).

¹⁹Varuni Gauri, 'Public Interest Litigation in India: Overreaching or Underachieving?' (World Bank, 2009).

powers, judicial capacity and inequalities amongst others. The author does not focus on the judicial interpretation and enforcement of PIL. Neither does the author address the challenge of cases that foster personal interest in the disguise of public interest. This is the focus of this study. Gauri, also focuses on the Indian experience, while this study seeks to address Kenyan scenario.

Philip and Piazza,²⁰ agree that PIL has led to creation of cognizable rights through landmark decisions and publicity. However not all PIL disputes have been settled in court. The authors argue that there is need to embrace alternative methods in solving such disputes. PIL depends so much on public funding, it may take long and the remedies that fall under PIL may not offer complete relief.²¹ The authors recommend that mediation be incorporated in the process of resolving PIL disputes. These authors do not focus on judicial interpretation of public interest but rather focus on how out of court settlements can be used before engaging in PIL. The scope that this study seeks to address is how the judiciary can interpret and enforce PIL while fostering justice.

The authors identify three characteristics of PIL that makes mediation the best alternative. First is the tendency of parties in PIL to take positions based on principle that put the essentials of discussion beyond negotiation. Second, is that much of PIL never resolves the underlying controversies. Finally, in most cases the government defenders fail someone to take responsibility for settling the disputes. Although Article 159 of COK was written in 1983 and was very peculiar to the US, this article provides a limelight into the use of alternative dispute resolution in PIL. The article is very shallow on the role of mediation. This study in addressing the challenges facing PIL in Kenya, but limits its scope of furtherance of personal interest in the disguise of PIL.

²⁰ Barbara Ashley Philips and Anthony C Piazza, 'The Role of Mediation and in Public Interest Litigation' (1983) 34, *Hastings Law Journal* 1231.

²¹ *Ibid.*

While in most jurisdictions the traditional *locus standi* has been relaxed making any person approach the court on behalf of another person without any direct interest, Sydney Faculty of Law in an article in Sydney Law Review argues that this may be of little significance if other procedural reforms are not made. In the case of *Oshlack vs. Richmond River Council* the court relaxed the ordinary rule of costs, that costs follow litigation. He argued that a PIL in essence protects the rights of the public and in order to encourage PIL, the courts should deviate away from the ordinary strict rule on costs. It is argued in order to encourage PIL courts should not award costs to public interest litigants in order to encourage them to approach the court. This article shall be relevant in addressing the issues of costs on PIL in Kenya. In Kenya, the courts have construed the award of costs such that each party bears its own costs. While this article was based on the US jurisprudence, this study focuses on the Kenyan scenario.

Onyango,²² discusses PIL in East African Countries; Kenya, Uganda and Tanzania. In his discussion on PIL in East Africa he tests four hypotheses which have been advanced as a rationale for PIL.²³ He critically analyses if PIL in the three countries has achieved the said rationale or it is just an enrichment for PIL lawyers. Onyango analyses the rich case law in the national jurisdictions and East African Court of Justice (EACJ). He provides an insight into the scope and development of PIL in East Africa. However, this article does not look at the role of the court in advancing PIL. It does not address the limitation of PIL to address public interests rather than used to advance individual interests at the pretext of public interest. This research intends to fill this gap. This study recognises the role of the Court in PIL and aims at providing mechanisms which the court can adopt in construing legitimate public interest cases.

²² Onyango (n 14)

²³ Ibid.

Sen,²⁴ on the other hand analyses in detail the role of the Indian Supreme Court in enhancing PIL in India. Although the study only focuses on the link between PIL and development, it shall be used to enrich this study. This study recognises the development in PIL in Kenya under the CoK. However, it goes beyond to address the practicability of PIL in addressing public interests rather than individual interests. It looks at the role of the court in advancing PIL in order to protect the interests of the vulnerable.

Luseka, discusses the role of PIL in advancing social and economic rights. The author examines the challenges facing the courts, litigants and on government policy. In the light of Kenyan context, the author examines how Kenya can use PIL in the new constitutional dispensation and realization of social economic rights recognised under Article 43 of the CoK. The author analyses in detail PIL case law on socio-economic rights. However the author focuses on community mobilization on PIL matters. This study focuses on the role of court in enhancing genuine PIL matters and discouraging PIL matters that aim to protect personal interest. It does not limit itself to socio-economic rights but discusses in detail Article 22 of the CoK on human rights protection and Article 258 on implementation of the Constitution.

The reviewed literature illustrates that there is scarce sources on PIL and the constitutional bounds in Kenya. While it is clear that PIL as a tool can be used by the vulnerable to access justice, in some instances it can be used by individuals to pursue their own interests. This research goes beyond litigation of public interest. It determines how the Courts interpret genuine public interest to prevent abuse of the court process, wastage of its time and dragging of parties in unfounded matters. This research shall therefore add to the scarce body of knowledge which has primarily focused on the role of PIL litigators and civil society.

²⁴ Sen (n 2).

1.9 Research Methodology

This research is library based. The focus of this study is limited to judicial interpretation of public interest in PIL and how the court has enhanced the concept of PIL. Due to the availability of case law and legislations on the topic under study, the researcher did not engage in fieldwork. The researcher analysed the available case law in Kenya and other jurisdictions. Data collection primarily entailed secondary sources. This involved the reading, discussion and analysis of policy papers and publications of different institutions in regard to policy formulation or the actual implementation of PIL. It also included reports made by official bodies established by the government of Kenya to inquire into the situation under study as well as any other data with a government department, agency or other credible organizations that have conducted inquiry into the situation. Secondary data collection technique entailed going through the relevant books, case law, CoK, articles, journals, conference papers and information from the internet on the topic under study.

1.10 Chapter Description

This study has five chapters.

The first chapter introduces the topic under study. It provides for the background, problem statement, literature review, objectives, research questions, hypothesis, theoretical framework, study justification etc.

The second chapter discusses the concept of PIL in detail and its historical development. This chapter provides the historical and theoretical underpinnings of the concept of PIL. It analyses the justifications for and against PIL. The objective of chapter two, is to provide an in-depth understanding of the concept of PIL.

The third chapter contextualizes PIL in Kenya since the promulgation of the CoK. It discusses the issue of *locus standi* and courts interpretation. Secondly it analyzes the

commencement of PIL, withdrawal and award of costs providing how the courts have interpreted the same in detail. The objective of this chapter is to provide an understanding of PIL in the Kenyan context.

The fourth chapter recognises that neither the CoK nor any legislation provide for definition and what constitutes public interest leaving it to the Courts interpretation. This chapter therefore analyses judicial interpretation and enforcement of PIL. It further analyses how the court guards itself against frivolous and petitions with ulterior motives in the disguise of PIL. The objective of this chapter is to determine the role of court in ensuring that only genuine PIL cases are litigated. It analyses the challenges and mechanisms that the court has put in place to address frivolous PIL cases

The fifth chapter draws the conclusions from the study and provides recommendations.

CHAPTER TWO

2.0 THE HISTORICAL DEVELOPMENT OF THE CONCEPT OF PUBLIC INTEREST LITIGATION (PIL)

2.1 Introduction

This chapter provides the historical development of PIL in Kenya under Article 22 on enforcement of human rights and Article 258 on enforcement of CoK. The aim of this chapter is to provide not only the historical development of PIL but to discuss the justification of developing PIL as a tool to protect human rights and ensure justice.

2.1 Historical Development of the Concept of Public Interest Litigation

PIL as we know it today in the Kenyan constitutional dispensation is not new. It is a recognised legal mechanism for the enforcement of public law. The term ‘public interest litigation’ was coined in 1976 by Abram Chayes, then a student at Harvard Law School.²⁵ According to Chayes, adjudication does not only involve private issues, but also issues of public law and regulation of policy are inevitable. PIL is a tool that is used to pursue public interest issues where the litigants do not require to prove any direct interest. Maleche defines PIL as, ‘litigation that focuses on issues of importance to the public at large, or for a major section of the public and whose outcome is likely to impact not only on the individual litigant but also on a larger section of the society’.²⁶

PIL is a collaborative and cooperative approach towards the litigation of public interest issues. In the case of *Upendra Baxi vs State of UP*, the Court emphasized that unlike in the adversarial traditional system where lawyers either win or lose a case, in PIL there is no winner or loser, all the parties must endeavour to end the conflict in issue.²⁷ While according

²⁵ Manisha Shahu ‘Public Interest Litigation’ <https://newindialaw.blogspot.co.ke/2013/04/public-interest-litigation.html> accessed 10 April 2017.

²⁶ Allan Maleche, ‘Public Interest Litigation in Kenya: The New Constitution Context’ (Kelin 2014).

²⁷ 1976 2 SC 521.

to Sen, the concept of public interest is now a concept that will inform key decisions made by public and private bodies, the need to understand its historical development and the conceptual understanding is very important.²⁸ The term 'PIL' has become a common term in the new Constitutional dispensation as it is used to ensure that fundamental rights and freedoms are respected. However, before elucidating into what the concept entails one must first understand its origins.

The evolution of the concept of PIL is debatable. Some commentators argue that the concept of group litigation originated in England as far as 1700 as litigators approached the Court to 'test conflicting views of slavery at common law'.²⁹ Other commentators argue that the modern concept of PIL originated in the US when a US lawyer, Louis Brandeis urged American lawyers not only to represent their corporate clients but also to consider public interest.³⁰ This was a time when America was undergoing industrialization and urbanization, most lawyers living in the urban areas represented the corporate clients and forgot about the local people. Brandeis noted in his speech, that the American lawyer had lost the opportunity, not because there was no opportunity, but because they had become adjunct of their corporate clients and not peoples' lawyer.

Brandies practiced for forty years before he was a judge. He represented public interest issues and volunteered for organizations and people in spearheading public interest cases such as the famous case of *Muller vs Oregon*,³¹ which led the Supreme Court in upholding a legislation that advanced the rights of women at the work place. Whereas Brandies is recognized as the father of PIL in the US, the *Brown Case*³² in the US is attributed as the first case in which the concept of PIL was developed. This case aimed at fighting against societal justice and no

²⁸ Sen (n 2).

²⁹ Carol Harlow and Richard Rawlings, *Pressure Through Law*, (Routledge 1992).

³⁰ Robert Cochran, 'Louis Brandeis and the Lawyer Advocacy System' (2013) 40 (3), *Pepperdine Law Review* 2.

³¹ 208 U.S. 412 (1908).

³² 347 U.S. 483 [1954].

individual harm had to be proved or damages sought. *Brown case*, became a centre stage which informed future PIL cases in the US. Law was seen as a liberation for the marginalised and as tool to change the power of the privileged who were dominantly the white. During the 1960s and 1970s civil society in US approached the Courts to litigate on public interest issues.³³ In a nutshell, PIL in the US was spearheaded by the civil society and its objective was to ensure access to justice by the underprivileged.

In India, PIL emerged as a social action litigation. India has emerged as one of the countries in the world that continues to use PIL for social gain. However, PIL in India can be traced in 1970s during which period many Indians were not able to access justice because the Court was not accessible. This was coupled by high costs as many rural Indians were poor and illiterate of their rights. However, the challenge of accessing justice by the poor and down trodden was exacerbated during the Emergency Period between 1975 June and March 1977, when the then Prime Minister suspended elections and civil liberties due to no locus standi. In the case of *ADM. Jabalpur v. Shivakant Shukla*,³⁴ the Court was invited to interrogate and intervene on the validity of the said presidential order. However, in a unanimous decision the Supreme Court upheld the presidential order making it difficult for any person who had been detained by the government to seek habeas corpus infringing on their rights to liberty. This decision was highly criticised and the independence of the judiciary questioned.

Having its reputation tainted during the emergency period, when it came to an end, the Supreme Court set to redeem its reputation. The Court was unpopular amongst the masses. In 1978, the Supreme Court received a letter scribbled on a piece of paper by an inmate from a prison alleging torture of a fellow inmate by prison guards. In entertaining the letter to protect the rights of the prisoners, the Supreme Court relied on Article 32 of the Indian Constitution

³³ Jayanth K Krishan, 'Public Interest Litigation in Comparative Context' (2001) 20, Buffalo Public Interest Law Journal 19.

³⁴ 1976 SCR 172.

which provided that any person could approach the Court by any appropriate proceedings for enforcement of fundamental rights.³⁵ In so doing, the Supreme Court of India enhanced access to courts even among the informed in the society who could not understand the courts procedural technicalities hence enhancing access to courts. Since then, PIL has been used as tool in India, to protect the rights and interests of the public.

PIL is based on various theoretical underpinnings. Hershkoff argues that the concept of PIL rests on three theoretical underpinnings.³⁶ First, it is based on the anti-positivist argument of majoritarian outcomes whereby the minority suffer in silence.³⁷ In this scenario due to defects that may arise in legislation not protecting the minority groups, PIL is used as a judicial intervention to protect the minority.³⁸ Minority in a society, in most cases may not be given an opportunity to voice their issues. PIL offers a platform whereby minority rights can be protected. Minority in this case include women, children, disabled, marginalised and the youth. Whereas in some cases, their rights might be entrenched in constitution or legislation, if violated, it may be difficult to access justice due to challenges such as illiteracy or inability to afford litigation.

Second, Hershkoff provides that PIL helps in ensuring that the laws in books is enforced on the ground.³⁹ She argues that legislation may provide for the protection of the less privileged in society but in practical enforcement may not be realised due to lack of political will or hostility. Finally, she asserts, PIL is used a social tool to engineer social change.⁴⁰ In this regard, those who did not have a voice in the society can use this tool to further their own rights.

³⁵ SP Sathe, 'Judicial Activism: The Indian Experience' (2001) 6 WASH. U. J. L. & POL'Y 29.

³⁶ Helen Hershkoff, 'Public Interest Litigation: Selected Issues and Examples' (World Bank 2004).

³⁷ Ibid.

³⁸ John Ely, *Democracy and Distrust* (Harvard University Press 1980).

³⁹ Hershkoff (n 61).

⁴⁰ Ibid.

Rekosh does not deviate away from what Hershkoff provides, however he argues that instead of trying to have a uniform definition of what PIL is, we should examine the multiple meaning implied from the term. He provides three ways in which PIL can be understood. First is the social conception of PIL which aims at protecting the poor and countervailing the powers of the wealth in the legal system.⁴¹ This is what informed Brandeis concept that lawyers should not only represent the corporate lawyers but the people. PIL is used to ensure that downtrodden in society are legally represented. Second is the substantive concept of PIL.⁴² This raises the question of what is public interest. In essence what constitutes public interest is left to the discretion of the Court. It calls the judiciary or any other government institutions to be subjective on issues touching on general welfare. Third, Rekosh brings out what he refers to as the process-oriented concept of PIL.⁴³ Which he argues, does not deviate from the social legal theory. In South Africa PIL has been encouraged by progressive constitutional provisions which have seen the protection of fundamental human rights and freedoms in the South African apartheid Constitution. As various jurisdictions enhance PIL it all rests on the justification that it will cure social injustice.

2.3 The development of PIL under the Kenyan Constitution

As many litigants approach the Court to litigate public interest cases as a result of the expanded *locus standi* under the new CoK, the concept of PIL in Kenya is not novel. In Kenya the historical development of PIL can be traced during the quest of the new Constitution as judges started deviating from the long English rule of standing where the Courts required an individual to show direct interest in a matter.⁴⁴ Before the promulgation of the CoK, Kenyan courts in interpreting PIL cases relied on the traditional English law which

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ KPTJ and others (n 33).

required that an individual cannot institute court proceedings relating to public.⁴⁵ An individual instituting court proceedings had to prove a direct interest in the matter, and allege existence of or anticipated damage or injury. This was clear in the famous case of *Wangari Maathai*,⁴⁶ where the Court ruled that the petitioner lacked *a locus standi* as she failed to show the injury she could suffer by the construction of the multi-billion complex in Uhuru Park.

Under the old Constitution Courts established that PIL cases could only be instituted by the AG. However under the Moi regime, coupled with the lack of rule of law, democracy and weaker protection of human rights, it was untenable for any AG to institute public interest litigation. However as the quest for constitutionalism arose, the Courts started to lessen the strict application of the rule of standing. This was evidenced by a number of cases, which recognised the need to protect public interest.

The *Priscilla Nyokabi Case* was the first case in which the court recognized the need to lessen the strict requirement of standing in PIL cases and adopt a liberate approach in its interpretation borrowing heavily from Indian and United Kingdom jurisprudence.⁴⁷ The court held that, ‘the issue of *locus standi* (standing) had shackled public law litigants for a long time’ and it was time it was lessened.⁴⁸ In the quest for a new Constitution, it was apparent that Kenyans needed a new governance system based on good governance and the rule of law. This could not be achievable, if the access to courts was hindered to protect public interests.

The new CoK which has been celebrated as liberative and transformative changed the whole idea of PIL and opened flood gates of PIL cases in Kenya as civil organizations and

⁴⁵ *Gouriet vs Union of Post Office Workers and Others* [1977] 3 All ER 70.

⁴⁶ eKLR [1989].

⁴⁷ Nairobi High Court Constitutional Petition 1 of 2010 eKLR 2010.

⁴⁸ Nairobi High Court Civil Application No.908 of 2000.

individuals approached the Court to litigate on constitutional rights and freedoms. In a publication by a group of civil society it provides that: ⁴⁹

Using PIL, new opportunities have arisen for Kenyans to leverage the law and courts to influence government policy dialogue and formulation. Moreover, PIL provides an opportunity for Kenyan civil society organizations to be proactive and set the agenda for social change. PIL actions undertaken by civil society groups and individuals.

PIL under the CoK has two facets. The first one is to enable the public and interest groups to participate in governance issues and shape public policy. Second it gives the Court the opportunity to interrogate and protect the interests of the public. It enables accessibility to Court by removing institutional obstacles that certain groups face in accessing the Courts. Cassels argues that PIL has four key features. The aim of these features is to ensure that those who cannot access the Courts have the opportunity to do so.⁵⁰ This enhances the accessibility of courts and access to justice.

Using PIL, public interest litigants in Kenya, have grabbed the opportunity presented by PIL to interrogate governance cases such as public appointments, use of public resources, public officers' integrity issues and implementation of the Constitution in general. For instance, during the Kibaki regime,⁵¹ a number of civil organizations instituted court proceedings in public interest when the president appointed male appointees for the position of AG, Director of Public Prosecutions (DPP), Chief Justice (CJ) and Controller of Budget despite Constitutional provisions that such appoints must consider the two-third gender rule. It was alleged that Kibaki had failed to consult the then Prime Minister in the said appointments as required by the grand coalition. The Court held that this suit raised public interest issues which were well guarded under the new CoK.

⁴⁹ KPTJ and Others (n 33).

⁵⁰ Rekosh (n 66).

⁵¹ Civil Appeal No. 218 of 2012.

PIL will not only be restricted to protection of national legislation. It will encompass the protection of human rights and freedoms recognised at the international level.

While the concept of PIL in itself is not novel under the CoK, it is novel in the sense that it has expanded the *locus standi* by providing that in addition to their own interest a person can institute Court proceedings in public interest. In *John Mining Temoi & Another vs Governor of County of Bungoma & 17 others*⁵² the Court held that that Articles 22(1) and (2) and 258 of the Constitution had expanded the horizons of *locus standi* in matters of enforcement of fundamental rights and freedoms. Further, the CoK is novel in the sense that it allows the Court to entertain human rights proceedings on the basis of informal documentation. The *Mutunga Rules* allows informal institution of Court proceedings where human rights and fundamental freedoms have been breached or there is a threat.

The concept of PIL, is now well entrenched into the CoK. It is now upon the litigants to grab this opportunity and pursue public interest issues. This will border on a wide array of issues such as governance, human rights, rule of law, democracy and the protection of the CoK. Those whose rights and access to justice had been denied during the old Constitution now have an opportunity to pursue the same. However, the interpretation of what constitutes public interest will rest upon the court. The court has an opportunity to develop PIL jurisprudence to enhance access to justice.

2.4 Conclusion

The concept of PIL can be traced in England in 1700, however the modern concept of PIL was developed in the US and spread in other jurisdictions. The objective of PIL is to protect the interests of the public and access to justice. In Kenya, PIL under the old Constitution faced various constraints as the Courts adopted a restrictive approach to the rule of standing and required that PIL could only be instituted by the AG. However the 2010 CoK has

⁵² eKLR 2014.

expanded the rule of standing and granted anyone the right to approach the Court and institute proceedings to enforce human rights and the Constitution. It is now upon the public interest litigants to grab the opportunity presented by PIL to protect the CoK and human rights.

CHAPTER THREE

3.0 INSTITUTING PUBLIC INTEREST LITIGATION UNDER THE CONSTITUTION OF KENYA 2010

3.1 Introduction

This chapter discusses how the CoK has shaped PIL by liberalization of rule of standing. It discusses who can institute PIL cases, the procedure, the withdrawal and award of costs in PIL. Instituting PIL requires public spirited citizen or organization to consider whether they have *locus standi*, understand how to file or withdraw the petition and the costs associated with such an application. The objective of this chapter is to provide Court and PIL litigants with knowledge of the expectations of PIL under the CoK.

3.2 PIL *Locus Standi* under the 2010 Constitution of Kenya

It is no doubt that PIL is now firmly entrenched in the CoK. However, this is paper based. It will only become operational if litigants grab the opportunity and pursue the same. The main hindrance that had faced PIL in the old Constitution was need for the litigants to prove *locus standi*.⁵³ However, the law has developed and has recognized that in some peculiar cases, a person can institute court proceedings in case where they do not have an individual interest and will not suffer harm, but it is in the interest of the public.⁵⁴

In most jurisdictions, PIL is now recognised as a fundamental tool in protecting human rights and enforcing the constitution. In India, the Supreme Court which has been attributed to the development of PIL, has recognized that the poor do not have the capacity to represent themselves or take opportunity of the Constitution and other progressive legislation.⁵⁵ In this

⁵³ Basant Lal Wadehra, *Public Interest Litigation: A Handbook with Modern PIL Format* (Universal Law Publishing 2009) 58.

⁵⁴ Pritam Kumar Ghosh, 'Judicial Activism and Public Interest Litigation in India' (2013) 1 (1), *Galgotias Journal of Legal Studies* 77.

⁵⁵ Mahesh R Halde, 'Locus Standi has Widening the Scope of Public Interest Litigation' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934112 accessed 24 June 2017.

regard it has encouraged the use of PIL as a tool to extend the reach of the judicial protection to the less disadvantaged who could not be protected through private litigation.⁵⁶ Any person can approach the Court to protect the interests of the poor, even though they will not benefit.

The CoK, has expanded other procedural avenues for access to justice in which a person can approach the Court even when they don't have a personal interest.⁵⁷ A person who is a member of a class of group of persons such as the marginalized people can institute court proceedings on behalf of the group. The above three scenarios apply to specific classes of groups whose issues may not affect the general public but only that specific class. In these cases, it can be inferred that the applicant has a certain relations with the class they seek to institute proceedings.

The final instance, where a person can institute court proceedings is when they are acting in the public interest. PIL is very peculiar and unique in the sense that even though the applicant need not have a personal interest, the issue should affect the general public.⁵⁸ The applicant need not establish interest or relationship. What the applicant needs to show is that they have no personal interest or gain, however the matter under consideration will affect the public if not considered. The CoK, has therefore broadened the scope of litigation. Anyone can now approach the court and seek remedies whereby the Constitution and human rights are under threat or have been violated.

The CoK has widened the scope of PIL by granting any person the right to institute proceedings. Article 3 (1) of the CoK obligates every person to respect, uphold and defend the Constitution. PIL is not only limited to natural persons. A person as defined under Article 260 of the CoK includes a company, association or other body of persons whether

⁵⁶ Deva (n 9).

⁵⁷ European Union, *Study in Children's Involvement in Judicial Proceedings: Contextual Overview for the Criminal Justice Phase-Poland* (Luxembourg Publications 2014).

⁵⁸ Alex Cyril Ekeke, *Access to Justice and Locus Standi before Nigerian Courts* (Master's Thesis, University of Pretoria 2014),

incorporated or unincorporated. This definition has enlarged the scope of who can approach the Court. A body need not be incorporated or unincorporated as long as the issue is of public interest one can approach the Court for redress. It is not surprising that in the spirit of defending the CoK, any person even where they are not directly affected, can institute court proceedings in the interest of the public. The objective of encompassing even unincorporated agencies in the CoK, is to ensure that the spirit of protecting the Constitution is not just paper based but fully pledged right. Where there is a danger of violating the CoK any person regardless of their capacity can freely approach the Court for remedies.

In order to enforce the Bill of Rights, the CoK (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (*Mutunga Rules*) were enacted. These Rules adopts the same definition of a person as the CoK.⁵⁹ The *Mutunga Rules* apply to all the proceedings under Article 22 of the CoK and its overriding objective is to ensure that every person has access to justice.⁶⁰ The *Mutunga Rules* envisages that all persons including the poor, illiterate, uninformed, unrepresented and people with disabilities have a right to access to justice. These groups of people may not be informed of their human rights and freedoms even in cases where they are violated. PIL is therefore a tool which can be used by the informed and illiterate to approach the Court and ensure access to justice.

The issue of who can approach the Court under the new constitutional dispensation was a matter of litigation in the *MumoMatemu Case*.⁶¹ In this matter, the respondent, argued that the fact that the petitioner had been deregistered as an NGO, it lacked the *locus standi* in the matter. The petitioner had challenged the appointment of MumoMatemu as the chairperson of the Ethics and Anti-Corruption Commission (EACC) on the ground that the appointment was unconstitutional and the appointee did not meet the threshold on leadership and

⁵⁹ Government of Kenya, *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules)* (Government Printers 2014).

⁶⁰ *Ibid*, section 2.

⁶¹ High Court at Nairobi Civil Application No. 29 of 2014, [2014] eKLR.

integrity.⁶²The Court was categorical that the Constitution has enlarged the scope of *locus standi*, and anybody whether incorporated or not would institute any public interest proceedings in Kenya. The Court went ahead to provide that, ‘even if the 1st respondent was deregistered prior to filing a cause in this Court, the new Constitution directs that *every person, including an association whether incorporated or not, can institute proceedings before a Court challenging the contravention of the Constitution*’.⁶³ The Act of deregistering did not in any way deprive the petitioner the standing to appeal before the Court on matters of technicalities.

It is in no doubt the issue of *locus standi* in public interest issues in regard to human rights and the constitutional in general is now firmly ascertained in the CoK. Courts have moved away from the strict interpretation of standing. A new dawn in public law litigation has been ushered and a purposive interpretation of the rule of standing adopted.⁶⁴ The traditional rule has been considerably enlarged and a liberal approach adopted. In the Case of *John Wekesa Khaoya (Wekesa Case) V Attorney General*⁶⁵ the High Court reiterated the principle that, ‘the *locus standi* to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Article 22 and 258 of the Constitution which ensures unhindered access to justice’.

In a similar case, *Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another*,⁶⁶the petitioner argued that the decision of the CJ to transfer 105 judges of the High Court on 15th April 2016 was unconstitutional and was meant to remove certain judges from certain cases. The respondents contended that the petitioner had no right

⁶² Ibid para 93.

⁶³ Mumo Case Para 78.

⁶⁴ *Priscilla Nyokabi Kanyua vs. Attorney General & Interim Independent Electoral Commission Nairobi HCCP No. 1 of 2010*

⁶⁵ High Court Bungoma, Petition No. 60 of 2012 [2013] eKLR para 4.

⁶⁶ Petition No. 167 of 2016, [2016] eKLR

to institute proceedings under Article 47 of the CoK because he was not one of the judges affected by the transfers.

⁶⁷It is therefore affirmed in the CoK that any person can approach the Court on PIL and such a person need not show that they have personal interest in the matter. They only have to show that the matter affects the public.

3.3 Instituting and withdrawal of PIL cases in Kenya

Any public spirited person, organization or a class of persons can now approach the Court to articulate public law issues without proving any interest in the matter. It is in no doubt that PIL is an accepted norm in the Kenyan constitutional dispensation. It is also more vibrant than it was in the independent Constitution. The CoK provides not only new opportunities for the litigators but has also expanded the human rights by introducing socio-economic rights and rights of special groups which had not been recognized under the previous Constitution. The aim is to protect the needs and rights of the minorities.

In filing a PIL application, the applicant is required to file at the High Court within which jurisdiction the matter falls.⁶⁸

In furthering PIL, the CoK underscores the need of the Court to observe rules of justice and not to be restricted by procedural technicalities. In India, the Supreme Court has been categorical that in matters of public importance, procedural technicalities have to take a back seat.⁶⁹ In Kenya, the Court is required in some matters, if necessary entertain proceedings on the basis of informal documentation. Whereas the *Mutunga Rules* apply to the enforcement of the Bill of Rights, it shall remain the Court's interpretation on whether the same shall apply to the other issues that touch on the enforcement of the Constitution. The oral application is

⁶⁷VidehUpathyay, *Public Interest Litigation in India: Concepts, Cases and Concerns* (Lexis Nexis 2007).

⁶⁸ Section 8, *Mutunga Rules 2013*.

⁶⁹ *Rural Litigation and Entitlement Kendra vs State of UP*, 1989 Supp (1) SCC 504

to be reduced in writing and the Registrar shall assist applicants in filling a prescribed form at the registry.⁷⁰ The essence of allowing informal documentation is to grant the informed in the society who do not understand the complexity of court proceedings to approach the court. This also applies to poor litigants who cannot afford lawyers to draft documentation for them. Any party has a right to withdrawal, discontinue or adjust a civil suit filed in a Kenyan Court in accordance with Order 25 of the Civil Procedure Rules. This is subject to payment of costs. The right to withdraw a case at any point is a matter of right as was held in the case of *Nicholas Kiptoo Arap Korir Salat Vs the Independent Electoral and Boundaries Commission and 7 others*.⁷¹ Rule 52 of the Court of Appeal Rules also grants an applicant the right to apply to the Court for leave to withdraw an application which may be made informally. The *Mutunga Rules* also allows a party by way of notice to the Court and respondent apply for withdrawal of a petition and with the leave of the Court to discontinue proceedings.⁷² The Court after hearing the parties will decide on the matter and determine the juridical effects of that decision.⁷³ What constitutes juridical effects will vary from one case to another and the Court can refuse such an application and record reasons for such refusal.⁷⁴

The question whether a public interest application can be withdrawn or discontinued has also been subject of litigation. The *Mutunga Rules* do not define or list the reasons upon which a Court can refuse an application for withdrawal or discontinuance of PIL proceedings. Rule 27(2) of the *Mutunga Rules* grants the Court the discretion not to allow withdrawal of a PIL case if it has adverse juridical effects on public interest. What constitutes juridical effects will depend on each case. Whether a PIL can be withdrawn at any stage of proceedings was discussed in the case of *Peter Makau Musyoka & 19 others vs Permanent Secretary Ministry*

⁷⁰ Section 14, *Mutunga Rules 2013*.

⁷¹ Petition 23 of 2014.

⁷² Section 27, *Mutunga Rules 2013*.

⁷³ Section 27, *Mutunga Rules 2013*.

⁷⁴ Section 27 (3), *Mutunga Rules 2013*.

of *Energy & 14 others (Musyoka case)*.⁷⁵ In this case the petitioners made an application to withdraw a public interest case on the ground that, the fear of environmental degradation as a result of extraction of coal deposits in the Mui Basin in Kitui County had only been speculative. In light of the promise that an environmental assessment would be undertaken, the petitioners wished to withdraw the case so that the project would take off and enjoy the economic benefits such as employment. The Court had to address whether such a withdrawal had adverse juridical effects on the public interests involved.

The Court echoed the Indian Supreme Court's ruling in the case of *SP Anand v H.D. Deve Gowda*⁷⁶. In declining the application to withdraw the public interest case in the *Musyoka case*, it set out three considerations which Courts should consider.⁷⁷ First, public interest initially presented in the case will not suffer as a result of the withdrawal. Second, there is no abuse of the process of the law. The party must act in good faith.⁷⁸ Finally, the case at hand is not an exercise in futility. This may be as a result of the case being overtaken by events. The Court was of the view that the petitioners had not shown that the public interest of the local community would be safeguarded even after the withdrawal.

The Court will be adamant to allow withdrawal or discontinuance of a public interest case if the parties are not in a position to show that those interests will be safeguarded. Once a public interest case has been initiated the Court places upon the parties a high threshold in case of withdrawal and discontinuance. The aim is to ensure that, the litigants do not waste the court's time and resources.

⁷⁵ Constitutional Petition 305 of 2012 [2014] eKLR

⁷⁶ (1996) 6SCC 734

⁷⁷ *Musyoka Case* para 25.

⁷⁸ *Sheela Barse v Union of India AIR 1988 SC 2211*

3.4 Award of costs in PIL

Financing PIL is likely to be expensive in Kenya as there is no legal aid schemes to support the same.⁷⁹ The fact that a PIL litigant is driven by public interest without any personal gain either economic or proprietary, it is unlikely for one to invest private funds into such an action. Although required under Article 22 (3, c), the *Mutunga Rules* have not provided for the issue of Court fees when commencing human rights proceedings. The objective of PIL is to ensure that those that could not afford justice due to poverty or illiteracy can now access justice without any hindrance. Court fees can hinder potential litigants from instituting court proceedings.

The award of costs to a successful party has been justified on two grounds. First is to indemnify the winning party.⁸⁰ The winning party is compensated for the costs of litigation. The second rationale is to discourage frivolous and vexatious court applications that will lead to wastage of Courts' time and resources. The purpose of this justification is to encourage an applicant to make a deliberate decision on the success of their case before approaching the Court.⁸¹

Whereas the general rule as to award of costs in litigation is that the unsuccessful party should bear the costs, there is an exception to the general rule. A court will not award costs to a successful party where the matter of litigation is novel or where the Court has interpreted an ambiguous legislation.⁸²

The Canadian courts, consider PIL to be an exception to the normal rule.⁸³ However this exception is not absolute and is reserved for the rarest of circumstances as was held in the

⁷⁹ Patricia Mbote and M Aketch, 'Kenya: Justice Sector and the Rule of Law' (Open Society Foundation 2011).

⁸⁰ Traditionally award of costs in civil litigation was to compensate victorious litigants.

⁸¹ Cecilia KaruruNgayu v Barclays Bank of Kenya & another [2016] eKLR, CIVIL CASE NO 17 OF 2014.

⁸² Orkin (n 125).

⁸³ Ibid.

case of *Pauli vs ACE INA Insurance Co by the Court of Appeal in Alberta*.⁸⁴ The appellants' motor vehicles had been damaged beyond economic repair. They were indemnified by the insurers. However, the insurers paid them the actual cash value less the policy deductible. The appellants through a representative action challenged the insurers' practice which was dismissed and costs awarded against them.⁸⁵ The Court of Appeal held that the chambers judge had erred and awarded no costs to the appellants in regard to the merits issue yet the case raised pertinent issues of public interest. Costs are awarded at the end of the litigation.

In the UK, the costs regime in PIL is unique as through case law it has developed the concept of protective costs orders to insulate a PIL litigant against adverse effects of a cost order.⁸⁶

The protection costs order typically caps a 'predetermined amount to recover if successful or if liable'.⁸⁷ The guidelines on the application of protective costs orders were set out in the *Corner House Case*.⁸⁸ The appellant appealed against a refusal for a protective order. *Corner House* sought a judicial review on the failure of the Export Credit Guarantee Department to consult it in carrying out a consultation on corruption. On appeal the Court set out the principles governing protective costs order in PIL.

The UK PIL is unique as it cushions the litigant at the commencement of the application. Unlike in Canada where such an order is made at the end of the proceedings.⁸⁹ UK also considers the role of pro bono as key factor.

In Kenya, the award of costs remains in the discretion of the Court . Section 27 of the Kenyan Civil Procedure Act and Section 26 of the *Mutunga rules* both stipulate that award of costs is

⁸⁴ 2004 ABCA 253

⁸⁵ *Ibid* para 8.

⁸⁶ Public Interest Law Clearing House, *Protective Costs Orders in Public Interest Litigation: Jurisprudence Review 2011* (PILCH 2011).

⁸⁷ Tom Mullen, 'Protective Expenses Orders and Public Interest Litigation' (2015) 19, *Edinburg Law Review* 36.

⁸⁸ [2005] 1 WLR 2600, EWCA Civ 192, [2005] 4 All E.R. 1

⁸⁹ Mullen (n 139).

in the discretion of court. The *Mutunga Rules* grants the Court the power to take ‘appropriate measures that every person has access to court to determine their rights and freedoms’ in determining costs of PIL.⁹⁰ This leaves it upon the Court to determine whether costs of a PIL application shall be awarded or an exemption to the general rule.

A court or a judge can only depart from the general rule that costs follow event if it is shown that there are good reasons for such departure. What amounts to good reasons depend on the Courts’ interpretation on a case by case basis. In a number of PIL case law, it is evident that the Kenyan courts consider public interest cases a good reason sufficient for court’s departure from the general rule. In the case of *Jasbir Singh Rai and Three Others v. Estate of Tarlochan Singh Rai and Four Others*,⁹¹ the court held that:

It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.

Despite the constitutionalization of PIL, in most of the decisions by the Kenyan Court on issues of public interest, the Courts have ruled that each party bears its own costs.⁹² The court also views awarding costs in PIL would constitute deterrent to the enforcement of Bill of Rights and implementation of the Constitution that would defeat the whole purpose of Articles 22 and 258 of ensuring that all persons have unhindered access to justice and implementation of the Constitutional provisions.⁹³

⁹⁰ Section 26 (2), Mutunga Rules 2013.

⁹¹ Nairobi High Court Petition No. 4 of 2012

⁹² *Jasbir Singh Rai and Three Others v. Estate of Tarlochan Singh Rai and Four Others*, Petition No. 4 of 2012, para 27.

⁹³ *John Harun Mwau and Three Others v. Attorney-General and Two Others*, Petition No. 23 of 2011; [2012] eKLR, para 179-180.

3.5 Conclusion

PIL is firmly recognized under the CoK. It has liberalised the rule of standing in PIL cases. Any person can approach the Court for remedies in pursuit of the protection of public interest. The procedural technicalities have been lessened as the court embraces informal application of PIL petition through letters. The Court has also put a high threshold on withdrawing of PIL cases unless there are sufficient reasons that the public have been redressed. The Courts will allow each party to bear its own costs. PIL litigants must ensure they have funding when commencing PIL cases. There exists no legal aid funding for PIL cases in Kenya.

CHAPTER FOUR

4.0 JUDICIAL INTERPRETATION OF “PUBLIC INTEREST” IN PUBLIC INTEREST LITIGATION UNDER THE 2010 CONSTITUTION OF KENYA

4.1 Introduction

Liberalization of the *locus standi* under CoK has opened the gates of PIL and any person can institute public interest proceedings in Kenya. The Court has the discretion to determine whether a petition is in public interest and an obligation to ensure that it is used as a forum to litigate public interest petitions and not petitions with personal gains clothed as public interest. This chapter analyses judicial enforcement of PIL and judicial interpretation of public interest. The aim of this chapter is to determine how the court guards against frivolous applications in the disguise of PIL.

4.2 Defining public interest under the CoK

The CoK defines a new social, economic and political order in the Kenyan governance system.⁹⁴ It is not surprising that public interest forms part of the new constitutional dispensation as rules of standing have been liberalized and any person regardless of whether they have an interest or not can approach the Court for redress where a public interest issue on human rights and enforcement of the Constitution has been infringed or is under threat of infringement. All that a public interest litigant has to prove is that it is in the ‘public interest’ and larger community will suffer injury if the matter is not addressed.⁹⁵ As seen in chapter three, the courts have also lessened procedural technicalities and can entertain informal documentation. A public interest litigant can file a petition in the form of a letter. PIL has also been recognised as good reason sufficient for the court to divert from the rule that costs

⁹⁴ Willy Mutunga, ‘The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court’s Decisions’ (2015) 1, SPECJU 6.

⁹⁵ Yoseph Mulugeta Badwaza, *Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?* (Masters Degree in Law, University of Pretoria 2005).

follow event and in that regard Kenyan case law indicate that every party bears its own costs. However in adjudicating public interest matters the Court must take into account the realities of litigants using PIL as a means to pursue personal interests or motives in the disguise of PIL.⁹⁶ Courts as temples of justice are called upon to safeguard the CoK and public interest.⁹⁷ Public interest issues must be taken into consideration by the courts when adjudicating on any matter. The question that follows is that, what really is public interest? In addition to Article 22 and 258 of the CoK, the term ‘public interest’ is referred to in various articles of the CoK. This connotes the importance the people of Kenya who possess sovereign power have put on public interest as a tool to liberate them and ensure access to justice.⁹⁸ The judiciary is vested with judicial authority and is mandated by the CoK to ensure that every Kenyan irrespective of status can access the Courts and justice shall be administered without undue regard to procedural technicalities.⁹⁹ Before delving into the court’s interpretation of what constitutes public interest, it is key to look at the constitutional provisions that refer to public interest.

Limitation of human rights in some cases will take into consideration public interest and the rights of individuals.¹⁰⁰ Article 24 of the CoK provides for the limitation of fundamental human rights and freedoms. The CoK grants the courts the power to limit certain rights where there is ‘need to ensure that the enjoyment of the rights and individuals does not prejudice the rights and fundamental freedoms of others’.¹⁰¹ This connotes that the individual human rights

⁹⁶ Ivneet Kaur Walia, ‘Public Interest Litigation: An Expression of Voice for the Suffers in Silence’ <https://poseidon01.ssrn.com/delivery.php?ID=667085003073003066126114090022116107001083027043001020067122123118107119027074091105058102060121102009115064109088102072091098060005035015015069097030111127096070124007001053116014100117124094007077005030023069082089116097113019118067089008098093088100&EXT=pdf> accessed 7 July 2017.

⁹⁷ *Republic vs. Judicial Commission of Inquiry Into The Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another Ex Parte Honourable Professor Saitoti* [2007] 2 EA 392; [2006] 2 KLR 400.

⁹⁸ Patrick Brian Odhiambo, *The Limitation of Rights under the Kenyan Constitution* (Masters Thesis, University of Pretoria 2015).

⁹⁹ Willy Mutunga, ‘Elements of Progressive Jurisprudence in Kenya: A Reflection’ (The Judiciary of Kenya 2012).

¹⁰⁰ Eugene Gressman, ‘Bicentennializing Freedom of Expression’ (1990) 20, Seton Hall Review 378.

¹⁰¹ Article 24, CoK 2010.

and freedoms may be limited where the public interest is present.¹⁰² Public interest will in some cases supersede individual rights.

The CoK has also established new public entities mandated to discharge their functions and enhance public interest.¹⁰³ Article 156 (6) requires the Attorney-General to promote, protect, uphold the rule of law and defend the public interest. The ODPP is required in exercising its powers under the CoK, to have regard to the ‘public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal processes.’¹⁰⁴ In the case of the *Republic v Director of Public Prosecutions & Another Ex-Parte Communications of Kenya*, the applicant argued that the decision by the DPP not to prosecute Royal Media Services for airing illegal frequencies was *ultra vires* and against public interest and policy.¹⁰⁵ The DPP had failed to protect public interest and policy by not allowing Royal media services to face the full force of law. The DPP in response provided that its decision was ‘purely based on law, the evidence available and was made with regard to public interest considerations and the need to prevent the abuse of legal processes.’¹⁰⁶ The Court held that it would not interfere with the prosecutorial powers of the ODPP because it had made an independent decision based on the evidential test that the case would not lead to a conviction. However, it emphasized that the ODPP in exercising its prosecutorial powers must satisfy itself of the evidential test and public interest test.¹⁰⁷

Public entities have a constitutional obligation to ensure that public interest is safeguarded and if not the Court may be called upon to compel them. Since the promulgation of the CoK,

¹⁰² Aileen Mcharg, ‘Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62, *The Modern Law Review* 671.

¹⁰³ MigaiAkech, ‘Institutional Reform in the New Constitution of Kenya’ (International Centre for Transitional Justice 2010).

¹⁰⁴ Article 157 (11), CoK 2010.

¹⁰⁵ Judicial Review Case No. 221 of 2013, High Court of Kenya Judicial Review Division.

¹⁰⁶ *Ibid.*

¹⁰⁷ Government of Kenya, *Kenya National Prosecution Policy* (Government Printer 2007).

a number of public spirited individuals and organizations have approached the Court to enforce the Constitution on the ground that public entities omissions or actions threatened the interests of the public.¹⁰⁸ The Court has been categorical that a public entity cannot contravene the CoK or any other law on ground of public interest. This was held in the case of *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 others*,¹⁰⁹ where the respondents argued that it would be against public interest for the court to grant the prayers of the petitioners and the proceedings were likely to occasion delay in procuring the necessary materials. The Court of Appeal in dismissing the appeal held that, the contravention of the CoK and statutes cannot be pleaded on public interest.¹¹⁰

Public officers serve the public and ensure that the public can access services provided by the public and access to justice.¹¹¹ They make cross-cutting decisions on every aspect of the wellbeing of the public and in that regard must consider public interest in their decision making. If they fail to do so, it opens an avenue for the people of Kenya to approach the Court and seek redress.¹¹² According to Aketch, public interest litigation opens doors to realize the values and principles of the CoK.¹¹³

The term ‘public interest’ also appears in various legislations that requires public officers and administrative institutions to consider in making key decisions. The object of the Company’s Act No.17 of 2015 as provided under section 3 is to ‘facilitate commerce... and to provide for the regulation of those entities in the **public interest**, and in particular in the interest of their members and creditors’. The Income Tax Cap 470 of the Laws of Kenya under Section 11,

¹⁰⁸*Centre for Rights Education and Awareness and Another vs John Harun Mwau & 6 others*, Civil Appeal No.74 of 82 of 2012

¹⁰⁹Civil Appeal No. 63 of 2017 [2017] eKLR.

¹¹⁰ Ibid para 99.

¹¹¹Jackton B Ojwang, *Constitutional Development in Kenya* (Nairobi: ACTS Press, 1990), 91.

¹¹² Odhiambo-Mbai, “Civil Service Accountability and Governance in Kenya Since Independence,” *African Journal of*

Political Science 8 (2003): 113.

¹¹³Aketch p 35.

allows an exemption of tax if it is in the public interest.¹¹⁴ The Land Act¹¹⁵ grants the National Land Commission the power to revoke a management order if it considers it is in the public interest¹¹⁶ and possess land through compulsory acquisition without following the procedures if the delay may be contrary to public interest.¹¹⁷ Other laws that have provisions on public interest include the Competition Act,¹¹⁸ Public Finance Management Act (PFMA),¹¹⁹ and Evidence Act amongst others.

Despite the fact that the term ‘public interest’ is well affirmed in the new Kenyan constitutional order and recognized in a number of legislations, none defines what public interest entails. The CoK does not define the term ‘public’ or ‘interest’. The CoK does not define who a public litigant is, however it allows any person to institute court proceedings in the interest of the public. It can be inferred that any person who approaches the court to enforce public interest is a public litigant. In the case of *Halloran Vs State*,¹²⁰ the Court set out the conditions of which a litigant should possess in order to be identified as a public interest litigant.¹²¹ A public interest litigant must pursue public policies that are not linked to personal interest and the public would benefit from the litigation. Then will such a litigant be referred to as public interest litigant.

What should the court consider when interpreting what constitutes ‘public interest?’. Public interest as a term has no definite meaning. Public interest is derived from two words: public and interest. Public in this context refers to the people of Kenya as a whole. The larger community. Interest on the other hand has different definition depending on the context. In this context interest refers to ‘something that provides help or benefit a person or a group’. In

¹¹⁴ Government of Kenya, *Income Tax Cap 470* (Government Printers

¹¹⁵ Government of Kenya, *Land Act No.6 of 2012* (Government Printers, 2012).

¹¹⁶ Section 18, Land Act 2012

¹¹⁷ Section 120, Land Act 2012

¹¹⁸ Section 37(b), 50(4), 74, Competition Act 2010.

¹¹⁹ Section 21(2), 56(2), 58(3,a), 112(a), PFMA 2012.

¹²⁰ Division of Elections 115P 2005

¹²¹ *Ibid* para 42.

defining public interest one must take into consideration that there is a conduct or act that will benefit the public. The interest has to affect the larger community and the public interest litigant must not have other ulterior motives other than the interest of the public.¹²² These ulterior motives may include politics, grievances meant to punish the other person or just a busy body who wants to waste the courts time and resources.¹²³

Black's law dictionary envisages that the interest of the public whether pecuniary or which their legal rights have been affected. It is not just mere curiosity or interests of a particular group. The interest should affect the larger community. The drafters of the CoK might have foreseen a scenario where litigants would institute proceedings for a group or class of people through public interest litigation. In order to differentiate PIL from class or group litigation, the CoK provides for the same under Article 22 (2) (b).

The innovation of public interest tool is to remedy the past ills and does not focus on individual. The court becomes more assertive in PIL than in individual cases as it is called not only to enforce the Constitution but to preserve the dignity of communities and promote social justice.¹²⁴ According to Mishra,¹²⁵ a PIL will be entertained by Courts if the litigant can show that there is a public injury occasioned by public wrong caused by a wrongful or ultra vires acts or omissions of the state or public authority. In a nutshell, what constitutes public interest will be determined on a case by case basis, and it is solely a court's discretion.

4.3 Public or private interest?:Judicial interpretation of 'public interest' under the CoK

While it has been recognized the liberalization of rule of standing in PIL cases is a noble cause that will enhance access to justice and constitutional implementation, Courts and scholars of PIL have presented fears that it will open doors for people clothed in PIL to

¹²² Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' [2011] Law Quarterly Review 1.

¹²³ Aman Hingoran, 'Public Interest Litigation' (2013) 59, Annual Survey of Indian Law 969.

¹²⁴ Kirby (n 182).

¹²⁵ OP Mishra, *Public Interest Litigation and Our Rights*, (1st edn, Diwedi Law Agency 2003) 10.

approach the court for personal gains.¹²⁶ There are two tests that the Courts can consider whether a petition is in the public interest or not. First is to determine whether the matter is in the interest of the public and second whether the petitioner is using PIL to pursue personal interests vindicated by ulterior motives.¹²⁷ Whereas PIL has been attributed as a tool that has granted voice to the voiceless and the poor to access justice, there is fear that the same can be used by persons for ulterior motives in the disguise of public interest.¹²⁸ Judge Lenaola expressed his fears in the way the right to institute public interest litigation (PIL) is being handled under the CoK in the case of *Okiya Omtatah Okoiti & 2 Others vs Attorney General and 3 Others* and stated that:¹²⁹

*...I must express my concern about the way the right of every person to institute a claim for the violation of the Constitution in the name of **public interest litigation** is being handled in Kenya. It is time that **this Court** stated that any person who seeks to institute a claim for the violation of the Constitution must do so based on a **legitimate, bona fide and genuine claim**. It has over the years become increasingly popular **for persons to institute a constitutional case claiming to be acting in the public interest but in fact self-serving and financial interests drive such claims**(emphasis added).*

The Court has an obligation to ensure that it entertains only legitimate public interest cases. There must be real and genuine. This can be difficult to unmask. As discussed in chapter three, the CoK has liberalized the rule of standing and any person can approach the court for enforcement of the rights of public and the Constitution. Whether a body is incorporated or not, it will not matter as long as it can show that the public interest is at stake and will suffer harm or injury.¹³⁰

¹²⁷ Stephen Ellmann, 'The Struggle and the Rule of Law in South Africa' (2015) 60, NYL School Law Review 57.

¹²⁸ Ibid.

¹²⁹ Petition No. 58 of 2014, Consolidated with Petition No. 209 Of 2014

¹³⁰ 1981) 149 CLR 27 para 35

Balancing public interests against private interests can be difficult. However, the courts must endeavour to ensure that only public interest is entertained under PIL. Any person can institute court proceedings in the Court on public interest as long as they are not ‘mere busybodies’.¹³¹ The application of busy bodies should be rejected

Critics of PIL have raised fear that busy bodies may use this avenue to pursue their own personal interests at the expense of noble public interest cases wasting Court times and judicial resources.¹³² It is now an accepted norm that Courts must ensure that they guard against misuse of PIL for ulterior motives.¹³³ Parties which approach the court in the name of public interest litigation must demonstrate that they are acting bona fide and not for personal gain or private motivation or other oblique considerations’¹³⁴

If a public interest litigant cannot show that the only sufficient interest he has in the matter is that of public as a whole, the Court’s should therefore close the doors for such busy-bodies.¹³⁵ Courts should reject any vexatious application in the colour of PIL that do not intend to protect the poor and the needy from the violation of their human rights but are meant to pursue personal gain or economic interests or political interests or any oblique consideration.¹³⁶

The determination of what amounts to public interest maybe difficult. The test of identifying a PIL was laid down in the case of *KV Amarnath v State of Karnataka*,¹³⁷ where the applicant approached the Court and prayed for issuance of appropriate writ or direction striking down the Karnataka Excise (Sale of Indian and Foreign Liquor) Amendment rules 1997, on the

¹³¹ *R v Greater London Council; Ex parte Blackburn* [1976] 3 All ER 184.

¹³² Dana Philip , ‘Public Interest Standing, Access to Justice, and Democracy under the Charter: Canada (AG) v Downtown Eastside Sex Workers United Against Violence’ (2013) 22, *Journal of Constitutional Forum* 20.

¹³³ Surya Deva, ‘Public Interest Litigation in India: A Critical Overview’ (2009) 1, *Civil Justice Quarterly Review* 19.

¹³⁴ Para 201.

¹³⁵ *Fertilizer Corporation Kamgar Union, Sindri and Ors. V. Union of India and Ors*

¹³⁶ Fariq Hussein, ‘Public Interest Litigation’ (Working Paper Series No.5 1993).

¹³⁷ ILR (1998) Kar 730.

ground that it was illegal, unconstitutional and against public interest. The applicant was a former foreign minister of Karnataka state. The respondent while refuting the allegations told the Court that he and the applicant were involved in political rivalry. In that regard the petitioner's case was not filed in public interest, 'was politically motivated and for cheap popularity...totally false and baseless allegations...out of jealousy and on account of political rivalry'.¹³⁸¹³⁹

The test advanced in the ruling above is indicative of the obligation placed upon the Courts in advancing public interest. This can inform the Kenyan courts in determining public interest matters. In the Kenyan scenario, the test was set out in the case of *John Wekesa Case*¹⁴⁰, where the court went ahead to set out the constitutional bounds upon which a PIL must be constrained. It held that:

...acceptable constitutional bounds which will be used in determining this application should be that the litigation must:-

- a) Be public interest litigation,*
- b) Be brought to advance a legitimate public interest,*
- c) Be one that will contribute to a proper understanding of the law; and*
- d) Not be aimed at giving the applicant a personal gain*

Where the Court establishes that an application was disguised as public interest such a case should be thrown out at the first instance.¹⁴¹ The Courts have to ensure that they are used as an avenue to pursue public interest matters alone.¹⁴² The Courts have insisted that the public interest litigant satisfy the threshold test that they are acting bonafide with no ulterior

¹³⁸ Ibid para 7.

¹³⁹ Ibid para 18.

¹⁴⁰ Petition No. 60 of 2012; [2013] eKLR.

¹⁴¹ AIR 2001 Del 68 (71).

¹⁴² Stanley A De Smith and JM Evans, *De Smiths' Judicial Review of Administrative Action* (4th edn, Stevens & Sons 1980).

motives.¹⁴³ However, the onus of demonstrating that the litigant is acting bonafide rests upon the litigant.¹⁴⁴ The litigants should also impose personal restraint by bringing only genuine cases spirited on public well-being and protection.¹⁴⁵ The Court only assesses the same.

In the case of *Okiya Omtatah Okoiti & 2 others v Attorney General & 3 others*¹⁴⁶ the petitioners referring to themselves as public spirited citizens and protectors of human rights, challenged the legality and construction of the Standard Gauge Railway (SGR) by the Kenyan government. Challenging the petition, the respondents argued that the petitioner's had rushed to court in disguise of public interest and had failed to exhaust the available avenues.¹⁴⁷ According to Article 79 of the CoK the petitioner ought to have raised its complaints with the EACC. Whilst public interest provides an avenue for litigants to question the actions of public entities it is a weapon that must be used with greater care.¹⁴⁸ The respondents sought an order that the Court makes a declaration the petition was 'filed in bad faith and motivated by ulterior motives, devoid of the alleged public interest and/or protection of the constitutional rights and freedoms'.¹⁴⁹ The Court indicated its fears on how the PIL can be used to enhance individual interests and held that:

It is time that this Court stated that any person who seeks to institute a claim for the violation of the Constitution must do so based on a legitimate, bona fide and genuine claim. It has over the years become increasingly popular for persons to institute a constitutional case claiming to be acting in the public interest but in fact self-serving and financial interests drive such claims (Emphasis added).¹⁵⁰

Another key issue that has arisen in PIL is whether a Court can look into public interest issue in a private interest. It has been established in Indian case law that the Court is not debarred

¹⁴³ Ibid.

¹⁴⁴ Sachidanand Pandey v State of WB, AIR 1987 SC 1109

¹⁴⁵ PP Craig, *Administrative Law* (Sweet and Maxwell Publishers 2007) 729.

¹⁴⁶ Petition No. 58 of 2014 Consolidated with Petition No. 209 of 2014 High Court of Kenya at Nairobi [2014] eKLR.

¹⁴⁷ Ibid para 21.

¹⁴⁸ Basant Lal Wadehra, *Public Interest Litigation: A Handbook with Model PIL Formats* (2nd edn, Universal Law Publishing Company 2009).

¹⁴⁹ SGR case para 49.

¹⁵⁰ SGR Case para 120.

into looking into public interest in a private interest, however this does not change the nature of the case.¹⁵¹ In India if a court identifies a PIL in a private matter it directs the bench to convert the petition into a PIL and direct the registry to place it before the Bench dealing with PIL matters¹⁵².¹⁵³ In the a private interest case of *Dr. Devendra Pratap Singh and Others vs Union of India Through Secy Heath and Family Welfare*,¹⁵⁴ the government of India had not provided for the appointment of male Ayush doctors and pharmacist in a program run by the government of the ground that they were not allowed to practice modern system of medicine. The court was called to look into whether in a private litigation, public interest could be looked into. In this case the private interest had dominated the public interest.

Whereas the Court has to ensure that only bonafide cases are brought before it there are no rules that specifically guide the Kenyan Courts. It is recognized that unmasking ulterior motives in PIL is not easy.¹⁵⁵ Lack of rules on PIL in Kenya grants every judge the discretion to device their own procedures in dealing with PIL. In India, each court is required to devise Rules that will guide it in PIL.

Following the Supreme Court direction and the powers conferred upon the Chief Justice and the Judges of the High Court under Article 226 of the Constitution of India, the Bombay High Court has enacted the '*Bombay High Court Public Interest Litigation Rules 2010*'.

If the petitioner contravenes these rules and the Court finds that the petition was frivolous or with oblique or mala fide and lacks bona fides, it will order the petitioner to 'pay exemplary costs as imposed by the Court so as to compensate the injury suffered by the private

¹⁵¹GuruvayoorDevaswom Managing Committee and another Vs. C.K. Rajan and others reported in (2003) 7 SCC 546,

¹⁵² Ibid.

¹⁵³(2005) 5 SCC 298,

¹⁵⁴Service Bench No. - 769 of 2011

¹⁵⁵ Aparna Polavarapu, 'Expanding Standing to Develop Democracy: Third Party Public Interest Standing as a Tool for Emerging Democracies' (2016) 41, Yale Journal of International Law 105.

respondents or by way of wastes costs'.¹⁵⁶ These costs are recoverable as arrears of land revenues if not paid within specified time. A litigant must be very cautious that the petition focuses on PIL so that they don't bear the costs or compensate the private respondents.

The approach by the Indian High Courts to formulate rules on PIL to guide judges is a move towards creating certainty and what is expected among litigants.¹⁵⁷ Any litigant before instituting any proceedings understands what is required, how to file and the risks associated with filing frivolous cases. If the Court determines that indeed the cause was to pursue personal gains not for the benefit of the public, such a litigant shall be ordered to pay exemplary costs to compensate the private respondents and waste of courts time and resources. The rationale is to deter frivolous actions and to ensure that only genuine PIL cases come before the Court.

The Kenyan *Mutunga Rules* do not provide in explicit the requirements of PIL petition and what the Courts expect from the litigants. It high time the Kenyan Courts, enact procedural rules that will guide PIL litigants and how the factors that the court will look into in determining public interest cases. So far each judge develops their own interpretation as long as it advances the spirit of the Constitution. As the court continues to develop PIL jurisprudence, such rules will be critical.

4.4 Conclusion

PIL is now constitutionalized under the CoK and affirmed under case law. It has liberalized the rule of standing and any person can approach the Court and seek remedies. This right to institute court proceedings that human rights and the CoK is infringed should not in any way be premised on ulterior motives. The Court as the custodian of the CoK and in exercise of judicial authority have upon themselves the obligation to ensure that only genuine public

¹⁵⁶ Ibid section 10.

¹⁵⁷ High Court of Himachel Pradesh, *The Himachel Pradesh High Court Rules on Public Interest Litigation* (2010).

interest petitions are adjudicated upon. Despite the fact that public interest is referred to in the CoK and statute, none of them defines public interest. The Courts have a wide discretion to determine what constitutes public interest. Case law indicate that the litigant must show that the petition is in public interest, it redresses public harm or injury and there is no personal gain, profit or other oblique considerations. While the Indian High Courts have established rule on public interest litigations, the Kenyan High Courts have not done so. This leaves each judge to devise its own interpretation of PIL.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter provides conclusions of this study based on research hypothesis, objectives, questions and problem statement. It analyses the information discussed under study and provides the findings. The recommendations provided in this chapter only focus on the scope of study.

5.2 Conclusion

PIL is well entrenched and affirmed under the CoK. In addition to Article 22 and 258 of the CoK, public interest is also recognised under several provisions of the CoK. Individual human rights can be limited where its enjoyment will prejudice the enjoyments of the rights of others. Human rights such as the right to property can be deprived when it is the public interest to do so. Government institutions are required to take into consideration public interest in making decisions. In a nutshell the concept of PIL is now part of the governance in Kenya that requires both public and private entities to integrate in its laws.

The rationale of PIL in Kenya is to ensure implementation of the CoK and the fundamental rights and freedoms. It was developed to ensure that the poor access courts and benefit from the court process. The end rationale of PIL is to ensure that every person can access justice, ensures accountability in government and development of law. It is therefore a fundamental aspect of the Kenyan governance and constitutional dispensations.

PIL under the CoK is not novel. Its historical development can be traced under the independent Constitution. However, under the independent Constitution, public interest was interpreted in a restrictive approach. The Court recognised that only PIL cases could be initiated by the AG. In this regard no person could initiate PIL because they lacked standing.

As the quest for new constitution increased, the Courts allowed litigants to show a minimal interest. The rigid rule on standing was lessened.

In regard to award of cost, case law indicates in PIL, each party will bear its costs. While the CoK requires the Chief Justice to formulate rules that will ensure that no fees are required in instituting human rights proceedings, so far the *Mutunga Rules* do not provide for the same. Litigation in Kenya is very expensive. Award of costs in litigation is discretionary. There is no government legal aid that funds PIL cases leaving it upon the parties to fund. In this regard the Court has in many cases diverted the rule that costs in litigation follow the event. The Courts have recognised that PIL provide sufficient reasons to divert from the general rule. Parties participating on PIL will bear their own costs. In other jurisdictions, Canada and Australia have adopted the no-costs approach in exceptional circumstances. In UK public interest litigant can apply to court for a protection costs order before commencement or during the proceedings to insulate itself against costs. Recognising PIL as an exception to the general rule on costs provides litigants with an incentive to file PIL cases and enhance social justice.

It is no doubt that PIL is referenced in the CoK and other legislation in Kenya. It is a core value that the government and even the private sector must embed in their decision making. However, neither the CoK nor the legislations defines public interest. Literature indicates that defining public interest is close to impossibility as it is a subjective concept. The judiciary as the final arbiter and interpreter of the laws has the obligation to judicially interpret and guard the CoK.

The Courts have been assertive that where it is clear that an application is made in the disguise of public interest yet it pursues personal interest, such a case will not be entertained. A litigant must ensure that they are within the constitutional bounds of PIL. In this case, the

matter must be a public interest litigation, advance a legitimate public interest, contribute to the understanding of the law and should not give the applicant a personal gain. However, due to the lack of rules on PIL, this may be difficult for the Kenyan courts to determine at the onset before the hearing of a matter. In the end, this would only result, in wastage of court time. The manner in which the court will balance public interests against private interest, and how it will handle busybodies, will determine the public confidence in PIL. Kenyan confidence in the judiciary has also increased as the judiciary continues to be assertive as a guardian of the CoK. However the judiciary can be used as a forum where busy-bodies spearhead their own personal interests in the disguise of public interest.

It is indeed clear that Kenyans have since the promulgation of the CoK approached the Court on a number of governance issues such as human rights violations, corruption, elections, and integrity of leaders, government appointments, and environmental protection amongst others. This is a clear indication that Kenyans embrace the role of PIL in the new constitutional dispensation and are using it to remedy past government wrongs, promote human rights and enforcement of the CoK. As Kenyans continue to be aware of their rights and constitutional privileges, we are going to experience more litigation arising on public interest.

5.3 Recommendations

Based on the following conclusions this study recommends the following:

Immediate

- a) The judiciary as the body that exercises judicial authority must continue to be assertive in its judicial interpretation of public interest. Judiciary is the guardian of the CoK. The liberalization of *locus standi* in PIL cases is a clear indication that the people of Kenya envisaged the opening up of the gates of judiciary to enforce the

constitution and remedy past injustice. The judiciary must ensure when faced with the adjudication of public interest they interpret in the same in a way that enhances the spirit of public interest as envisaged in the CoK.

- b) While the CoK does not define what constitutes public interest, the courts must endeavour to accommodate only those cases which advance legitimate public interest. The judiciary in interpreting public interest should ensure that the only public interest petitions that are legitimate and genuine issues are granted forum. The Court should not allow itself to be used as a means to enhance personal interests such vengeance, political rivalry, economic interests or any other oblique considerations. Busy bodies who have no public interests in mind should be barred at the instance.
- c) The Judiciary in order to ensure that it does not waste courts time and resources, should scrutinise public interest petitions before entertaining them to determine whether they meet the threshold of public interest.
- d) In balancing between private and public interests, the court should adopt a proportional approach. Public interest should override personal interest.

Medium Term

- a) There is need for all stakeholders involved in justice to create awareness on public interest and the opportunities it offers. These stakeholders include the Judiciary, public entities, devolved government, schools, academia, researchers and civil society on the role of public interest. The awareness can focus on how PIL can be commenced and the requirements for PIL.
- b) The public should take an initiative and spearhead public interest within their knowledge. The liberalization of rule of standing in PIL encompasses that it is time

Kenyans took this opportunity to safeguard and protect the constitution which they have pride in.

Long Term

- a) In order to deter frivolous petitions in the disguise of PIL, the Kenyan courts should adopt PIL guidelines. This has been practiced in India where courts are required to adopt PIL guidelines. These guidelines provide and determine what the court considers to be public interest. This enables the litigants to be certain of the matters they can apply as PIL. These guidelines should be disseminated to the public. These rules and guidelines should define what public interest in the confines of Kenyan jurisdiction is and what factors the court will consider in determining public interest. The rules should also stipulate what action or conduct can amount to public interest. These rules should require public interest litigants to state that they have no personal interest. In order to deter applications with ulterior motives other than public interest, the Court should award the litigants exemplary costs as it is the case in India.

- b) Litigation in Kenya is very expensive. PIL is also complicated by the fact that very few individuals will pursue PIL cases because they have no personal benefit. In this case the government should put in place a legal aid fund to fund PIL cases. This will not only enhance PIL but offers an opportunity for the poor to litigate on issues that affect them. Whereas the Courts have adopted an approach that each party bears its own costs as an exception to the rule that costs follow the event this is not sufficient enough.

- c) The civil society should take the forefront in articulating public interest as they are versed with the constitution and human rights.

BIBLIOGRAPHY

Books

Baxi U, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' in Neelan Tiruchelvam and Radhika Coomaraswamy (eds), *The Role of the Judiciary in Plural Societies* (Frances Pinter Publishers 1987).

Cane P, 'Standing up for the Public' in Peter Cane (ed) *Public Law* (ANU 1995) 276.

Craig PP, *Administrative Law* (Sweet and Maxwell Publishers 2007) 729

De Smith SA and Evans JM, *De Smiths' Judicial Review of Administrative Action* (4th edn, Stevens & Sons 1980).

Desai AH and MuralidharS, 'Public Interest Litigation: Potential and Problems' in BN Kirpal and Others (eds), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press 2000).

Deva S, 'Constitutional Courts as Positive Legislators: The Indian Experience' in Allan R Brewer-Carias, *Constitutional Courts as Positive Legislators* (Cambridge University Press 2011) 587-601.

Ely J, *Democracy and Distrust* (Harvard University Press 1980).

Freeman MDA, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2008).

Harlow C and Rawlings R, *Pressure Through Law*, (Routledge 1992).

Mishra OP, *Public Interest Litigation and Our Rights*, (1st edn, Diwedi Law Agency 2003) 10.

Morrison W, *Jurisprudence: from the Greeks to Post-Modernism* (Cavendish Publishing Limited 1997).

Mullen T, "Standing to Seek judicial Review" in A McHarg & T Mullen (eds), *Public Law in Scotland* (2006).

Ojwang JB, *Constitutional Development in Kenya* (Nairobi: ACTS Press, 1990), 91.

Orkin M, *The Law of Costs* (2nd edn, Aurora 1987).

Rozzaque J, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer Publishers 2001)

Stein LA, *Locus Standi* (Sydney University Press 1979).

Upathyay V, *Public Interest Litigation in India: Concepts, Cases and Concerns* (Lexis Nexis 2007).

Wacks R, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012).

Wadehra BL, *Public Interest Litigation: A Handbook with Modern PIL Format* (Universal Law Publishing 2009) 58.

Journal Articles

Akech M, 'Institutional Reform in the New Constitution of Kenya' (International Centre for Transitional Justice 2010).

Brandeis LD, 'The Opportunity in the Law' Address Before the Harvard Ethical Society May 4, 1905 In *Business: A Profession* 313, 321 1941.

Cassels J, 'Judicial Activism and Public Interest Litigation: Attempting the Impossible?' (1989) 37, *American Journal of Comparative Law* 493.

Chaturvedi MN, 'Liberalizing the Requirement of Standing in Public Interest Litigation' (1984) 26, *Journal of the Indian Law Institute* 42.

Chayes A, 'The Role of the Judge in Public Law Litigation' (1976) 89, Harvard Law Review 1281.

Cochran RF, 'Louis Brandeis and the Lawyer Advocacy System' (2013) 40 (3), Pepperdine Law 22.

Deva S, 'Public Interest Litigation in India: A Critical Overview' (2009) 1, Civil Justice Quarterly Review 19.

Deva S, 'Public Interest Litigation in India: A Critical Overview' (2009) 1, Civil Justice Quarterly 19.

Durbach A, McNamara L, Rice S and Rix M 'Public Interest Litigation: Making the Case in Australia' (Sydney Business School Papers 2013)

Ellmann S, 'The Struggle and the Rule of Law in South Africa' (2015) 60, NYL School Law Review 57.

Fertilizer Corporation Kamgar Union, Sindri and Ors. V. Union of India and Ors

Ghosh PK, 'Judicial Activism and Public Interest Litigation in India' (2013) 1 (1), Galgotias Journal of Legal Studies 77

Gressman E, 'Bicentennializing Freedom of Expression' (1990) 20, Seton Hall Review 378.

Hershkoff H, 'Public Interest Litigation: Selected Issues and Examples' (World Bank 2004).

Hingoran A, 'Public Interest Litigation' (2013) 59, Annual Survey of Indian Law 969.

Holladay Z, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) 19, Indiana Journal of Global Legal Studies 555.

HolladayZ, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) 19(2), Indiana Journal of Global Studies 555.

HolladayZ, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012) 19(2), *Indiana Journal of Global Studies* 555.

Hussein F, 'Public Interest Litigation' (Working Paper Series No.5 1993).

Kirby, M 'Deconstructing the Law's Hostility to Public Interest Litigation' [2011] *Law Quarterly*

Krishan JK, 'Public Interest Litigation in Comparative Context' (2001) 20, *Buffalo Public Interest Law Journal* 19.

Krishan JK, 'Public Interest Litigation in Comparative Context' (2001) 20, *Buffalo Public Interest Law Journal* 19.

Maleche A, 'Public Interest Litigation in Kenya: The New Constitution Context' (Kelin 2014).

Mbai O, 'Civil Service Accountability and Governance in Kenya Since Independence' (2003) 8, *African Journal of Political Science* 113.

Mbazira C, 'Public Interest Litigation and Judicial Activism in Uganda: Improving the Enforcement of Economic, Social and Cultural Rights' (HURIPPEC Working Paper No. 24 of 2009) 14-27.

Mbote P and Aketch M, 'Kenya: Justice Sector and the Rule of Law' (Open Society Foundation 2011).

Mcharg A, 'Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62, *The Modern Law Review* 671.

Mullen T, 'Protective Expenses Orders and Public Interest Litigation' (2015) 19, *The Edinburg Law Review* 36

Mutunga W, 'Elements of Progressive Jurisprudence in Kenya: A Reflection' (*The Judiciary of Kenya* 2012).

Mutunga W, 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' (2015) 1, *SPECJU* 6.

Onyango JO, 'Using Courts of Law to Tackle Poverty and Social Exclusion: The Case of Post-2010 Kenya' (2015) 19, *Journal of Law, Democracy and Development* 193.

Philip D , 'Public Interest Standing, Access to Justice, and Democracy under the Charter: Canada (AG) v Downtown Eastside Sex Workers United Against Violence' (2013) 22, *Journal of Constitutional Forum* 20.

Philips BA and Piazza AC, 'The Role of Mediation and in Public Interest Litigation' (1983) 34, *Hastings Law Journal* 1231.

Polavarapu A, 'Expanding Standing to Develop Democracy: Third Party Public Interest Standing as a Tool for Emerging Democracies' (2016) 41, *Yale Journal of International Law* 105..

Public Interest Law Clearing House, "Protective Costs Orders in Public Interest Litigation: Jurisprudence Review 2011" (PILCH: Melbourne, 2011).

Rekosh E, 'Who Defines the Public Interest? Public Interest Law Strategies in Central and Eastern Europe' (2005) 2, *SUR International Journal on Human Rights* 166.

Sathe SP, 'Judicial Activism: The Indian Experience' (2001)6 *WASH. U. J. L. & POL'Y* 29.

Scott KE, 'Standing in the Supreme Court: A Functional Analysis' (1973).

Sen S, 'Public Interest Litigation in India: Implications for Development' (Mahanirban Calcutta Research Group 2012).

Sen S, 'Public Interest Litigation in India: Implications for Law and Development' (Mahanirbhan Calcutta Research Groups, Policies and Practices No. 47 of 2012).

Susman SD, 'Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation' (1994) 13, *WIS International Law Journal* 57.

Sydney University Law School, 'Costs and Public Interest Litigation: After *Oshlack vs. Richmond River Council*' (1999) 21, *Sydney Law Review* 680.

Tollefson C, 'Costs in Public Interest Revisited' (2011) 39, *Advocate Quarterly Review* 179;

Wadehra BL, *Public Interest Litigation: A Handbook with Model PIL Formats* (2nd edn, Universal Law Publishing Company 2009).

Walaba AA, 'The Plight of the Aged and the Ageing Persons in Kenya: A Review of Existing Literature' (2014) 2(4), *International Journal of Advanced Research* 68

Government and Institutional publications

European Union, *Study in Children's Involvement in Judicial Proceedings: Contextual Overview for the Criminal Justice Phase-Poland* (Luxembourg Publications 2014).

Gauri V, 'Public Interest Litigation in India: Overreaching or Underachieving?' (World Bank, 2009).

Hussein F, 'Public Interest Litigation in Pakistan' (Sustainable Development Policy Institute, Working Paper Series No.5 of 1993).

Ontario Law Reform Commission, *Report on Class Actions* (Ministry of Attorney General, 1982)

Ontario Law Reform Commission, *Report on the Law of Standing* (Ministry of Attorney General, 1989).

Thesis

Badwaza Y, 'Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?' (Masters Degree in Law, University of Pretoria 2005).

Ekeke AC, *Access to Justice and Locus Standi before Nigerian Courts* (Master's Thesis, University of Pretoria 2014),

Luseka B, *Public Interest Litigation-Securing Protection of the Social and Economic Rights: Challenges, Opportunities and Lessons* (Masters of Law Degree, Central Europe University 2012).

Odhiambo PB, *The Limitation of Rights under the Kenyan Constitution* (Masters Thesis, University of Pretoria 2015).

Internet sources

'Public Interest Litigation' <https://newindialaw.blogspot.co.ke/2013/04/public-interest-litigation.html> accessed 10 April 2017.

Halde MR, 'Locus Standi has Widening the Scope of Public Interest Litigation' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934112 accessed 24 June 2017.

Leanza P & Pridal O, 'Justice and the Right to Fair Trial' <http://www.search.ask.com/web?q=Piero%20Leanza%20%26%20Ondrej%20Pridal%2C%20%2E2%80%98%20Justice%20and%20the%20Right%20to%20Fair%20Trial%2E2%80%99&o=15570&l=dis&qsrc=2871> accessed 21 October 2016.

Megret F, 'The Human Rights of the Elderly: An Emerging Challenge'
<http://www.cardi.ie/userfiles/Human%20Rights%20of%20the%20Elderly.pdf> accessed 24
June 2017.

Onyango JO, 'Human Rights and Public Interest Litigation in East Africa: A Bird's Eye
Review'
<https://poseidon01.ssrn.com/delivery.php?ID=586024090004104066089097023113117105036053067045062087091089089119013068085097094104033016012031048048013080082025099091116020009094094009064090091019113089115083127055062048110122125080101122071014092091026086092010069000031102087028016030111018100101&EXT=pdf>
accessed 23 November 2016.

Walia IK, 'Public Interest Litigation: An Expression of Voice for the Suffers in Silence'
<https://poseidon01.ssrn.com/delivery.php?ID=667085003073003066126114090022116107001083027043001020067122123118107119027074091105058102060121102009115064109088102072091098060005035015015069097030111127096070124007001053116014100117124094007077005030023069082089116097113019118067089008098093088100&EXT=pdf>
accessed 7 July 2017.