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MASTER OF LAWS

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**E-COURT PROCESS SERVICE: A CASE FOR THE REVIEW
OF THE LAW REGULATING COURT PROCESS SERVICE
IN KENYA**

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DECLARATION.

I, Jackson Muia Lord, do hereby certify that this Project is my original work and it has not been submitted for the award of a Degree or any other award in any other University.

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DEDICATION

I dedicate this Project to my family, the firm of Janet, Jackson & Susan LLP and the Kenyan Judiciary.

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Lastly to everyone who encouraged me and supported me directly or indirectly I wish to thank you and wish you well.

LIST OF CONVENTIONS, STATUTES AND OTHER LEGAL INSTRUMENTS

Civil Procedure Act and Civil Procedure Rules 2010

Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Hague Convention on Service Abroad of Judicial and Extrajudicial Documents

The Computer Misuse and Cybercrime Act No. 5 of 2018

The Constitution of Kenya, 2010

The Evidence Act Cap 80 Laws of Kenya

The Kenya Information and Communication Act (KICA), Cap 411 Laws of Kenya

The Kenya Information and Communication (Amendment) Act, 2009

TABLE OF CASES

Advtech Resourcing (Pty) Ltd v Kuhn 2007(4) ALL SA 1386, C

Central Electricity Regulatory Commission Vs National Hydroelectric Power Corpn. Ltd. & Ors, Civil Appeal No. 2010(D.21216/2010

CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens (KZD) (unreported case no 6846/2006, 3-8-2012)

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Ehrenfeld v. Salim A Bin Mahfouz, No. 04 Civ. 9641(RCC), 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005).

Federal Trade Commission v. PCCare247 Inc. et al No. 12-CIV-7189 (PAE) (S.D.N.Y. Mar. 7, 2013)

Grace Wairimu Mungai v Catherine Njambi Muya [2014] eKLR

KSL and Industries Ltd., (Formerly Known as Krishna Texport Industries Ltd.), vs Mannalal Khandelwal and the State of Maharashtra Through the Office of the Government Pleader (Criminal Writ Petition No. 1228 of 2004),

Koinange Investments & Development Ltd v Robert Nelson Ngethe [2014] eKL

Mpafe v. Mpafe, No. 27-FA-11 (4th Dist. Family Ct. of Minn. May 10, 2011).

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)

Mwai Kibaki Vs Daniel Toroitich Arap Moi[1999] eKLR,

National Bank of Kenya Vs Cyprian Nyakundi(2016)eKLR

New England Merchants National Bank v. Iran Power Generation and Transmission Co., 495 F. Supp. 73, 76 (S.D.N.Y. 1980).

Omar Shallo v Jubilee Party of Kenya & another [2017] eKLR

Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1017 (9th Cir. 2002).

Simon Gichangi Mugo v Pierre Asabi Misambi & 2 others [2013] eKLR

Whos Here, Inc. v. Orun, No. 1:13-cv-00526-AJT-TRJ, 2014 U.S. Dist. LEXIS 22084 (E.D. Vir. Feb. 20, 2014).

S v. Ndiki ([2007] 2 All SA 185 (Ck))

St. Francis Assisi v. Kuwait Finance House; Kuvaytturk Participation Bank Inc., Hajjaj Al Ajmi

The Kross Television India Pvt Ltd & Anr Vs. Vikhyat Chitra Production & Ors, Suit (L) No. 162 Of 2017

LIST OF ABBREVIATIONS

EAC	East Africa Community
KICA	Kenya Information and Communication Act
SA	South Africa
ICT	Information and Communication Technology
KLR	Kenya law Report
TAM	Technology Acceptance Model
UNICIC	U.N. Convention on the use of electronic communications in international contracts
UNCTAD	United Nations Conference on Trade and Development
UNCITRAL	The United Nations Commission on International Trade Law

ABSTRACT

The main objective of this study is to analyse the available electronic communication platforms which can be used for court process service. Improved Information and Communication Technology has brought about new modes of communication through social media platforms such as WhatsApp, Facebook, and Twitter among others which have revolutionised communication. These new modes of communication are poised for being cost effective, instantaneous, efficient and easy to use. It is because of these improved modes of communication which are mostly internet based that the world is slowly becoming a global village.

Communication is pivotal in court proceedings. It is a requirement that upon filing a suit, the Plaintiff must give notice to the Defendant. Service of process allows the Defendant to take note of the suit. It also gives an opportunity to the Defendant to file responses. The way used to bring to the attention of the other party of a pending suit that is, service of summons is what is generally referred to as Court process service.

The Civil Procedure Rules 2010 is the main statutory framework on service of process. Order 5 of the Civil Procedure Rules provides for service through personal service, service through an authorised agent, service via affixing of copy of summons in an open space in court or the defendants place of residence, business or work, service via advertisement and service through registered post.

In Kenya, the law relating to service of process is yet to be amended to accommodate the new modes of communication which can be used effectively in process service. The Kenyan Courts though they have recognised technology as enabler of justice and have even embraced technology in areas such e-filing, e- payment, e-transcription of court proceedings, use of email in sending notices among others, the relevant laws on procedure are yet to amended to allow the use of other electronic means such as social media sites as a means of substituted service.

Countries such as the United States of America, India, and South Africa among others which have incorporated the use of electronic communication in service of process have realized tremendous benefits which have bolstered delivery of justice.

This study examines the place of electronic communication as an alternative mode of process in our rules of procedure with a view to making recommendations for review of the relevant rules to accommodate the use of these platforms.

CHAPTER ONE

E-COURT PROCESS SERVICE: CASE FOR REVIEW OF APPLICABLE LAW REGULATING COURT PROCESS SERVICE IN KENYA

1.1.1 BACKGROUND INFORMATION.

Recent technological improvements in the field of communication have heralded a new dawn in the communications, governance and business world. Electronic communication platforms such as text messages, email, Facebook¹, Twitter², WhatsApp³ and Instagram⁴ though recently developed, have gained widespread acceptance and use globally. The hastened adaptation of these technological developments has been propelled by improved communication infrastructure, cost effectiveness, convenience of use, reliability as well as efficiency⁵. Though platforms such as WhatsApp, Facebook, twitter, email are mostly computer based, the advent of internet enabled mobile phones has enabled the use of these media by a majority of the adult population in the world.

In Kenya, as at September 2017, it was estimated that mobile phone subscriptions were 41 million up from 40.2 million as at July of the same year.⁶ Of the over 40 million mobile subscribers, over 30.189 Million mobile telephone subscribers (up from 29.6 million) have

¹ According to the Cambridge English Dictionary, Facebook is “the name of a website where you can show information about yourself, and communicate with groups of friends”. <
<https://dictionary.cambridge.org/dictionary/english/facebook>> -Accessed 03/01/2017

² On WhatIs.com <<http://whatis.techtarget.com/definition/Twitter>> Twitter has been defined as “a free social networking microblogging service that allows registered members to broadcast short posts called tweets”.- Accessed on 03/01/2017

³ WhatIs.com on <<http://whatis.techtarget.com/definition/WhatsApp>> defines WhatsApp Messenger as “a cross-platform instant messaging application that allows iPhone, BlackBerry, Android, Windows Phone and Nokia smartphone users to exchange text, image, video and audio messages for free”

⁴ According to the Cambridge English Dictionary, Instagram is “the name of a social networking service for taking, changing, and sharing photographs and videos”

⁵ A. Crandall et al, Mobile Phone Usage at the Kenyan Base of the Pyramid, November 2012, <https://blogs.worldbank.org/ic4d/files/ic4d/mobile_phone_usage_kenyan_base_pyramid.pdf> at 18,22,23 Accessed on 02/01/2018

⁶ Communication Authority of Kenya, First Quarter Sector Statistics Report For The Financial Year 2017/2018 (July-Sep 2017) at 2<<http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Q1%20%202017-18.pdf>, Accessed on 02/01/2017

their phones Internet enabled.⁷ The majority are also connected to email and social networking platforms such as WhatsApp, Facebook, Instagram and Twitter.⁸

Increased penetration of Information and Communication Technology (ICT) developments has led to improved communication.⁹ With improved reliable mobile telephone networks, it has been possible for an increased number of people to communicate at ease from any part of the world. This has resulted in increased trust on the use of the various communication platforms.

It is in no doubt that the various technological developments in the communication sector have revolutionised the way of doing business all over the world. Various sectors have gradually adopted the use of technology to bolster their operations¹⁰.

In the Kenyan judicial sector, technology has been adopted in various operations. Currently courts in Kenya are employing automated transcription system, e-receipting, e-filing of Court documents, e-case management, e-recording of proceedings as well as e-communication of correspondence amongst the judicial officers and court users.¹¹ The Judiciary is also in the process of setting up Virtual Courts with a pilot project having been set up between the Court of Appeals at Mombasa and Nairobi.¹²

⁷ Ibid at 2 and Communication Authority of Kenya, Fourth Quarter Sector Statistics Report For The Financial Year 2016/2017 (April-June 2017)

<<http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Report%20Q4%20%202016-17.pdf>, at 24 Accessed 02/01/2017

⁸State of the Internet in Kenya 2017 at 4 < <https://www.ifree.co.ke/wp-content/uploads/2018/02/State-of-the-Internet-in-Kenya-report-2017.pdf>>accessed on 08/10/2018

⁹ The Standard Digital, last amended on 18th March 2015,

<<https://www.standardmedia.co.ke/article/2000162611/how-ict-drives-kenya-s-economic-growth>> Accessed 03/01/2018

¹⁰ The Standard Digital, last amended on 18th March 2015,

<<https://www.standardmedia.co.ke/article/2000162611/how-ict-drives-kenya-s-economic-growth>> Accessed 03/01/2018

¹¹ Sustaining Judiciary Transformation(SJT); A service Delivery Agenda- 2017-2021, at 46 < http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf> Accessed 11/11/2017

¹² Ibid

Communication amongst parties during court proceedings is very important. It is a canon rule that a defendant to a suit must be informed once a suit is filed and be informed of subsequent activities affecting the matter. Giving notice of the pending suit to the Defendant gives the Defendant an opportunity to participate in the proceedings to defend the case. A party who files pleadings in court must serve Summons/Notice of the pleadings together with the pleadings to the Defendant. This is generally what is referred to as court process service.

Currently, a party to a suit can effect service of process through direct service commonly referred to as personal service or substituted service which may entail sending the Summons using the last known address, advertising in a newspaper with nationwide circulation or by affixing the summons at the Defendant's residence or place of business.¹³ It is a legal requirement that you can only use the legally recognised rules of service and no other.¹⁴ Any attempt to use any other method will only be termed illegal, a nullity and the Court will not recognise that there was proper service of process.¹⁵

The adoption of use of electronic means in the service of legal documents is yet to be legislated upon. E-process service can be referred to the use of electronic communication platforms to effect service of process. Though at one point the High Court Sitting in Nairobi in 2016 in the case of **National Bank of Kenya Vs Cyprian Nyakundi(2016)eKLR** allowed the use of WhatsApp to effect process service on the Defendant, the Court in a more recent case of **Omar Shallo v Jubilee Party of Kenya & another [2017] eKLR**, observed that:

Considering the above Rules which are applicable to the petitions herein, service by means of WhatsApp was outside the means recognised by the law, and would therefore, be bad service.

.... In the instant case, the Respondent did not effect personal service. He sought no leave to use alternative mode of service but elected privately to use a mode never heard of in law.¹⁶

The foregoing discourse clearly shows that though some Courts are willing to flex the rules in exercise of their unfettered discretion to adopt technology in process service, other Courts feel that the law must be applied as is. According to them as in the case of Omar Shallo, as long as the law has not been amended to allow use of the electronic communication platforms

¹³ See generally Order 5 Civil Procedure Rule s 2010

¹⁴ Ibid

¹⁵ Omar Shallo Ibid

¹⁶ Omar Shallo v Jubilee Party of Kenya & another [2017] eKLR

in process service, they cannot purport to allow parties to use electronic means to effects service.

The key pillar in the judicial sector is efficient, cost effective and speedy delivery of justice. Adoption of use of technology in some judicial operations has made a positive impact on handling of cases.¹⁷ However, no legislative framework has been formulated or enacted nor has there been an amendment of the existing rules of civil procedure to allow electronic court process service to march the technological advancements.

As it stands, our rules on court process service have not been reviewed to adopt the use of technology in effecting service. Owing to the many electronic technological advancements in the Communications sector notably with the advent of social networking sites, it is indisputable that the use of these platforms can not only effectuate court process service but can also offer a cost friendly alternative which would enhance delivery of justice.¹⁸

E-court process service as an alternative to traditional process service methods can be used to serve defendants who are elusive or lack permanent physical addresses. With the use of technology, a party to a suit who is unable to reach the defendant for personal service after all due diligence can be able to reach the Defendant with whom they share any of the social networking platforms through WhatsApp for instance and effect service at a lesser cost compared to using a newspaper. Where the parties have previously exchanged contacts such as email addresses or mobile phones numbers and the parties use platforms such as WhatsApp, the use of such platforms would provide a viable option for effecting service of process. In a scenario where parties are ‘friends’ on Facebook or follow each other on twitter can also allow the use of such platforms to effect service of process.

Owing to the fast changing technological advancements, there is need to have the existing rules of service of Court related documents reviewed to accommodate the use of electronic

¹⁷ Sustaining Judiciary Transformation(SJT); A service Delivery Agenda- 2017-2021, at 44 <
http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf> Accessed 11/11/2017

¹⁸ Martin M. Mbui, Transforming Legal Process through Technology Kenyan case; The Reality, The Possibility, The Promise. At 3 <<http://www.kenyalaw.org/LVI2014/docs/LegalProcessThroughTechnology.pdf>> Accessed 23/5/2018

communication technologies to effect service. This will also ensure standardization of the applicable rules on e-court process service hence promoting certainty.

1.1.11 STATEMENT OF THE PROBLEM.

This research endeavours to explore the viability of the use of electronic communication platforms such as email, Facebook, Twitter, WhatsApp, Instagram and Telegram among others as an alternative to the existing modes of Court process service to bolster effective speedy hearing and determination of cases. There is need for review of the current legal framework on court process service to allow use of electronic means to effect service.

1.1.12 HYPOTHESIS.

This study proceeds on the following assumptions;

- a) There exist electronic communication platforms, which can be used as alternative means of court process service in Kenya.
- b) The use of electronic communication platforms as an alternative to the existing modes of process service would bolster delivery of justice.
- c) The current legislative framework does not explicitly allow the use of electronic communication platforms in court process service.

1.1.4 JUSTIFICATION OF THE STUDY.

Kenya has been severally commended for the exponential increase in use of improved Information and Communication Technology.¹⁹ Some of the electronic communication platforms offer instantaneous delivery of information, are cost effective and can be conveniently and effectively used to supplement the existing methods of service of legal documents.

Use of these methods will come in handy to help serving litigants who cannot be physically traced for service or who are evasive but have identifiable and recognisable presence in any media such as email, Facebook, WhatsApp among others or those can only be traced at an extraneous efforts and expense.

¹⁹ *The Standard Digital*, last amended on 18th March 2015,

<<https://www.standardmedia.co.ke/article/2000162611/how-ict-drives-kenya-s-economic-growth>> Accessed 03/01/2018

Notwithstanding, Kenya lacks a legislative framework to guide the adaptation and use of Technology in Court process service.

1.1.5 OBJECTIVES OF THE STUDY.

This study endeavours to meet the following objectives:

- a) To analyse the legal framework governing conventional /existing methods of court process service in Kenya.
- b) To study and analyse the viability of the use of electronic communication platforms such as email, Facebook, WhatsApp among others in Court process service including the probable rules to govern electronic court process service.
- c) To analyse the current legal framework governing electronic transactions relevant to e-court process service.
- d) To make recommendations for review of existing court process service rules to facilitate application of technology in Court process service in Kenya.

1.1.6 RESEARCH QUESTIONS

- a) What is the current legal framework governing process service in Kenya?
- b) What is the viability of the use of electronic communication platforms such as email, Facebook, WhatsApp, among others as alternative modes of process service in Kenya?
- c) What is the current legal framework governing electronic transactions relevant to e-court process service
- d) What legislative reforms can be undertaken to allow the use of electronic communication platforms as alternative modes of court process service?

1.1.7 THEORETICAL FRAMEWORK

This study endeavours to create an understanding of the availability of electronic communication platforms useful for court process service and the viability of adapting the use of technology as an alternative to the traditional court process service in Kenya. The study will be guided by three theories.

a) The Technology Acceptance model Theory

The proponents of technology acceptance model (TAM) theory namely Fred Davis²⁰ and Richard Bagozzi²¹ posit that when consumers are presented with a new technology two key considerations determine whether they will accept and use the technology or not, that is the apparent usefulness and ease-of-use.²²

Lunceford criticising this theory argues that the basis of perceived usefulness and ease of use overlooks other issues, such as cost implications and structural imperatives that force users into adopting the technology.²³

The Applicability of this Theory in this study is pegged on the ease of use and likely usefulness of use of technology as a mode of court process service.

b) The Diffusion of Innovations Theory

The main proponent of the Diffusion of Innovations Theory is Everett M. Rogers. He presents a theory on modalities through which new ideas spread and are accepted by the society. He goes ahead to argue how the adoption of the new idea affects the society. Rogers posits that “Diffusion is a kind of social change, defined as the process by which alteration occurs in the structure and function of a social system. When new ideas are invented, diffused, and are adopted or rejected, leading to certain consequences, social change occurs.”²⁴The adoption and use of new ideas has both positive and negative results. Rogers lists three categories for consequences: desirable versus undesirable; direct versus indirect, and anticipated versus unanticipated.²⁵

²⁰F. D. Davis, "Perceived usefulness, perceived ease of use, and user acceptance of information technology", *MIS Quarterly*, **13** (3) (1989) at 319–340.

²¹ R. P. Bagozzi,; F. D. Davis,; P. R. Warshaw, , "Development and test of a theory of technological learning and usage.", *Human Relations*, Vol 45, Issue 7, (1992) at 660–686,

²² Ibid

²³ Lunceford, Brett "[Reconsidering Technology Adoption and Resistance: Observations of a Semi-Luddite](#)". *Explorations in Media Ecology* (2009) at 29–47.

²⁴ Everett Rogers, *Diffusion of Innovations*, 5th Edition, New York: Free Press (2003) at 6

²⁵ Ibid

This theory has been criticized on ground that it does not take into account an individual's resources, ability or available infrastructure or even social support to adopt the new behaviour or innovation.²⁶

This study assumes that there is widespread acceptance of use of technology amongst the citizenry hence the application of this theory.

c) **Information Systems Success Theory**

This research will also be relying on the Information Systems Success Theory. William H. DeLone and Ephraim R. McLean propounded this theory. The Information Systems Success theory majors on the relationships among six critical dimensions of Information and Communication technologies systems' success which include information quality, system quality, service quality, system use/usage intentions, user satisfaction, and net system benefits.²⁷

There exists several criticisms over this theory. One of the critics against the theory Pitt suggest that due to the increasing significance of the relationship of the consumer with the IT departments as opposed to the IT applications a service quality construct needs to be added to the model.²⁸ Another criticism of the model is the fact that only individual and organizational benefits are included in it such that benefits related to other levels of analysis, such as industry or even society, do not have a place in the model.²⁹

This study proceeds on the assumption that there is in existence technological infrastructure to support the use of the various electronic platforms, which can be used for e-process service.

²⁶ Diffusion of Innovation Theory, <<http://sphweb.bumc.bu.edu/otlt/MPH-Modules/SB/BehavioralChangeTheories/BehavioralChangeTheories4.html>> Accessed on 11/10/2018

²⁷ W. H. DeLone & E. R McLean, "The DeLone and McLean Model of Information Systems Success: A Ten-Year Update". *Journal of Management Information Systems* (2003) at 9–30

²⁸ Pitt, F.L., Watson, R.T., and Kavan, C.B. 1995. "Service Quality: A Measure of Information Systems Effectiveness," *MIS Quarterly* (19:2), at 173-187

²⁹ Peter, B.S., Sandy, S., Ravi, P., and Matthew, B. 1999. "Dimensions of Information Systems Success," *Commun. AIS* (2:3es), at 5.

1.1.8 RESEARCH METHODOLOGY

The research is qualitative in nature. The research relied majorly on secondary data types and sources. It involved looking at the rules governing court process service which are essentially contained in Statutes.

The study reviewed secondary sources of data on what has previously been written about e-court process within Kenya and other jurisdictions. Mainly the research was conducted using desk review research which entailed the use of books, scholarly journals and articles, periodicals, case law, legal reports, working papers, newspapers articles as well as information from the internet.

Data was collected by visiting libraries such as the University Of Nairobi School Of Law Library, Jomo Kenyatta Memorial Library, High Court of Kenya Libraries and the Internet.

1.1.9 LITERATURE REVIEW

This study focuses on the practicability of the use of electronic means in court process service in Kenya. Many scholars such as Judge Justice Makau, Mbugua and Mbui have written on the use of technology in other sectors in the judiciary in Kenya. There is however little written relating to the subject matter herein by Kenyan Scholars. This study entailed a review of literature on application of technology in other judicial functions in Kenya as well as literature of e-court process service in other jurisdictions.

Use of Technology in the Kenyan Judiciary.

In the 2017-2022 Strategic Plan, the Kenyan judiciary acknowledges that indeed technology is a propeller to improved justice delivery.³⁰ One of the main objectives the Judiciary has set out is to ensure that the adaptation of use of technology is citizen centric. It is aimed at ensuring that court users get the best experience attainable by use of technology.³¹

Though the judiciary has adopted the use of technology in some of its operations such as automated transcription system, e-receipting, online case tracking(e-diary system), e-filing of

³⁰Sustaining Judiciary Transformation(SJT); A service Delivery Agenda- 2017-2021, at 44 <
http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf> Accessed on 11/11/2017

³¹ Ibid 47

Court documents, electronic case management, electronic recording of proceedings as well as electronic communication of correspondences, the use of technology in the service of documents is yet to be appreciated.

Judge Hon. Justice Makau J.A. writing on ‘factors affecting case management’ appreciated the fact that technology has a crucial role to play. He argued that technology facilitates data processing, speedy retrieval of files, archiving of information, data storage and recording of proceedings.³² It is also his argument that technology would aid in fast trials, efficiency and effectiveness of the administrative process.³³ It is also his finding that technology boosts internal as well as external communication. In interpreting the data he collected, he found that over 90.4% of the judicial staff and Officers at the Counties use ICT. Out of the units surveyed, 88.4% were of the opinion that technology would aid improved administration of justice and minimize case backlog. Amongst the people he interviewed, 88.5% also agreed that use of technology would enhance fast resolution of matters.³⁴

Mbugua writing on ‘Influence of electronic Case management’ posits that ICT has the overall effect of having trials move fast, allows quick access to information on cases and it also simplifies the processes.³⁵ It is his further argument that ICT would help courts resolve some of the problems bedevilling them such as backlog. It is also his concern that the failure to use ICT in courts is a major snag for the present information democracy.³⁶

³² J. A. Makau, Factors Influencing Management of Case Backlog in Judiciary in Kenya a Case of Courts within Meru and Tharaka Nithi Counties, University of Nairobi, 2014, at 14

<http://erepository.uonbi.ac.ke/bitstream/handle/11295/74133/Makau_Factors%20influencing%20management%20of%20case%20backlog%20in%20judiciary%20in%20Kenya.pdf?sequence=3&isAllowed=y> Accessed 14/11/2017

³³ Ibid at 15

³⁴ Ibid

³⁵ Mbugua Kabiro Chrispine, Influence of the electronic Case Management System on the Effectiveness of Court Service Delivery; the Case of Eldoret Court Station, Kenya, University of Nairobi, 2012, at <http://erepository.uonbi.ac.ke/bitstream/handle/11295/10911/Mbugua_Electronic%20case%20management%20system.pdf?sequence=4> Accessed 14/11/2017.

³⁶ Ibid

Mbui on his part argues that technology provides a chance for the integration and automation of procedures of practice.³⁷ It is his contention that by using the Internet, it enhances legitimacy by making information publicly available. He also posits that the use of virtual courts would enable provision of legal services at a reduced cost, improve access to justice by cutting on cost and distance and foster quick finalisation of matters.³⁸

A review of the foregoing readings clearly shows the various areas where ICT has been applied in judicial functions in Kenya. It is clear that the use of ICT in Court activities is indeed highly beneficial with the resultant effect of quick delivery of justice. Nevertheless, our rules are yet to be amended to allow the use of electronic platforms for court process service in Kenya.

Electronic Court process service in other jurisdictions.

Kawamo posits that electronic technology significantly changes the modes of communication in use with a direct effect on civil procedure in particular.³⁹ He argues that Electronic Technology is convenient and effective.⁴⁰ It is his sentiments that adoption of electronic technology is unavoidable and would be an appropriate improvement.⁴¹ He further argues that Electronic Technology with a well-founded communication system is indispensable in civil procedure. Use of Electronic Technology he argues would bring effective justice.⁴²

Tamayo writing on applicability of electronic technology on court process service argues that the use of email enhances flexibility and judicial discretion.⁴³ It is her argument that the circumstances of a given case should dictate if there is need for alternative forms of process

³⁷ Martin M. Mbui, Transforming Legal Process through Technology Kenyan case; The Reality, The Possibility, The Promise. At 3 < <http://www.kenyalaw.org/LVI2014/docs/LegalProcessThroughTechnology.pdf>> Accessed 11/11/2017

³⁸ Ibid 6

³⁹ Masonari Kawano, - Applicability of Electronic Technology in the Course of Civil Procedure in Miklós Kengyel & Zoltán Nemessányi, Electronic Technology and Civil Procedure; New Path to Justice from around the World at 5

⁴⁰ Ibid

⁴¹ Ibid 3

⁴² Ibid 4

⁴³ Yvonne A. Tamayo; Catch me if you Can; Serving US Process on an elusive Defendant abroad, Harvard Journal of Law and Technology, Vol. 17, No. 1, Fall 2003, at 219

service to be employed with the sole aim of reaching the Defendant.⁴⁴ He further posits that email is no doubt a fast and efficient method of communication.⁴⁵ He suggests that electronic service of process would simplify and facilitate quick service on parties outside jurisdiction.

Rachel Cantor writing on Internet Process Service opines that electronic summons can be issued on electronic platforms by having at least two electronic signatures appended by the Court and another for the clerk or litigant.⁴⁶ She posits that thereafter the summons can be served electronically. It is her argument that Internet process service would provide an “excellent, cheaper, reliable and instant alternative to the conventional means of process service”.⁴⁷

The last three scholars above are from other jurisdictions and have dealt with a specific type of e-process service. This study will endeavour to analyse the various probable electronic platforms that can be used in Court process service in Kenya.

Sheilla in her book *Science at the Bar* posits that the necessity of regulations on advanced technological developments has been higher in the last decade than any other time. She asserts that there is need to regulate the use of technology to conserve the rather finite resources to avoid depletion. It is her observation that Courts in the United States of America have resorted to being policy makers to check the concerns of the industrialised society.⁴⁸

Michael Murungi, writing on *Cyber Laws in Africa* outlined the role of ICT on Vision 2030. He also writes on the Kenya’s National ICT Policy⁴⁹ and also discusses a number of legislations on ICT related subjects. These include the use of digital signatures as provided

⁴⁴ Ibid 220

⁴⁵ Ibid 224

⁴⁶ Rachel Cantor, *Internet process service, A constitutionally Adequate alternative?*, *The University of Chicago law Review*, B Vol. 66. No. 3 (Summer, 1999), at 960

⁴⁷ Ibid 964-66

⁴⁸ Jasanoff Sen Sheilla, *Science at the Bar: Law, Science, and Technology in America, a Twentieth Century Fund book* (Cambridge, MA: Harvard University Press, 1995) at 25

⁴⁹ Michael Murungi, *Cyber law in Kenya*, *The Netherlands, Kluwer Law International*, 2011 at 40

for under KICA.⁵⁰ He also traces the evolution of rules governing the admissibility of electronic evidence over the years.⁵¹

Sheilla's and Murungi's works emphasise the need to have legislative reforms to match technological advancements. However, their focus is not on electronic process service regulations. This study will focus on much needed legislative reforms to effectuate electronic court process service.

1.1.9 CHAPTER BREAKDOWN.

This Study has five chapters. Chapter one is the Introduction. It covers background of the study, statement of problem, justification of the study, statement of objective, research question, theoretical framework, research methodology, literature review, hypothesis and chapter breakdown.

Chapter two deals with the legislative framework on e-transactions in Kenya and electronic evidence which have a bearing on e-court process service.

Chapter three deals with recognised modes of process service in Kenya. It defines court process service and analyses the regulatory framework for court process service in Kenya. It also focuses on the current approach on e-court process service in Kenya

Chapter Four deals with e-court process service, the legal framework governing it and recognised forms of e-court process service in India, US and South Africa. It also looks at the benefits and challenges of each of the e-court process platforms.

Chapter Five provides a conclusion and recommendations.

⁵⁰Ibid 142

⁵¹ Ibid

CHAPTER TWO.

2.0 LEGAL AND REGULATORY FRAMEWORK ON ELECTRONIC TRANSACTIONS IN KENYA RELEVANT TO COURT PROCESS SERVICE.

In the recent times, people are gradually embracing new ways of doing business using electronic platforms. Many contracts are currently being initiated and concluded online. Giant companies have emerged out of doing business online. An electronic transaction has been defined as an “act of buying or selling something or sending money electronically, especially over the Internet.”⁵²

The recent years have also experienced the development of new modes of communications platforms based on the Internet. Advanced technology has also brought in new modes of communication such as use of social media. Technology has made human being interactions via electronic communication channels more cost effective, convenient and instantaneous.

The increased development and use of electronic platforms has called for the enactment of laws and regulations to govern these transactions. Laws enacted should deal with all stages of any business transaction from execution, performance and enforcement.

2.1 INTERNATIONAL LEGAL FRAMEWORK

Some of the international legal instruments relevant to court process service include;

- a) The 1965 Hague Convention on the Service of Judicial and Extra-judicial Documents in Civil or Commercial Matters
- b) The 2005 United Nations Convention on the use of Electronic Communications in International Contracts

2.1.1 The 2005 U.N. Convention on the use of electronic communications in international contracts.

The 2005 UNICIC (the “Convention”) is the main international legal instrument regulating electronic commercial transactions at the international arena. The Convention was passed by General Assembly on 23rd November 2005 and was opened for signature on 16th January

⁵² Cambridge Dictionary < <https://dictionary.cambridge.org/dictionary/english/electronic-transaction> > accessed on 25/06/2018

2006.⁵³ The convention is meant to provide a meaningful solution to the challenges facing electronic commercial transactions.

Under the convention electronic transactions have the same force of law on performance and enforcement just like any other contract subject to compliance with the relevant rules governing electronic commerce and commerce in general. This convention applies only to international business transactions concluded online.

2.1.2 The 1965 Hague Convention on the Service of Judicial and Extra-judicial Documents in Civil or Commercial Matters

The 1965 Hague Convention on the Service of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (the Hague Convention)⁵⁴ is an international treaty which provides for modes of service which parties effecting service abroad can use.

Article 10(a) of the Hague Convention allows parties to a suit to ‘send judicial documents, by postal channels, directly to persons abroad’ if the ‘State of destination does not object.’⁵⁵ The Hague Convention does not expressly allow the use of electronic means for service but may be inferred to permit service by electronic means to the extent that such means constitute “postal channels” within the meaning of Article 10(a). The Convention will allow the service of process as long as the other state does not prohibit and the address of the person to be served is known.

In 1999, the Permanent Bureau of the Hague Convention had a meeting comprising of members of the Hague Conference on Private International Law.⁵⁶ In appreciating the use of electronic platforms, the Commission observed that;

The use of means of communication as rapid and simple as electronic mail reflects two fundamental aims of the Convention, which are to bring the document in question to the actual knowledge of the addressee in due time to enable the defendant to

⁵³ Ibid

⁵⁴ Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 10, Nov. 15, 1965, 20 U.S.T. 361, 58 U.N.T.S. 163

⁵⁵ Ibid

⁵⁶ Catherine Kessedjian, Preliminary Document No. 7 on Electronic Data Interchange, Internet and Electronic Commerce, at <ftp://hcch.net/doc/gen-pd7e.doc> (April 2000).

prepare a defense and to simplify the method of transmission of these documents from the requesting country to the country addressed.⁵⁷

The Commission noted the importance of allowing transmission of Notices via email and by large other electronic means. The commission also noted that Article 10 (a) should be interpreted broadly enough to accommodate use of electronic means on service of process.⁵⁸

In light of the fact that for one to send someone documents via email and to many of the social networking sites you need to know his address in a way provides such electronic means as viable means of process service⁵⁹.

Justice Paul A. Engelmayer, United States District Judge New York in the case of **Federal Trade Commission v. PCCare247 Inc. et al**,⁶⁰ noted that;

India has not objected to service by Facebook, and the Court knows of no international treaty prohibiting such means. Therefore, service by means of email and Facebook is not prohibited by international agreement. The Court, in its discretion, is therefore at liberty to authorize service by such means, provided that due process is also satisfied.⁶¹

Article 2 of the Convention provides that “each contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other contracting States.”⁶²

2.2 NATIONAL LEGAL FRAMEWORK.

The Kenya Information and Communication Act (KICA)⁶³ is the key legislation governing electronic transactions in the Country. The law endeavours to foster the development of the information and communications sector as well as electronic commerce by providing for e -

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ 12 Civ. 7189 (PAE)

⁶¹ Ibid

⁶² Hague Convention on Service Abroad of Judicial and Extrajudicial Documents art. 2, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163

⁶³ The Kenya Information and Communication Act (KICA), Cap 411 Laws of Kenya

signatures, identity, attribution, data protection, online crime, intellectual property, and admission of evidence, security, offences and jurisdiction.

KICA legally recognises electronic communications and transaction. An electronic communication or a contract is not invalid or unenforceable on the solitary ground that it is in the form of an electronic communication.⁶⁴

d) ELECTRONIC SIGNATURES

An electronic signature has been defined as "...an electronic indication of a person's intent to agree to the content of a document or a set of data to which the signature relates"⁶⁵. There are two kinds of signatures recognised by KICA namely advanced electronic signature and electronic signature.

Section 4 of **The Kenya Communications (Amendment) Act No. 1 of 2009** states that;

"Electronic signature" means data in electronic form affixed to or logically associated with other electronic data which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message

"Advanced electronic signature" means an electronic signature which meets all the following requirements:

- (a) is uniquely linked to the signatory;
- (b) is capable of identifying the signatory;
- (c) it is created using means that the signatory can maintain under his sole control; and
- (d) it is linked to the data to which it relates in such a manner that any subsequent change to the data is detectable;⁶⁶

KICA provides that an electronic signature is considered to be reliable for the purpose of identifying a party and his or her intention, if the signature creation data is solely linked to the signatory; the signature creation data were at the control of the signatory, and no one else; any alteration to the signature is detectable; and that any alteration made to information, which the signature relates to, after the time of signing, is detectable.⁶⁷

⁶⁴ S. 83 KICA

⁶⁵ What is electronic signature? <<https://ec.europa.eu/cefdigital/wiki/pages/viewpage.action?pageId=46992760>>
Accessed on 06/06/2018

⁶⁶ S 4 KICA

⁶⁷ Article 6(3) of the Model Law on e-Signature and section 83O(3) of KICA

Electronic signatures have legal effects comparable to the ones of handwritten signatures and they can be used in any situations such as signing contracts, tax declarations, online banking among others.

e) IDENTITY, AUTHENTICATION AND ATTRIBUTION

Internet based communication as well as transaction at times involve parties who have not met before. Even where the parties have met before you only transact on the belief that the person on the other end is the intended party. The authentication of the other person's identity and capacity becomes a critical issue.

KICA under Section 831 (L) is recognising the difficulties of proof that would otherwise arise, addresses the issue of identification and attribution by way of presumptions.

An e-message is attributed to the originator if he is the one who sent it or if it was sent by a person he has duly authorised to send or it originates from a system programmed by the originator to send such messages automatically.⁶⁸

f) ADMISSIBILITY OF ELECTRONIC EVIDENCE

Sakara writing on the effects of technological advancements on our everyday activities he notes that, "The advent of technological development and the consequent evolution of paperless transactions have permeated every sphere of life, and the legal system is no exception: in the event of disputes involving transactions conducted through electronic means, parties are bound to rely on electronic evidence of such transactions."⁶⁹

In the South African Case of **S v. Ndiki**⁷⁰ Justice Van Zyl ruled that:

It seems that it is often too readily assumed that, because the computer and the technology it represents is a relatively recent invention and subject to continuous development, the law of evidence is incapable or inadequate to allow for evidence associated with this technology to be admissible in legal proceedings. A preferable

⁶⁸ S 83L KICA

⁶⁹ Sasaka, Admissibility Of Electronic Evidence In Kenya, January 8, 2017,

< <https://sheriamtaani.wordpress.com/2017/01/08/admissibility-of-electronic-evidence-in-kenya/> > Accessed on 05/06/2018

⁷⁰([2007] 2 All SA 185 (Ck))

point of departure in my view is to rather closely examine the evidence in issue and to determine what kind of evidence it is that one is dealing with and what the requirements for its admissibility are.⁷¹

Electronic evidence though can be source of best information available in support of a given claim, such evidence is faced with challenges such as likelihood of being altered or manipulated without leaving a trace to show the changes made compared to paper based evidence.⁷² The infrastructure or equipment used as well as the required technological know-how on Information and communication technology platforms may also pose a challenge.

Section 83G of KICA recognises the use of electronic evidence provides that;

Where any law provides that information or other matter shall be in writing then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is:—

- (a) rendered or made available in an electronic form; and
- (b) accessible so as to be usable for a subsequent reference.⁷³

The Evidence Act⁷⁴ makes provisions for the application of electronic evidence. It also provides for the prerequisites for the admission of such evidence. Section 78A of the Act provides:

- (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
- (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
- (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - (c) the manner in which the originator of the electronic and digital evidence was identified; and
 - (d) any other relevant factor.
- (4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any

⁷¹ Ibid

⁷² Admissibility of Video/Electronic Evidence in Kenya - What you see is not what you get

<http://chelanga-advocates.blogspot.com/2012/06/admissibility-of-videoelectronic.html>> Accessed 05/06/2018

⁷³ S 183G KICA

⁷⁴ Chapter80 Laws of Kenya

law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.⁷⁵

We can deduce from the provisions that electronic messages are admissible as evidence as long as they comply with the requirements of the Act.

Section 106 (B) of the Act sets us the conditions which must be satisfied for the admissibility of electronic evidence. It provides as follows: –

Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.⁷⁶

Section 106B (2) states that: –

The conditions mentioned in sub section (1) in respect of a computer output, are the following- the computer output containing the information was produced by the computer during the period over which the computer was used to store or process the information for any activities regularly carried out over that period by a person having lawful control over the use of the computer during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in ordinary course of the said activities; throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly was out of the operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and the information contained in the

⁷⁵ S 78A , The Evidence Act

⁷⁶ Ibid S 106B

electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.⁷⁷

The import of the above cited provisions is that any information stored in a computer which is then printed or copied to optical media such a CD, shall be treated like documentary evidence and will be admissible as evidence without production of the original.⁷⁸ Notwithstanding, for such evidence to be admissible, it must also meet the requirements set out under Section 106B (4) which provides that: –

In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following –

- (a) Identifying the electronic record containing the Statement and describing the manner in which it was produced
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) Dealing with any matters to which conditions mentioned in subsection (2) relate; and
- (d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.⁷⁹

It is also a requirement that, for electronic evidence to be admissible it must be accompanied by a certificate as provided above.

Justice Ngugi J, in the case of **Republic v Mark Lloyd Steveson [2016] eKLR**, being faced with a question of admissibility of electronic evidence note inter alia that:

For completeness, it is important to refer to the provisions of sections 106B(1), (2) and (3) as well as section 106(I) of the Evidence Act even though neither parties brought them up. The former sections reinforce the admissibility of electronic records including computer print-outs and provide for a straightforward way of automatically authenticating them if certain conditions enumerated in section 106B(2) are met by producing a certificate of authenticity. That certificate needed must satisfy three conditions:

- a. It must identify the electronic records and production process;
- b. It must show the particulars of the producing device; and

⁷⁷ Ibid S 106B (2)

⁷⁸ Sasaka, Admissibility Of Electronic Evidence In Kenya, January 8, 2017, <<https://sheriamtaani.wordpress.com/2017/01/08/admissibility-of-electronic-evidence-in-kenya/>>

⁷⁹ S106B (4) Cap 80

c. It must be signed by the responsible person.

In the present case none of these conditions were met. In any event, for a computer output to be considered a document for admissibility under section 106B(1), it must satisfy the conditions in section 106B(2) namely that:

a. The output must have been produced during regular use;

b. It must be of a type expected in ordinary use;

c. The computer generating the output must be operating properly or it must be shown that the accuracy of the computer is not otherwise affected; and

d. Where multiple computers are involved, those operating in succession and considered as one.⁸⁰

2.3 MILESTONES IN APPLYING TECHNOLOGY IN THE COURTS;-JUDICIAL DIGITISATION PROGRAMME IN KENYA

The Kenyan judiciary has in the recent years focused on harnessing the benefits brought about by improved communication and information technology in its endeavour promote access to justice.⁸¹ The digitalization programme is aimed at improving efficiency, transparency and help in clearing case backlogs.

The former Chief Justice Willy Mutunga inaugurated the judicial transformation initiative during his tenure. The Judiciary Transformation Framework recognised the use of technology “as enabler of justice”.⁸² On 10/10/2014 he established the Integrated Court Management System Committee. The core mandate of this Committee is to come up with strategies and policies to actualize the transformation agenda. The Committee came up with three sub-committees each with specific assignments to help in its work. These sub-committees were; Transcription sub-Committee, Electronic filing sub-Committee and Enterprise Resource Planning Sub-committee.

The Transcription sub-committee was tasked with the role of developing an electronic based transcription and recording of court proceedings mechanism. The Electronic filing committee was to come up with an electronic filing system. The electronic filing system was inaugurated in March 2017 and was supposed to be piloted by the Milimani Commercial and tax division before being rolled out through the country. Electronic filing helps in fast tracking of cases. Advocates and litigants filing fresh matters are required to file both hard and soft copies.

⁸⁰ Republic v Mark Lloyd Steveson [2016] eKLR

⁸¹ Sustaining Judiciary Transformation (2017-2021) at 54

⁸² Ibid

Advocates and litigants are required to open an account with the judiciary in the electronic filing system which they are supposed to use in filing of documents.

The use of mobile money technology has also been employed in payment of court fees and fines. Many courts throughout the Country have since the introduction of the mobile payment procedure adopted it which has eased the filing procedure besides enhancing transparency in revenue collection in the judiciary.

The Integrated Court Management System Committee has also developed an ICT Master Plan 2017-2022 and automated the Judiciary Transcription System in the Milimani Commercial and Tax Division.⁸³ This system is mainly audio-visual recording of court proceedings to be used in preparing transcripts.⁸⁴ The judiciary is making heavy investment on technology infrastructure to help it realize the transformation agenda.⁸⁵

The judiciary is also in the process of introducing an electronic diary management system.⁸⁶ This system is geared towards addressing the problems faced in fixing of dates ranging from parties having to travel to make a request for filing retrieval several days before the date of fixing dates to long queues witnessed on fixing days in some of the stations. The system is also useful in producing of cause lists automatically.⁸⁷

The Judiciary is also working on an Integrated Case Management system aimed at providing real-time reports on status of pending matters and to help in tracking cases and performance of the judicial officers.⁸⁸

Though the judiciary is trying to harness the available technology in its activities, in some instances judicial officers are constrained by lack of clear legal framework governing a given area. For instance, Courts are faced with a dilemma on allowing the use of technology in court process service vis-à-vis current legal framework.

⁸³ Ibid at 45

⁸⁴ Ibid at 47

⁸⁵ Ibid

⁸⁶ Ibid at 48

⁸⁷ Ibid

⁸⁸ Ibid at 52

2.4 CONCLUSION.

KICA and the Evidence Act make provisions such as on electronic signatures, admissibility of electronic evidence which are relevant to e-court process service. Amending the relevant rules of procedure on court process service to expressly allow use of electronic communication platforms in process service will bolster expeditious delivery of justice.

The Courts in recognising technology as enabler of justice have started to employ use of technology in activities such as filing of documents, payments, virtual courts, e-transcription among others.

Extending the use of electronic communication platforms in the service of process will go a long way in enhancing delivery of justice.

CHAPTER THREE.

THE REGULATORY FRAMEWORK ON COURT PROCESS SERVICE IN KENYA

3.1 INTRODUCTION

Process is “any type of formal court document directed to a particular named person commanding him or her to do or to refrain from doing an action.”⁸⁹ Service of process has been defined as the “delivery of writs, summons, pleadings or any other legal papers to the person required to respond to them”.⁹⁰ Service also includes delivery of necessary notices such as mention or hearing or even judgement/ruling notices by one party to a suit to the other.⁹¹ Service of process also means “the delivery of judicial documents to the persons named in the documents in a manner that places the named persons on notice that a judicial action has commenced against him/her”.⁹²

3.2 IMPORTANCE OF SERVICE OF PROCESS

It is a general rule that, no order of court requiring a person to do or abstain from doing any act may be enforced unless and until a copy thereof is served personally or through any of the recognised means upon such person.⁹³ Service of any document must be effected before the lapse of the time stipulated for the service to be effected.⁹⁴

Service of documents relating to a case on the other party is very important. It is the practice that whether or not a case will take off is determined by whether there was service of process. Without evidence that the Defendant has been informed of a claim before Court or the Defendant has been notified that a matter is coming up for hearing or for any directions , a court cannot issue further orders as to the progress of the matter.

In the case of **Koinange Investments & Development Ltd v Robert Nelson Ngethe [2014] eKLR**, the Supreme Court Justices observed that:

⁸⁹ What Is “Process?” Certified Civil Process Server Program,

<<https://www.jud11.flcourts.org/docs/Process%20Server%20Manual%202017.pdf>> Accessed on 01/03/2018

⁹⁰ Legal Dictionary, < <https://legal-dictionary.thefreedictionary.com/Service+of+Process>>Accessed on 05/03/2018

⁹¹ Ibid

⁹² Ibid

⁹³ Halsbury’s Laws (n114) 289

⁹⁴ O. 5. 2 Civil Procedure Rules 2010

...service of Court documents is an important component in the administration of justice, and is a common aspect of litigation that confronts courts of all cadres, in the normal business schedule. Service as a procedural function, is regulated by law and other relevant instruments...

Though service is an inescapable procedural aspect of every Court-oriented action, this matter is regulated by law.⁹⁵

A party to a suit has a right to be notified of any step taken or to be taken. Article 50 of the Constitution of Kenya 2010 encapsulates the ingredients of the right to fair hearing. Fair hearing entails giving notice to the other party.

Under the Constitution, it is a requirement that every person involved in a case has a right to be informed the case with sufficient details to enable that party understand the nature of the case and file appropriate defence.⁹⁶ Without being informed of any claim which is pending before court, the Defendant cannot be denied the right to respond adequately to the claim.⁹⁷ Through service of process, a party is granted a chance to participate in the proceedings. This is in line with the right to be present during the hearing of the case.⁹⁸

The Constitutional provisions on right to fair hearing echo the principles of natural justice. One of the key principles of natural justice is '*audi alteram partem*', which is a Latin maxim which means that no one should be condemned unheard.⁹⁹ To comply with this principle, a defendant should be served with all documents and notices relating to the case. The period under the notice or summons should be such that it allows the Defendant adequate time to respond to the claim or prepare for hearing. Section 20 of the Civil Procedure Act makes it mandatory that a defendant be served with all court documents.

⁹⁵ Koinange Investments & Development Ltd v Robert Nelson Ngethe [2014] eKLR

⁹⁶ Art.50 (2)(b) of the Constitution of Kenya, 2010

⁹⁷ Ibid Art. 50(2)(c)

⁹⁸ Ibid Art. 50 2(f)

⁹⁹ See generally Ibid Article 50 and Duhaime's Law Dictionary, <<http://www.duhaime.org/LegalDictionary/A/AudiAlteramPartem.aspx>> accessed 09/10/2018

The Civil Procedure Act under the Oxygen (Double O's) Principle obligates courts to dispose of matters within the shortest time possible and expeditiously.¹⁰⁰ The Double O principle is derived from the words 'overriding objective' under Sections 1A & 1B of the Civil Procedure Act¹⁰¹ and Sections 3A and 3B to the Appellate Jurisdiction Act whose main objective is to promote just, expeditious, proportionate and affordable resolution of disputes as the overriding objective.¹⁰² This principle serves to avoid the unnecessary miscarriage of justice by allowing the courts more discretion.

In Karuturu Networks Ltd & another vs Dally Figgis Advocates, Nairobi Court of Appeal CA NO. 293/2009 it was held that:

The application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there under, the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals.

In City Chemist & Anor vs. Oriental Commercial Bank(2008)eKLR the Court stated,

... however, is not to say that the new thinking (the oxygen principle) uproots well-established principles or precedents in the exercise of discretion of the court, which is a judicial process devoid of whim and caprice. On the contrary, the amendments enrich those principles and embolden the court to be guided by a broad sense of justice and fairness as it applies those principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application.

This is in line with the Constitutional right to have a trial conducted and concluded within a reasonable period.¹⁰³

¹⁰⁰ Ss. 1A & 1B Civil Procedure Act

¹⁰¹ Cap 21 Laws of Kenya

¹⁰² John Mbaluto, Advent of 'oxygen rule' breathes life into civil litigation<
<https://www.internationallawoffice.com/Newsletters/Litigation/Kenya/Njoroge-Regeru-Company/Advent-of-oxygen-rule-breathes-life-into-civil-litigation>> Accessed 09/10/2018

¹⁰³ Art.50 2(e) of the Constitution

Noting that the main objective of the overriding principle is to deliver justice, where there is a conflict between subsidiary legislation and the Civil Procedure Act, the provisions of the Act prevail.

In case of **Kenya Commercial Bank Limited -vs- Kenya Planters Co-operative Union Civil Application No. Nrb. 85 of 2010** it was held that:

Where there is a conflict between the statute (overriding principle) and a subsidiary legislation (rules of the Court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 compliant, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or the attainment of justice and fairness in the circumstances of the each case.

The Civil Procedure Rules¹⁰⁴ with relation to various actions stipulate time limitations for service. Parties have an obligation to comply with such provisions without inordinate delay. Failure to serve may have dire consequences. For instance, where the Plaintiff does not serve summons within twelve (12) months of issuance and does not apply for extension of the validity of the summons, the suit abates.¹⁰⁵

In the case of **Grace Wairimu Mungai v Catherine Njambi Muya [2014] eKLR**, Justice J. M. Mutungi as he then was, ruling on an issue where summons to enter appearance were never served within the provided time frame stated:

In the premises it is my finding and holding that no summons have been served on the Defendant in this suit within the prescribed period and the suit having been filed in October 2011 the plaintiff has been extremely lax-in prosecuting it and is undeserving of any discretion from the court. I accordingly allow the Defendant's Notice of motion dated 22nd August 2013 and order the plaintiff's suit struck out with costs to the Defendant.¹⁰⁶

In the case of hearing Notices, where there is proof of service but the Defendant fails to attend, in the case of the Plaintiff attending, the Plaintiff may be allowed to proceed ex-parte. In the case of the Defendant attending, he may seek to have the Plaintiff's suit dismissed.¹⁰⁷ With regard to interlocutory applications wherein ex-parte injunction orders have been issued

¹⁰⁴ Civil Procedure Rules, 2010 is the main regulatory framework on procedural rules governing civil matters

¹⁰⁵ O. 5. 2 Civil Procedure Rules 2010

¹⁰⁶ Grace Wairimu Mungai v Catherine Njambi Muya [2014] eKLR

¹⁰⁷ Ibid O. 12 R 1 & 2

it is a mandatory requirement that the order, application and any other pleading be served within three(3) failing which the orders lapse automatically.¹⁰⁸

3.3 COURT PROCESS SERVER

Kenyan law¹⁰⁹ requires that a person authorised by law delivers pleadings and all court documents. Persons who can serve include, process servers, courts or advocates. A process server is a person licensed by the High Court of Kenya to effect service of legal documents.¹¹⁰

It is the duty of the process server to effect service of process on the intended party. The process server must ensure that he properly identifies the person to be served. This will ensure that if called upon for cross-examination on the person he served, the process served can easily identify that person.¹¹¹ Where the person to be served is not known to the process server, the Plaintiff is required to accompany the process server to help identify the Defendant.

After effecting service, the process server is required to swear an affidavit/return of service showing the method of service used whilst noting to state how the Defendant was identified, the place and date of service and whether or not the Defendant acknowledged service.¹¹²

3.4 METHODS OF SERVICE

The Civil Procedure Rules 2010 under Order 5 capture the main methods of process service in civil cases in Kenya. Though these provisions principally relate to service of summons, the same rules apply to service of all pleadings, applications, orders as well as notices. The Order captures the following main methods of Court process service:

- a) Service on Defendant personally
- b) Service upon agent
- c) Service by leaving at the place of residence, business, office or work
- d) Service via registered post or courier

¹⁰⁸ Ibid O 40 R 4(3)

¹⁰⁹ See Supra note 64

¹¹⁰ Ibid O. 5 R 6

¹¹¹ Ibid O. 5 R. 16

¹¹² Ibid). 5 R. 15

- e) Service by pinning at an open place on a building
- f) Service via advertisement

These methods can be grouped into either personal service or substituted service. Personal service is the best form of service. Substituted service is normally allowed only after all attempts to serve a party through personal service have failed

3. 4. 1 Personal service.

Personal service is used to refer to ‘in-hand delivery of the papers to the proper person’.¹¹³ This mode of service is deemed the most appropriate. Personal service is deemed to be the most effective means of process service. This mode of service has the advantage of the process server handing the documents to the Defendant personally. The Defendant will always have a challenge to disapprove that the documents were served. Personal service takes preference over other modes of service and it is always advisable to effect personal service whenever feasible.¹¹⁴

The Court of Appeal justices in the case of **Mwai Kibaki Vs Daniel Toroitich Arap Moi[1999] eKLR**, posited that:

Rule 9 (1) and (2) of Order 5 of the Civil Procedure Rules deal specifically with service on a party or his agent. The general tenor of service under this Order is that unless there is an appointed agent or unless a defendant cannot be found service is normally personal. Exceptions only come when personal service is not practicable.¹¹⁵

This case marked a turning point on the discourse on personal service. There was a realization that the party intended to be served may be within sight to effect service but due to prevailing circumstances be not able to reach him for service. In the Mwai Kibaki case cited above, though no evidence was given to show that personal service was attempted, evidence was given showing that the ring of security details around the President would make it impossible to effect personal service. Nonetheless, it has been held that nothing in the ruling showed that service could not have been effected using alternative means.¹¹⁶

¹¹³ Service of Process - Methods Of Service - Defendant, Personal, Substituted, and Notice - JRank Articles <<http://law.jrank.org/pages/10165/Service-Process-Methods-Service.html#ixzz5Tbvi9c9Q>> Access 11/10/2018

¹¹⁴ Ibid O 5 R 8

¹¹⁵ Mwai Kibaki Vs Daniel Toroitich Arap Moi[1999] eKLR,

¹¹⁶ Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR

a) Service on the defendant personally

The process server in personal service is required to trace the person to be served with the aid of the instructing party - can be defendant or plaintiff.¹¹⁷ The instructing party has the responsibility of helping the process server gather as much information as possible to enable locate the person to be served. Once located, if the person to be served is not known to the process server, the process server must be accompanied by someone capable of identifying the Defendant or in the alternative have sufficient particulars as to be able to identify that person.¹¹⁸

If the person being served is cooperative, such a person is supposed to acknowledge receipt by endorsing on the return document.¹¹⁹ In the case of inmates, the law requires that they be served personally but in the presence of the officer in charge of the prison.¹²⁰

Personal service though poised as the best service, has its own challenges. First, it is not in all cases that one has the physical address of the person intended to be served. Tracing a party to be served has at times proved to be a difficult task.

It is also possible that some parties being sought to be served owing to their positions will use various means to prevent or avoid service. Activist Okiya Omtata recently alleged that he had been prevented by police from serving court documents to the directors of the Communication Authority at their headquarters.¹²¹ At times, process servers while undertaking service are faced with the threat of violence.¹²² Some parties are also unreachable even though where they can be reached is known making it very difficult to reach them to effect service.¹²³

¹¹⁷ O 5 R Civil Procedure Rules 2010

¹¹⁸O. 5 R. 15 Civil Procedure Rules 2010

¹¹⁹ Ibid O. 5 R. 17

¹²⁰Ibid O 5 r18

¹²¹ Waweru Titus, 'Activist Omtatah blocked from serving CA court orders to suspend media shutdown' Standard Digital, <<https://www.standardmedia.co.ke/article/2001268247/activist-omtatah-blocked-from-serving-ca-court-orders-to-suspend-media-shutdown>> Accessed on 01/03/2018

¹²² Lillian Aluanga-Delvaux, 'Why the court process servers are not sitting pretty', Standard Digital, Sat, April 13th 2013, <<https://www.standardmedia.co.ke/article/2000081402/why-the-court-process-servers-are-not-sitting-pretty>> accessed on 01/03/2018

¹²³ Vincent Mwangi, 'Court dismisses Kibaki petition against Moi', Daily Nation, FRIDAY JULY 23 1999, <https://www.nation.co.ke/news/1056-389344-1787gez/index.html> accessed on 01/03/2018

b) Service on an agent

Where the person to be served cannot be found after due diligence, the rules on procedure allow service on an agent. The agent must be authorized to receive the documents.

In the matter of **Aluodo Florence Akinyi v Independent Electoral and Boundaries Commission & 2 others** [2017], the Court ruled that;

I find that that Eunice was not an authorised agent for purposes of receiving service and was therefore defective and did not meet the requirement of the rule 2 of the Rules. It did not matter that Eunice was a clerk or worked in the 2nd respondent's office, what mattered was whether Eunice was authorised to receive service by the 2nd respondent. Evidently, she was not.

Order 9 Rule 2 lists the following as persons who can be served on behalf of a party:

- i) A person with a power of attorney
- ii) A person carrying on work or business on behalf of the person sought to be served
- iii) In case of corporations, a secretary, director or other principal officer of the Company or any other person duly authorised under the Company's seal.
- iv) Special or general agents appointed by the person sought to be served.

Other persons who may be deemed to be agents for purposes of service are:

- a) An advocate who has instructions to receive documents on behalf of the party sought to be served.¹²⁴
- b) The manager working or carrying on business on behalf of the person sought to be served.¹²⁵ Service on the manager will be allowed where the person sought to be served is outside the jurisdiction of the Court.
- c) A person in-charge of immovable property.¹²⁶ This is applicable where it is not possible to serve the person sought to be served personally.
- d) Adult member of the family of the person being sought to be served with whom they reside together.¹²⁷
- e) Head officer in the case of public officers.¹²⁸

¹²⁴ Ibid O. 5 R. 8(2)

¹²⁵ Ibid O. 5 R 10

¹²⁶ Ibid O. 5 R 11

¹²⁷ Ibid O. 5 R 14

- f) Commanding officer in the case of a soldier.¹²⁹
- g) Any person duly authorised to receive documents on behalf of the Attorney General.¹³⁰

Service on an agent who is permitted to act as such is always deemed to be as effectual as personal service.¹³¹ Such service is always regarded as proper service.

The main challenge with relation to service on an agent is proving that a person is an agent and that he has authority to receive process on behalf another.

3.4. 2 Substituted service.

Substituted service entails the use of any other mode of service rather than personal service. Substituted service has been defined as ‘service of process made under authorization of the court upon some other person, when the person who should be served cannot be found or cannot be reached’.¹³²

A party must apply to the Court for leave to be allowed to use substituted means of service.¹³³ The Court must be satisfied that all efforts to effect personal service have failed before granting an application for leave to serve through registered post.¹³⁴

a) Service via registered post or courier

This method involves the posting via registered post of the process to either the last known address in the case of individuals or corporations¹³⁵ or sending them in the case of a matter with the Attorney General using a prepaid registered envelop. If one has to use courier services, it must be one approved by the Court.¹³⁶

¹²⁸ Ibid O. 5 R 19 (1)

¹²⁹ Ibid O. 5 R. 19 (2)

¹³⁰ Ibid O. 9 R. 2

¹³¹ Ibid O. 9 R. 3

¹³² The Law Dictionary, <<https://thelawdictionary.org/substituted-service/>> Accessed on 11/10/2018

¹³³ Ibid

¹³⁴ Ibid Rule 17

¹³⁵ Ibid O. 5 R. 3

¹³⁶ Ibid

In **Re Estate of James Allan Guam (Deceased) [2018] eKLR**, the Honourable Court allowed service on parties to the succession cause through courier on the contention that it had been difficult to reach the respondents physically for direct service due to the distance. The respondents were living at 3114 Livonia Avenue Apartment No. 6 Los Angeles California 90034 USA.

This method of service is currently not widely used compared to yesteryears where mailing was one of the main modes of communication. As a consequence, the postal corporation in Kenya has devised the use of phone numbers as the post office number in a bid to woo people to continue using postal services.¹³⁷

b) Service by pinning at an open place on a building

Where the party being sought cannot be found to effect personal service, the laws allow that with the leave of Court, service can be realised by pinning the process on an open place within the Court premises, or on the house of the person sought to be served or where the Defendant carried on business or worked¹³⁸. This can also involve pinning the process on the outer door of such building.

In the case of **Grohe Dawn Watertech Fitting Pty Ltd v Ideal Ceramics [2018] eKLR** the Honourable Court granted leave for service of summons upon the Defendant by affixing a copy thereof in some conspicuous place in the Courthouse and part of the premises in which the Defendant is known to have last carried on business after the process server in the matter tried to get a director of the Defendants to effect service in vain since the receptionist at the Defendant's place of business refused to accept service and refused to cooperate to facilitate service.

c) Service by leaving at the place of residence, business, office or work

Where the person sought to be served cannot be found but has a known and established place of residence, owns business premises or where he ordinarily carries on work, service can be

¹³⁷ See <<http://www.mpost.co.ke/>> accessed 20/09/2018

¹³⁸ Ibid O 5 R 15

effected by sticking a copy of the documents at a visible part of the building he ordinarily carries on his business, resides or works from.¹³⁹

This applies in cases of corporations where service can be effected by leaving the documents at the registered office of the corporation or the work site of the corporation.¹⁴⁰ Where a person has a claim against the Attorney General, the law also allows service by leaving the documents at the Office of the Attorney General.¹⁴¹

d) Service via Advertisement

The Rules on process service also allows service via a newspaper with nationwide publication¹⁴². This method requires that one obtains permission from the Court to use this method. One has to convince the Court that the person to be served cannot be found, he has dodged service in the past despite several attempts or it is impracticable to use the other ordinary means of process service.

Where one has to serve through advertisement, the advert must contain sufficient details to help the person being served get acquainted with what he is required to do. At least a newspaper advert should state the name of the court which issued, title and number of the cause of action, notice of the period allowed to comply with the notice and the contacts of the person issuing the notice. The paramount consideration is to allow the other party get information over the pending matter and to enable him act accordingly.¹⁴³

In the case of **John Mwangi Nyaga v Monica W. Wanderi**[2011] eKLR, the Appellate Court upheld the decision of the trial Court which had allowed service of process through advertisement on a party who could not be found to effect personal service.

This mode of service may be faced with two main challenges. Firstly, it is known that not all people buy newspapers or even not all places get newspapers. It also notable that such method is rather expensive to use for some litigants.

¹³⁹ Ibid O. 5 R. 14

¹⁴⁰ Ibid O. 5 R 3

¹⁴¹ Ibid O. 5 R. 9(2)

¹⁴² Ibid O. 5 R. 17(4)

¹⁴³ Simon Gichangi Mugo v Pierre Asabi Misambi & 2 others [2013] eKLR

3. 5. E-Court process service in Kenya.

Though some courts may be flexible enough to allow use of electronic communication as an alternative means of Court process service, the lack of clear rules on the issue has led others to shut the door on the application of technology on matters of process service.

The dilemma has been real as was witnessed in the High Court Sitting in Nairobi in 2016 in the case of **National Bank of Kenya Vs Cyprian Nyakundi(2016)eKLR** where the Court allowed the use of WhatsApp to effect process service on the Defendant, whereas the Court in a more recent case of **Omar Shallo v Jubilee Party of Kenya & another [2017] eKLR**, observed that;

Considering the above Rules which are applicable to the petitions herein, service by means of WhatsApp was outside the means recognised by the law, and would therefore, be bad service.

.... In the instant case, the Respondent did not effect personal service. He sought no leave to use alternative mode of service but elected privately to use a mode never heard of in law.¹⁴⁴

In the Case of **Child Welfare Society Of Kenya Registered Trustees V Nation Media Group Ltd T/A Nation Newspapers & 2 Others[2012]eKLR**, the Court ruled that;

The advocate recommends that he uses email or the DHL Courier to effect the said service. This form of service is not provided for in our procedure under the civil laws.

In the case of **Chama Cha Mashinani Elections Board & 2 others v Beatrice Chebomui [2017] eKLR**, the Honourable Court ruled that;

With respect, I agree with the submissions of Mr. Wanyama that the aforesaid mode of service is not recognised under Order 5 of the Civil Procedure Rules, 2010. That mode of service by electronic transmission.

The foregoing discourse clear shows that though some Courts are willing to flex the rules in exercise of their unfettered discretion to adopt technology in process service, other Courts feel that the law must be applied as is.

The amendment of the rules on Court process service to make them explicitly clear that electronic communication platforms can be used a substituted means of process service

¹⁴⁴ Omar Shallo v Jubilee Party of Kenya & another [2017] eKLR

would create certainty and uniformity on the issue of e-court process service and bolster the dispensation of justice.

3. 6 CONCLUSION.

The Civil Procedure Rules under Order 5 provides for two main modes of process service namely, personal service and substituted service. Personal service is deemed to be the best form of service for being effective and wards off the challenge of the Defendant later on saying that he did not receive the notices.

Nonetheless, where the Defendant for whatever reason cannot be reached for service, the rules allow a party to apply to Court seeking leave to use any of the substituted means of service. The use of e-court process service has been met with uncertainty due to the existing legal framework which does not expressly allow e-court process service.

CHAPTER FOUR

ELECTRONIC COURT PROCESS SERVICE; A CASE OF UNITED STATES OF AMERICA, INDIA AND SOUTH AFRICA.

4.1 INTRODUCTION

Process service is an integral part of any justice system. An efficient court process service has a direct bearing to access to justice. Most Countries Kenya included emphasise on personal service as the best mode of process service. Personal service is advocated for as many deem that it offers an assurance that the intended person actually received the documents compared to substituted modes of service such as advertisement, registered post and affixing on a conspicuous space in Court or place of residence.

Though personal service offers the best option to effect service at times it becomes difficult to trace the person to be served. Increased and frequent movement of people aided by improved means of transport poses a challenge to tracing people for personal service¹⁴⁵. Even where some of them are traced some will try to evade being served. Because of the realization that not all the time that personal service will be available different countries have developed rules allowing substituted means of service in line with improved technological developments in the communication sector.

Various alternative modes of service having devised with the sole aim of ensuring that parties are notified of a matter pending in Court. Before a party is allowed to use substituted means of service, he must satisfy that the Court that he has taken all reasonable actions to inform the other party.¹⁴⁶

The use of electronic communication platforms presents an opportunity to reach persons who should be served with court process documents but they cannot be traced physically for service. Some proponents of the use of electronic means of process service have argued that the use of such platforms should be used as a last resort whereas others advocate for use of electronic means just like any other means of substituted Court process service.

¹⁴⁵Annie Chen, "Electronic Service of Process: A Practical and Affordable Option" (2016), Cornell Law School J.D. Student Research Papers. 39. <http://scholarship.law.cornell.edu/lps_papers/39> at 1

¹⁴⁶ Ibid

The application of electronic service of process has been poised as a major step towards harnessing the advantages brought about by improved technology-increased spread and use of internet.¹⁴⁷

Justice Paul A. Engelmayer, United States District Judge New York in the case of **Federal Trade Commission v. PCCare247 Inc. et al**,¹⁴⁸ observed that;

And history teaches that, as technology advances and modes of communication progress, courts must be open to considering requests to authorize service via technological means of then-recent vintage, rather than dismissing them out of hand as novel.¹⁴⁹

Internet based electronic communication platforms have eased the way of doing business at all sectors. Internet based communication is relatively cheap, convenient, prompt and even maintains a record. Any record created on an internet platform may be difficult to change compared to paper-based record.¹⁵⁰

With the use of electronic communication though there could a challenge of verification of the authenticity of the account and delivery, it still presents a viable option to the various modes of Court process service. The use of electronic communication means will always be directed to a specific person.¹⁵¹ This presents a better likelihood of the notice reaching the target person unlike the use of newspapers.

To cure the problem of verification of genuineness of a social media account, many states have enacted laws criminalising the operation of accounts by ‘anonymous’ people or impersonation. The enforcement of such laws to ensure compliance would guarantee that the person whose address is available on a given social media platform is likely to be of the actual owner.

One of the means of substituted means of service used is by publishing the intended notice in a daily newspaper or newspapers with nationwide circulation. The assumptions made while

¹⁴⁷ Chen Ibid at 2

¹⁴⁸ 12 Civ. 7189 (PAE)

¹⁴⁹ Ibid

¹⁵⁰ Chen Ibid at 3

¹⁵¹ Ibid at 3

allowing the use of such an alternative means of process service is that the intended person will have a way of knowing about the notice. This alone is great misgiving as not all people read newspapers or have people who read newspapers on daily basis.

The use of daily newspapers in publishing notices can be compared to the use of public posts on social networking sites. For instance, the posting of a notice on WhatsApp or Facebook Group where the intended party is a member provides an efficient way of ensuring that there is 'personal service'.¹⁵² Where the intended party is not a member of a given group but there is evidence that its members comprise persons close to the intended party in a case where such a notice is posted to such group that offers even a more effective service than the use of newspapers.¹⁵³ Use of Facebook, WhatsApp among other will also have some other advantages over newspapers.

Facebook, WhatsApp among others despite having the public wall' or Group forums they also provide for private messaging service where you can send a message to the recipient private box. These platforms owing to their many uses from communication to news to advertisement are frequently used. Users of these platforms frequently visit them. Added features in these platforms also help senders of information to know whether the recipient has opened and read the message.

These platforms also have the advantage of having an independent notification system. To open a Facebook account one is required to use his phone number or his email address. Facebook setting provide for the owner of the account to allow Facebook to be sending notifications of any new posting to the phone number or email address provided. This ensures that one gets to know of pending notifications even before logging into his Facebook account. Nevertheless, the notification settings are optional and one can choose deactivate sending of notifications.

Justice Paul A. Engelmayer, United States District Judge New York in the case of **Federal Trade Commission v. PCCare247 Inc. et al**, observed that;

¹⁵² Ibid 4

¹⁵³ Ibid

The FTC would send a Facebook message, which is not unlike an email, to the Facebook account of each individual defendant, attaching the relevant documents. Defendants would be able to view these messages when they next log on to their Facebook accounts (and, depending on their settings, might even receive email alerts upon receipt of such messages).¹⁵⁴

This Chapter looks at the application of e-court process in three countries namely the United States, India and South Africa. The three Countries have made strides in amending necessary legislation to facilitate e-court process service. The Courts in these Countries have allowed the various electronic communication means such as Twitter, WhatsApp, Facebook, Email among others.

4.2 ELECTRONIC COURT PROCESS SERVICE IN THE UNITED STATES OF AMERICA.

The Federal Rules of Civil Procedure provides for the rules of procedure governing civil matters in the U.S. These Federal Rules mandates each State to make its own rules of procedure. Article 4(e),(1), (h)(1)(A) establishes that individuals and corporations may be served “following state law for serving a summons . . . in the state where the district court is located.”¹⁵⁵

Where personal service is impossible service can only be effected through substituted means as provided under the given state law. Most states apply the rule that “the court may allow service of process to be made in any other manner reasonably calculated to give defendant actual notice of the proceedings and an opportunity to be heard.”¹⁵⁶

In the United States of America the Standards for use of alternative means of Court process service were laid down in the case of **Mullane v. Central Hanover Bank & Trust Co.**¹⁵⁷ where the Court observed that notice to the parties must be;

¹⁵⁴

¹⁵⁵ Martha L. Arias, Internet Law - Service of Process through E-Mail: Is it Possible? <http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2347> Accessed on 05/09/2018

¹⁵⁶ *ibid*

¹⁵⁷ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)

Reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.¹⁵⁸

The core objective of service of court documents is to ensure that the opponent is given notice of any matter filed or pending before Court. On being served, a party is required to file his response thereto. Where a party is duly served and there is evidence before Court by way of return of service that he was indeed served but he fails to enter appearance, the Court will allow the plaintiff to proceed with the matter as undefended suit.

With the advent of improved communications platforms Courts have since the second half of the 20th Century recognised the need to embrace technology in Court process service. In the US District Court for the Southern District of New York case of **New England Merchants National Bank v. Iran Power Generation and Transmission Co.**¹⁵⁹ the Court in allowing the use of telex to effect court process service ruled;

I am very cognizant of the fact that the procedure which I have ordered in these cases has little or no precedent in our jurisprudence. Courts, however, cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.¹⁶⁰

In the year 2002, in **Rio Properties, Inc. v. Rio International Interlink**,¹⁶¹ in allowing the use of email to effect service the United States Court of Appeal for the Ninth Circuit confirmed three factors earlier on laid down by the trial Court in the matter to be considered in determining whether or not to allow service via email. Firstly, "prior attempts by the plaintiff to effectuate service by traditional methods. Secondly, the defendant's use of email for communication, and thirdly, evasion of service by the defendant."¹⁶² The Court in its words stated;

¹⁵⁸ Ibid

¹⁵⁹ *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73, 76 (S.D.N.Y. 1980).

¹⁶⁰ Ibid 81

¹⁶¹ *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002).

¹⁶² *Chen, Annie* Ibid at 5

We acknowledge that we tread upon untrodden ground. The parties cite no authority condoning service of process over the Internet or via e-mail, and our own investigation has unearthed no decisions by the United States Courts of Appeals dealing with service of process by e-mail and only one case anywhere in the federal courts. Despite this dearth of authority, however, we do not labor long in reaching our decision. Considering the facts presented by this case, we conclude not only that service of process by e-mail was proper—that is, reasonably calculated to apprise RII of the pendency of the action and afford it an opportunity to respond—but in this case, it was the method of service most likely to reach RII. To be sure, the Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide notice and an opportunity to respond (citation omitted). In proper circumstances, this broad constitutional principle unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance.¹⁶³

Losey has posited that “email combines the accountability of a pen-and-ink letter with the convenience of a phone call,”¹⁶⁴. Hedges on his part commends the use of email as it provides instantaneous delivery of information and one can be able to access the email from anywhere as long as he is connected to the internet.¹⁶⁵ These features also hold true to the recently developed social networking media such as Facebook, WhatsApp among others.

Many entities-individuals and corporates have embraced social networking platforms to reach out to their customers and clients. Social networking sites have also been used to keep people updated on matters of importance as well as keeping upto date on news. Social networking sites have also recently gained momentum on use as tools for fighting for bigger space on the protection of human rights. The increased use of social networking sites as a means of communication gives a reason for Courts to recognise them as a possible means of service of process.

Setting precedent over other nations in allowing use of internet for process service, Courts in the United States have recognised process service though the various social networking platforms. A Minnesota Court in **Mpafe v. Mpafe**,¹⁶⁶ in the year 2011 allowing service on the defendant on Facebook, Myspace, email or any other social networking stated that;

¹⁶³ Rio Ibid at 1017

¹⁶⁴ Adam C. Losey, Note, Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege, 60 FLA. L. REV. 1179, 1186 (2008)

¹⁶⁵ Ronald J. Hedges et al., Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts, 4 Fed. Cts(2009) at 57

¹⁶⁶ Mpafe v. Mpafe, No. 27-FA-11 (4th Dist. Family Ct. of Minn. May 10, 2011).

The traditional way to get service by publication is antiquated and is prohibitively expensive” and that “technology provides a cheaper and hopefully more effective way.¹⁶⁷

On 30th September 2016, the Court of Appeal in the United States District Court Northern District of California in the case of **St. Francis Assisi v. Kuwait Finance House; Kuveytturk Participation Bank Inc., Hajjaj Al Ajmi**; the Judge invoked Rule 4(f)(3) in allowing the Plaintiff to serve the defendant- a Kuwait National via twitter.

The developments in technology have even helped in tracking whether or not a message has been delivered. Various software advancements in various social networking platforms provide confirmation once a message is delivered and read. For instance, the blue tick in the case of WhatsApp among others.

Notwithstanding the fact that many Courts have appreciated the impact of technology on Court process service some courts still hold on the traditional modes of Court process service. In 2012, the District Court of the Southern District of New York refused an application to allow service via Facebook arguing that the request was “unorthodox” and found that Chase bank did not provide “a degree of certainty” about both the Facebook profile and the email address that was attached to it that would ensure that the defendant would receive and read the process.¹⁶⁸

In the case of **Ehrenfeld v. Salim A Bin Mahfouz**,¹⁶⁹ the Court in denying the use of service via email observed that “apparently only used as an informal means of communication,” the Court questioned the reliability of an email in ensuring that the Notice reached the Defendant. The Court was also concerned about the likelihood of the Defendant to be frequently checking his emails.

Courts at times require evidence that the recipient has been in touch with his account recently. A recent message received by the recipient or send by the recipient using a given a platform provides a sure of ascertaining activity of the account.

¹⁶⁷ Ibid

¹⁶⁸ Chen ibid at 10

¹⁶⁹ No. 04 Civ. 9641(RCC), 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005).

Through the enactment of the E-Government Act¹⁷⁰ in 2002 almost all Courts in the United States created websites. The Courts have also since then embraced electronic filing of Court records.¹⁷¹ Electronic filing of documents allows ease of access and retrieval of Court documents. It is also convenient and cost effective.¹⁷²

The United States Courts has been in the forefront in the use of technology in the various fields. The Courts have accepted the use of internet to effect process which has eased delivery of justice.

4.3 ELECTRONIC COURT PROCESS SERVICE IN INDIA

The Law governing court process service in India currently is the Civil Procedure Code (Amendment) Act, 1999 (46 of 1999). It became operational from July 01, 2002. Section 27, 28, 29, 143 and Order V (Rules 9 to 30), Order XXVII (Rule 4), Order XXIX (Rule 2), Order XLVIII (Rules 1, 2 and 3), Order III (Rules 3, 5 and 6), Order XXVIII (Rule 3), Order XXX (Rule 3), and Order XLI (Rule 14) of the Code of Civil Procedure govern the issues of process service in India. The Current Act in trying to match with time has made provisions allowing service of Court process through courier, Fax and e-mail. Order 5, Rule 21 and 24 were amended to include the 'Fax and Electronic Mail Services'.¹⁷³ Rule 9 allows service of court documents through any mode the Court would deem fit in the circumstances of the given case.

The Information Technology Act-2000 (ITA-2000) is the main cyber law in India. The Act recognises e-Documents and Digital Signatures as equivalent to the "Written" or "Typed" or "Printed" counterparts.¹⁷⁴

The use of email for service of Court documents has been in use for over two decades now. The use of email is poised as a "form of documentary evidence and can be admitted as

¹⁷⁰ Hedges Ibid at 58

¹⁷¹ Ibid

¹⁷² Ibid at 59

¹⁷³ Judicial Administration Of E-Governance available on

<http://shodhganga.inflibnet.ac.in/bitstream/10603/24096/13/13_chapter_8.pdf> at 292 accessed on 09/09/2018

¹⁷⁴ Ibid at 297

evidence in court in the same way as can other forms of documentary evidence”.¹⁷⁵ The users of the email service are always called up to take extra steps to ensure security of their accounts in line with the host’s security features.

An Email account unless guarded may be subject to cyber-attacks which would make it impossible for the owner to access emails meant for him before they are deleted or interfered with hence circumventing the course of justice. Users of emails are required to comply with the requirements of the BSI 'Code of Practice for Legal Admissibility and Evidential Weight of Information Stored Electronically' (the Code). Failure to comply with the Code may expose one to the challenge of unreliability of any data stored in the email.¹⁷⁶

The Supreme Court of India in **Central Electricity Regulatory Commission Vs National Hydroelectric Power Corpn. Ltd. & Ors.**¹⁷⁷ gave directions that in commercial cases and in cases where interim orders are granted service may be done through E-mail besides the traditional methods of process service.

In accordance with Part X and Order V, Rule 9 of the Code of Civil Procedure, 1908, the High Court of Delhi came up with 'Delhi Courts Service of Processes by Courier, Fax and Electronic Mail Service (Civil Proceedings) Rules, 2010'. These rules became operational in February 9, 2011. Rule 12 provides for use of email. Under Rule 15 a Court is allowed to issue orders for witness summons to issue via email.

In the matter of **KSL and Industries Ltd., (Formerly Known as Krishna Texport Industries Ltd.), vs Mannalal Khandelwal and the State of Maharashtra Through the Office of the Government Pleader** (Criminal Writ Petition No. 1228 of 2004), the Court noted that all practical means should be used to deliver summons to avert delays. The Court allowed service through email.

The Bombay High Court Appellate Side Rules, 1960, have also been amended with rule 5A being introduced which allows use of FAX or E-Mail in addition to the traditional modes of

¹⁷⁵ Ibid at 321

¹⁷⁶ Ibid at 321

¹⁷⁷ Civil Appeal No. 2010(D.21216/2010

process service. The use of the electronic means was allowed in urgent matters as well commercial cases.

Over the years, various Courts in India have interpreted the rules allowing use of electronic platforms broadly to accommodate the use of social media. On 23/03/2017, High Court Of Judicature at Bombay Ordinary Original Civil Jurisdiction Notice Of Motion (L) No. 572 Of 2017 In Suit (L) No. 162 Of 2017 the **Kross Television India Pvt Ltd & Anr Vs. Vikhyat Chitra Production & Ors**, the Court in reaffirming service through email and WhatsApp observed that;

I do not see what more can be done for the purposes of this motion. It cannot be that our rules and procedure are either so ancient or so rigid (or both) that without some antiquated formal service mode through a bailiff or even by beat of drum or pattaki, a party cannot be said to have been 'properly' served. The purpose of service is put the other party to notice and to give him a copy of the papers. The mode is surely irrelevant. We have not formally approved of email and other modes as acceptable simply because there are inherent limitations to proving service. Where an alternative mode is used, however, and service is shown to be effected, and is acknowledged, then surely it cannot be suggested that the Defendants had 'no notice'. To say that is untrue; they may not have had service by registered post or through the bailiff, but they most certainly had notice...¹⁷⁸

Where a party uses WhatsApp to effect service, he is required to attach a computer printout showing that indeed the information was sent. The print is able to show whether it was delivered or not. Double ticks would be evidence that the message was delivered. Double blue ticks are evidence that the message was delivered and read.¹⁷⁹

Notwithstanding, for party to be allowed to serve through any of the electronic means, a party must seek leave of the Court first. The applicant must demonstrate that all practicable efforts to use the ordinary means have been in futile. Allowing the use of electronic court process service is a matter of discretion of the Court.¹⁸⁰

¹⁷⁸ Kross Television India Pvt Ltd & Anr Vs. Vikhyat Chitra Production & Ors,

¹⁷⁹ Akanksha Jain, 'Double Tick' On WhatsApp Prima Facie Shows Summons Have Been Delivered, 4 May, 2018, <<https://www.livelaw.in/double-tick-on-whatsapp-prima-facie-shows-summons-have-been-delivered-read-order/>> accessed on 11/09/2018

¹⁸⁰ Lokesh Vyas, Admissibility of summons through Whatsapp in Legal Proceedings, May 20, 2018 <<https://blog.ipleaders.in/summons-whatsapp-legal-proceedings/>> Accessed on 11/09/2018

4.4 ELECTRONIC PROCESS SERVICE IN SOUTH AFRICA

The Uniform Rule of Court 4A came into operation on 27th July 2012. The key provisions are Rule 4 and 5. The rules govern the transmission of Court documents and notices. It provides for service of process other than that initiating application proceedings, by hand delivery, registered post, electronic mail or facsimile. Besides, provisions of the Electronic Communications and Transactions Act 25 of 2002, which relates to communication of data messages also applies.

Rules of procedure for service of legal notices have since 2012 changed extending the application of Chapter 3 of the Electronic Communications and Transactions Act. The amendments allowing the application of the Act to service of process by allowing admission of data messages by extension accommodates the use of social media platforms such as Facebook, BBM, WhatsApp among others.¹⁸¹

On 23rd August 2013 the Superior Courts Act No. 10 of 2013 which at Section 44, deals with delivery of summonses, writs and other process became operational. Section 44(1)(a) of the Superior Courts Act provides for two instances in civil proceedings before a superior court where service may take place by means of transmission by fax or any other electronic medium 'as provided by the rules.

KwaZulu-Natal High Court in Durban in the case of **CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens (KZD)**¹⁸² Steyn J in allowing service through a message on Facebook besides a notice being published in a local newspaper observed that;

Changes in the technology of communication have increased exponentially and it is therefore not unreasonable to expect the law to recognise such changes and accommodate them...

Courts, however, have been somewhat hesitant to acknowledge and adapt to all the aforesaid changes and this should be understood in the context that courts adhere to established procedures in order to promote legal certainty and justice.¹⁸³

Court further in appreciating the growing uses of Facebook noted that;

¹⁸¹ Ibid

¹⁸² CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens (KZD) (unreported case no 6846/2006, 3-8-2012)

¹⁸³ Ibid

Whilst the website is initially intended to be a social network service, the present application showed that it has developed to serve more than one purpose. For example it is being used as a tool for tracing individuals and in some instances to bring information to the knowledge of those individuals concerned.¹⁸⁴

Service via electronic means is regarded as an alternative means of service. Personal service is still deemed to be a superior means of service. Court in the case of CMC considered the following factors in granting an application for substituted means; “the nature and extent of the claim, the grounds on which the court has jurisdiction to entertain the claim, the manner of service the court is asked to authorise, the last known whereabouts of the person to be served, the inquiries that have been made to ascertain the person’s present whereabouts and any information that may assist the court in deciding whether leave should be granted and, if so, on what terms”¹⁸⁵ It also noted that it was on the applicant to prove that the use of Facebook was a viable option and that the notice would indeed reach the defendant.

Registered Short Messages Services have also been recognised as valid means of effecting process service.¹⁸⁶ As long as there is compliance with Section 19(4) of the Electronic Communications and Transactions Act, the Plaintiff can use registered SMS to deliver notices to the Defendant. However, this is no available to ordinary SMS.

4. 5 CONCLUSION.

Internationally, commendable progress has been made by courts from various countries in adopting the use of electronic communication in effecting. The use of technology in Court process service has witnessed great application in Countries which have made laws which permit the use of such methods. Use of internet to effect service has benefits such as being instantaneous, costs effective, convenient and user friendly.

The three countries discussed above have through their laws allowed the use of electronic communication platforms to effect service of process. The rules of procedure in these countries have been made flexible enough to allow even future technological developments.

¹⁸⁴ ibid

¹⁸⁵ P Farlam & DE van Loggerenberg Erasmus Superior Court Practice (Cape Town: Juta 2011) at B1-27

¹⁸⁶Registered-sms-communication-is-closing-the-door-on-defaulters <https://www.cellfind.net.za/registered-sms-communication-is-closing-the-door-on-defaulters/> accessed on 11/09/2018

Countries yet to make amendments to their laws to allow electronic court process service are yet to enjoy the benefits of advanced communication technology. Kenya can borrow greatly from the practice on e-court process service in these countries.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 INTRODUCTION

This study sought to find out the current legal framework on service of court process with a keen interest on the availability of electronic means of effecting service and the viability of electronic process service in the Kenyan Legal System. The study also centred on the use of internet based service of process in three countries namely the United States of America, India and South Africa.

5.2 FINDINGS

5. 2.1 Chapter 1.

The study established that technological advancements in the communication world has changed in a great way they way communication and businesses are done. From individuals to corporations to Government agencies, technology has become the way of doing things.¹⁸⁷ Developments such as the creation of social media platforms such as Facebook, WhatsApp, Twitter, Telegram and Instagram among others have revolutionised the communication world in a very big way. The ability to relay messages and respond instantaneously using these platforms coupled with being cost effective has made the use of these platforms inevitable in all sectors. Further, improved infrastructure and the availability of internet enabled gadgets more specifically mobile phones has been a propeller of the new way of doing things.¹⁸⁸

Communication has never been as easy as is now. These diverse technological developments has made it easy to communicate with anyone anytime from any place. The inventions has brought about increased convenience and efficiency.

Chapter 2.

This Chapter looked at some of the relevant legislations relevant to e-court process. The Chapter makes highlights on the legal provisions on electronic signatures, identity, authentication, attribution and admissibility of electronic evidence all which have a bearing on e-court process service.

¹⁸⁷ See Generally Sustaining Judiciary Transformation(SJT) Supra Note 5

¹⁸⁸ The Standard Digital, last amended on 18th March 2015, <<https://www.standardmedia.co.ke/article/2000162611/how-ict-drives-kenya-s-economic-growth>> Accessed on 20/09/2018/2018

The study also found that Government agencies such as the Judiciary have adopted the use of technology to assist in the management of their activities. In the Kenyan Judiciary, technology is being used in filing of court papers, payments of court fees, transcription of Court proceedings, video conferencing, service of Court process service, examination and recording of evidence, general communication among others.¹⁸⁹

Chapter 3.

The research highlighted on the importance of service of process. Service of process is a very important step in any given trial. It is the rule that once a party files documents in Court, the must be served. Service is intended to bring to the attention of the defendant that a suit has been filed calling upon him to file his response. Where there is evidence that though the Defendant was served but has refused to enter appearance, the Courts will always allow the Plaintiff to proceed with the case undefended.¹⁹⁰

The research also looked at the legally recognised methods of service which have more of a universal application which include personal service, service through an authorised agent, service via affixing of copy of summons in an open space in court or the defendants place of residence, business or work, service via advertisement among others.

The study found out that personal service is poised to be the best form of service. Whenever practicable, parties are always advised to first try to effect personal service. Some parties whenever they know that they are likely to be faced with civil suit may be in cases of breach of contracts will by all means try to dodge service of court documents with an aim of frustrating the plaintiff. There is also a challenge when it comes to effecting service in people in high positions in the society as it was witnessed in the Mwai Kibaki case (*Supra*) after the disputed 1992 elections. Where personal service is impossible, a party will be allowed with leave of the Court to serve the Defendant through any of the other alternative means.

The use of these alternative forms of service comes with their own challenges. For instance, if it is affixing the documents at the place of residence, business or work of the defendant, if

¹⁸⁹ See Generally Sustaining Judiciary Transformation(SJT); A service Delivery Agenda- 2017-2021 < http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf> Accessed on 20/09/2018

¹⁹⁰ Order 12 Rule 1 & 2, Civil Procedure Rules 2010

the defendant has already moved, it would mean that that person may never get to know of the documents.

In the case of use of newspapers, firstly, it is usually very expensive, not many litigants will afford and not all people read newspapers or have people they are close to who read newspapers such that they can inform them of any newspaper notice.

The use of the Post office has also become unpopular. Indeed, in appreciating the impact of technology, the Kenya Postal Corporation is now calling upon members of public to open mail boxes synchronised with their phone numbers.¹⁹¹

The research also found out that Kenya has lagged behind in amending its rules of procedure to align with new technological developments. Since rules on procedure relating to issues such as service are always laid down in legislations, where there is lack of a proper legislation allowing the use of electronic means of service, courts have been left with no option than observing that though the use of these platforms would ease the way of doing things, nevertheless unless legislation was enacted permitting the use of such platforms such as social media use of such platform remain impossible. For instance, the dilemma in Kenya.¹⁹²

Having clear legislation on the use of technology in effecting service brings about certainty as parties know the means which have been authorised and the circumstances in which they can be used.

Chapter 4

It was a finding of the research that the adoption of use of technology in service of process has helped in access to justice. In the Countries which have employed the service of court documents via electronic communication platforms, it has helped in tracing evasive parties or parties who would not have been easy to reach to effect service. E- process service has come with other benefits such as being cheaper compared to some alternative forms of service such as advertisement in local dailies among others. E-court process service also has the advantage

¹⁹¹ See <http://www.mpost.co.ke/> accessed 20/09/2018

¹⁹² See *Omar Shallo v Jubilee Party of Kenya & another* [2017] eKLR where the Court ruled that service through WhatsApp was unheard of in law.

of being instantaneous. Further developments in the social media platforms such as WhatsApp have also made it possible to know that a message has been received and has even been read by the recipient.

After looking at the countries which have embraced the use of e-court process service, the findings back the need for Kenya to amend its existing rules on process service to march with the new technological developments.

5.3 CONCLUSION

The study set out on the premises that Kenya is yet to formulate a legislative framework allowing the use of technology in court process service. This research sought to explore the availability and the viability of use of electronic communication platforms such as text messages, email, Facebook, Twitter, WhatsApp, and Instagram as alternative modes of Court process service to bolster delivery of justice. The study also sought to make recommendations for review of existing court process service rules to facilitate application of technology in Court process service in Kenya.

The research has indeed established that though the judiciary acknowledges technology as 'enabler of justice'¹⁹³ the current rules on process service do not allow the use of improved communication platforms to effect service. Cases and the proceedings which ensue are all about communication. The plaintiff must notify the other party of a pending case. Over the years we have use the traditional methods. As a country, we have not matched the pace of technological advancements by amending the rules on court process service to accommodate the use of electronic means to serve legal documents.

The research has shown that there exists electronic modes of service which other countries have embraced. Amending the rules on court process service will create certainty and uniformity in the use of technology in court process service in Kenya.

¹⁹³ Sustaining Judiciary Transformation(SJT); A service Delivery Agenda- 2017-2021, at 46 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf> Accessed

5.4 RECOMMENDATIONS

5.4.1 Need to amend rules on process service in Kenya

The Civil Procedure Rules 2010 Order 5 and other rules¹⁹⁴ on process service in Kenya lists the following as main modes of Court process service; Personal service, Service upon agent, Service by leaving at the place of residence, business, office or work, Service via registered post or courier, Service by pinning at an open place on a building and Service via Publication. The rules do not envisage the use of electronic means as a way of effecting court process service.

The findings in this study back the viability on the use of electronic communication platforms as a means of court process service. There is need to tap the benefits of wide spread use of new electronic communication means to effect service. A review of Order 5 Civil Procedure Rules and other laws governing the service of court documents to allow use of electronic communication platforms to serve court documents will give Courts powers to allow the use of such means as alternative forms of service. It will also create certainty and uniformity.

5.4.2 Factors to be considered in allowing an application of substituted service through electronic means

In considering such an amendment, the Legislature needs to factor in the considerations to be made by the Courts before allowing an application to serve through electronic means. Currently, some Courts require that documents to be filed to include an email address and a phone number. There is need to make clear provisions for universal application across the country. To secure any eventualities which may occur where only one email is provided, parties may be required to provide at least two email addresses and at least two phone numbers.

On the use of electronic communication platforms, provisions need to be made requiring that for an applicant to be allowed to serve through for instance WhatsApp, Facebook and other

¹⁹⁴ See the Supreme Court (Presidential Election Petition) Rules, 2017 (L.N. 113/2017), Court of Appeal (Election Petition) Rules, 2017 (L.N. 114/2017), Elections (Parliamentary and County Elections) Petitions Rules, 2017 (L.N. 116/2017), The Probate and Administration Rules among others.

platforms operating using similar systems, they will need to provide evidence that indeed the person intended to be served is the owner of the sated account and that there has been recent activity. Recent activity may relate to a scenario where the Applicant received a message from the person be served on even an update by the owner of the account on his timeline. It can also be where in the case of fro instance, WhatsApp, the parties exchanged phones numbers where a party is active on WhatsApp. Recent activity can also relate to a contribution or an update on a Group where that person is a member.

Where there could be a question as to the authenticity as to the owner of the account, provision can be made that the Applicant do provide a background information as to when such a person started using the platform and how frequently he has been using it. This will cure the challenge of 'fake accounts' being created in the name of the person to be served with the sole aim of showing the court that there exists an account under the person's name.

There can also be a requirement that the account should have been in use for a given set time or even it has been in use for at least a given period of time. There is also need to make provision- based on the instantaneous nature of use of such platforms, there be a requirement that service should be effected within a given period of time.

5.4.3 Proof of service

Once service is effected, there is need for clear provisions on proof of based on the account operator settings which prove that indeed the message was delivered. For instance, in the case of email, a delivery notification. In the case of WhatsApp, the double tick for delivery and the double blue tick which shows that the message has been read.¹⁹⁵

Recent exchange of messages between the parties over the same account or even recent postings after the message was sent would be clear evidence that the recipient indeed saw the message. Whether he read it, deleted it or ignored it should not to be a basis to deny that there was service. As long there is evidence of delivery and recent activity such evidence of reading the message or posts on one's wall will be clear evidence that indeed the recipient got the message and as such there was service.

¹⁹⁵ Akanksha Jain, MAY 4, 2018, 'Double Tick' On WhatsApp Prima Facie Shows Summons Have Been Delivered <https://www.livelaw.in/double-tick-on-whatsapp-prima-facie-shows-summons-have-been-delivered-read-order/> accessed on 11/09/2018

The amendments can also provide for use of at least two modes of service. This can entail the use of one of the traditional methods or the use of social media.

5. 5 CONCLUSION.

Kenya has for long been commended for its increased use of internet and more specifically on the use of electronic communication platforms such as Twitter, WhatsApp, and Facebook among others. These new modes of communication have provided effective, instantaneous, convenient and cheaper ways of passing information.

In Court proceedings, it is a requirement that the plaintiff must always effect service of process on the Defendant. Currently, the main methods of process service which are widely accepted according to the relevant law include personal service, service on an agent, service through registered post, service through advertisement, service through affixing the court documents at a conspicuous place in a Court House, Defendant's place of work, residence or business.

The Rules on procedure on Court process service need to be amended to express provide for use of electronic communication platforms as alternative means of court process service. This will bolster delivery of justice.

BIBLIOGRAPHY

BOOKS AND JOURNALS

Bagozzi, R. P. et al, , "Development and test of a theory of technological learning and usage.", Human Relations, Vol 45, Issue 7, (1992).

Cantor, Rachel Internet process service, A constitutionally Adequate alternative?, The University of Chicago law Review, B Vol. 66. No. 3 (Summer, 1999),

Davis, F. D. "Perceived usefulness, perceived ease of use, and user acceptance of information technology", MIS Quarterly, **13** (3) (1989).

DeLone W. H. et al, "The DeLone and McLean Model of Information Systems Success: A Ten-Year Update". Journal of Management Information Systems (2003)

Graham J.H Smit et all, internet Law and Regulation, 4th Edition, (London: Sweet and Maxwell, 2007)

Hedges R.J et al., Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts, 4 Fed. Cts(2009)

Losey, A.C. Note, Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege, 60 FLA. L. REV. 1179, 1186 (2008)

Murungi, M, Cyber law in Kenya, The Netherlands, Kluwer Law International, 2011

Rogers, Everett Diffusion of Innovations, 5th Edition, New York: Free Press (2003) at 6

Masonari, K, - Applicability of Electronic Technology in the Course of Civil Procedure in Miklós Kengyel & Zoltán Nemessányi, Electronic Technology and Civil Procedure; New Path to Justice from around the World, Springer Netherlands(2012).

Sheilla, J. N. Science at the Bar: Law, Science, and Technology in America, a Twentieth Century Fund book (Cambridge, MA: Harvard University Press, 1995)

Tamayo, Y. A. , Catch me if you Can; Serving US Process on an elusive Defendant abroad, Harvard Journal of Law and Technology, Vol. 17, No. 1, Fall 2003

REPORTS

Communication Authority of Kenya, First Quarter Sector Statistics Report For The Financial Year 2017/2018 (July-Sep 2017)

<<http://www.ca.go.ke/images/downloads/STATISTICS/Sector%20Statistics%20Q1%20%202017-18.pdf>,>

Sustaining Judiciary Transformation(SJT); A service Delivery Agenda- 2017-2021, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf> Accessed 11/11/2017.

PUBLISHED THESES

J. A. Makau, Factors Influencing Management of Case Backlog in Judiciary in Kenya a Case of Courts within Meru and Tharaka Nithi Counties, University of Nairobi, 2014,

<http://erepository.uonbi.ac.ke/bitstream/handle/11295/74133/Makau_Factors%20influencing%20management%20of%20case%20backlog%20in%20judiciary%20in%20Kenya.pdf?sequence=3&isAllowed=y> Accessed 14/11/2017

Martin M. Mbui, Transforming Legal Process through Technology Kenyan case; The Reality, The Possibility, The Promise. <

<http://www.kenyalaw.org/LVI2014/docs/LegalProcessThroughTechnology.pdf>> Accessed 23/5/2018

Mbugua Kabiro Chrispine, Influence of the electronic Case Management System on the Effectiveness of Court Service Delivery; the Case of Eldoret Court Station, Kenya, University of Nairobi, 2012, at <

http://erepository.uonbi.ac.ke/bitstream/handle/11295/10911/Mbugua_Electronic%20case%20management%20system.pdf?sequence=4> Accessed 14/11/2017

ARTICLES

1. Akanksha Jain, 'Double Tick' On WhatsApp Prima Facie Shows Summons Have Been Delivered, 4 May, 2018, <<https://www.livelaw.in/double-tick-on-whatsapp-prima-facie-shows-summons-have-been-delivered-read-order/>> accessed on 11/09/2018
2. Admissibility of Video/Electronic Evidence in Kenya - What you see is not what you get <http://chelanga-advocates.blogspot.com/2012/06/admissibility-of-videoelectronic.html>> Accessed 05/06/2018
3. Bill Belsey, Cyberbullying: An Emerging Threat to the "Always On : ' Generation (Cochrane, Alta: Cyberbullying.ca, 2007) available at <<http://wvlw.cyberbullvina.ca/pdf/Cyberbullying.pdf>> accessed 05/06/2018
4. Chen, Annie, "Electronic Service of Process: A Practical and Affordable Option" (2016), Cornell Law School J.D. Student Research Papers. <http://scholarship.law.cornell.edu/lps_papers/39>
5. A. Crandall et al, Mobile Phone Usage at the Kenyan Base of the Pyramid, November 2012, <https://blogs.worldbank.org/ic4d/files/ic4d/mobile_phone_usage_kenyan_base_pyramid.pdf>
6. Cambridge Dictionary < <https://dictionary.cambridge.org/dictionary/english/electronic-transaction>> accessed on 25/06/2018
7. Catherine Kessedjian, Preliminary Document No. 7 on Electronic Data Interchange, Internet and Electronic Commerce, at <ftp://hcch.net/doc/gen-pd7e.doc> (April 2000).
8. Chris Neumeyer, US Court Approves International Service of Process by Facebook < <https://lettersblogatory.com/2013/03/15/us-court-approves-international-service-of-process-by-facebook/>> accessed on 06/09/2018
9. <https://legaldictionary.net/cybercrime/> Accessed 06/06/2018
10. < <https://www.techweez.com/2018/05/24/computer-misuse-cybercrimes-act/>>
11. <http://www.mpost.co.ke/> accessed 20/09/2018
12. Haynes and Boone LLP "You've been served" - Federal court permits service of process via Facebook <<https://www.lexology.com/library/detail.aspx?g=3c0c2df9-f9b3-45a6-bd73-fac93a2d4d2d>> Accessed on 06/09/2018
13. John M. Kandiri , ICT Policy in Kenya and Ways of Improving the existing ICT Policy, a Paper presented to the Management Science Students Association, UON
14. Judicial Administration Of E-Governance available on <http://shodhganga.inflibnet.ac.in/bitstream/10603/24096/13/13_chapter_8.pdf> at 292 accessed on 09/09/201

15. Legal Dictionary, < <https://legal-dictionary.thefreedictionary.com/Service+of+Process>>Accessed on 05/03/2018.
16. Lillian Aluanga-Delvaux, '*Why the court process servers are not sitting pretty*', Standard Digital, Sat, April 13th 2013, <<https://www.standardmedia.co.ke/article/2000081402/why-the-court-process-servers-are-not-sitting-pretty>> accessed on 01/03/2018
17. Lokesh Vyas, Admissibility of summons through Whatsapp in Legal Proceedings, May 20, 2018 <<https://blog.ipleaders.in/summons-whatsapp-legal-proceedings/>> Accessed on 11/09/2018
18. Martha L. Arias, Internet Law - Service of Process through E-Mail: Is it Possible?<http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2347> Accessed on 05/09/2018
19. On WhatIs.com <http://whatis.techtarget.com/definition/Twitter>
20. P Farlam & DE van Loggerenberg Erasmus Superior Court Practice (Cape Town: Juta 2011) at B1-27
21. Registered-sms-communication-is-closing-the-door-on-defaulters <https://www.cellfind.net.za/registered-sms-communication-is-closing-the-door-on-defaulters/> accessed on 11/09/2018
22. Sasaka, Admissibility Of Electronic Evidence In Kenya, January 8, 2017, < <https://sheriamtaani.wordpress.com/2017/01/08/admissibility-of-electronic-evidence-in-kenya/>> Accessed on 05/06/2018
23. State of the Internet in Kenya 2017 < <https://www.ifree.co.ke/wp-content/uploads/2018/02/State-of-the-Internet-in-Kenya-report-2017.pdf>>accessed on 08/10/2018
24. Steven W. Teppler 28 November 2011, The Continuing Relevance of Personal Service of Process; National law Review; <<https://www.natlawreview.com/article/continuing-relevance-personal-service-process>> accessed 20 March 2018
25. The Cambridge English Dictionary, < <https://dictionary.cambridge.org/dictionary/english/facebook>> -Accessed 03/01/2017.
26. The Standard Digital, last amended on 18th March 2015, <<https://www.standardmedia.co.ke/article/2000162611/how-ict-drives-kenya-s-economic-growth>>

27. What Is “Process?” Certified Civil Process Server Program,
<<https://www.jud11.flcourts.org/docs/Process%20Server%20Manual%202017.pdf>>
Accessed on 01/03/2018.
28. Vincent Mwangi, ‘*Court dismisses Kibaki petition against Moi*’, Daily Nation, FRIDAY
JULY 23 1999, <https://www.nation.co.ke/news/1056-389344-1787gez/index.html>
accessed on 01/03/2018
29. Waweru Titus, ‘*Activist Omtatah blocked from serving CA court orders to suspend media shutdown*’ Standard Digital,
< <https://www.standardmedia.co.ke/article/2001268247/activist-omtatah-blocked-from-serving-ca-court-orders-to-suspend-media-shutdown>> Accessed on 01/03/2018
30. What is electronic signature?
<<https://ec.europa.eu/cefdigital/wiki/pages/viewpage.action?pageId=46992760>>
Accessed on 06/06/2018