APPLICATION OF THE COMMON LAW DOCTRINE OF EQUITY IN THE UGANDAN LEGAL SYSTEM

BY:

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DECLARATION

I, **Nakajubi Justine Mufumbya LLB/20010/82/DU** declare that this dissertation is as a result of my own efforts. To the best of my knowledge, it is original and has never been submitted to any University or Institution for any academic award.

I henceforth present it for the award of Bachelors of Laws Degree.

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APPROVAL

This dissertation under the topic **"APPLICATION OF THE DOCTRINE OF EQUITY IN THE UGANDAN LEGAL SYSTEM"** has been under my supervision and guidance as the Kampala International University Supervisor, I hereby approve it as ready for examination.

Signature _____

DR. CHIMA MAGNUS

Supervisor

Date 19-9-2023

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DEDICATION

Man has not yet invented language which can truly bring out his/her tried and true sentimental passionate attachment to those dear and special to him/her. No matter how hard I strain to find the terms which can accurately enact what I mean, I fail to get any. All I can do is to dedicate this book to them.

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Attorney General Vs Major General David Tinyefunza Constitutional Application no.1 of 1997

Banco Arabe Vs Bank of Uganda Civil Appeal No.8 of 1998

Bruno Kiwuuwa

Central London Property Trust Ltd Vs High Trees House Ltd (1947) KB 130

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Westdeusche Vs Islington London Borough Council Constitutional Petition No.2 of 2001

TABLE OF AUTHORITIES /STATUTES

The Constitution of the Republic of Uganda 1995 as Amended

The Judicature Act Cap 13

The Magistrates Court Act Cap 16

The Insoivency Act Act 14 of 2011

The Partenership Act Cap

The Succession Act

ABSTRACT

The study basically introduces equity as a law and its application in the Ugandan legal system. Equity was first introduced in Uganda through the **Reception clause** of the 1902 Order in Council which formalized colonial rule in Uganda and was the fundamental law of the protectorate.

Equity later through its constant use and adoption was promulgated in the **Judicature Statute** and currently still in existence in the **Judicature Act Cap 13** which Act was commenced with the spirit to consolidate and revise the Judicature Act to take into account the provisions of the constitution relating to the judiciary.

The researcher arrived at the findings of the study through desk researching which included reading of already available information about the topic, internet, textbooks and any other literature available.

The study further narrowed down to equity application in Uganda with specific reference to the constitution 1995 as Amended, the Statutes and case law on the same to find out how it is applied and the challenges it faces as a law applicable in Uganda and how effective the loopholes or lacunae can be remedied.

With regard to the application of equity in Uganda, two cases stand out; **Attorney General Vs David Tinyefunza and Uganda Association of Women Lawyers Vs Attorney General** which highlighted and gave an effect on the development of constitutionalism in Uganda as both courts that is the Constitutional and Supreme observed that the Constitution is the supreme law and can wipe out rules of court by rendering them void for being inconsistent with any of its provisions.

Further more, they highlighted the trend that the court chose to take with regard to procedural rules against substantive justice, the trend that procedures can be compromised to deliver justice as the constitution is meant to safeguard rights and not procedure.

TABLE OF CONTENTS

DECLARATION i
APPROVAL ii
ACKNOWLEDGEMENT iii
DEDICATION iv
TABLE OF CASES. v
TABLE OF AUTHORITIES /STATUTES vii
ABSTRACT viii
TABLE OF CONTENTS ix
CHAPTER ONE 1
GENERAL INTRODUCTION OF THE STUDY 1
1.0Background of the study 1
1.1 Definition of equity 1
1.2 The common law 2
1.3 The development of equity. 4
1.5 Statement of the problem 8
1.6 Justification of the study 11
1.7 Objective of the study 11
1.8 Specific objectives of the study 12
1.9 Significance of the study 12
1.10 Methodology 13
1.11 Data collection 13
1.12 Data analysis 13
CHAPTER TWO 14
LITERATURE REVIEW 14
2.1 Introduction 14
CHAPTER THREE 22
LEGAL SYSTEM OF EQUITY AND ITS PRINCIPLES. 22
3.0 Introduction 22
3.1 The legal system of equity. 22
3.2 General principles 24
3.2.1 Introduction 24

3.2.2 Equity will not suffer a wrong to be without a remedy 25
3.2.3 Equity follows the law 26
3.2.4 He who seeks equity must do equity 26
3.2.5 He who comes to equity must come with clean hands. 27
3.2.6 Equality is equity 28
3.2.7 Equity looks at substance rather than form. 29
CHAPTER FOUR 30
RELATION BETWEEN EQUITY, COMMON LAW 30
AND CUSTOMARY LAW. 30
4.1 Introduction 30
4.2 Relationship between equity, law and common law. 30
4.3 Relationship between equity and customary law 38
CHAPTER FIVE 43
DOCTRINES OF EQUITY 43
5.0 Introduction 43
5.1 Specific performance 43
5.2.1 Defenses 44
5.3 Trusts 45
5.4 Estoppel 48
CHAPTER SIX 50
CHALLENGES FACING THE APPLICATION OF EQUITY 50
6.1 Introduction 50
6.2 General challenges faced by equity. 50
6.3 Challenges facing equity in Uganda 51
6.4 Conclusion 53
CHAPTER SEVEN 54
7.0 Introduction 54
7.1 Various recommendations 54
7.2 Conclusion 56
LIST OF REFERENCES 57

CHAPTER ONE

GENERAL INTRODUCTION OF THE STUDY

1.0Background of the study

1.1 Definition of equity

Equity is a distinct body of rules that seeks to introduce ethical values in to the legal norms. In this respect one commentator once explained that equity consists of a set of legal principles entitled by the extrinsic superiority to supersede the older law.

In its latter definition which properly explains the idea of equity in the England legal system, it will be observed that equity in the England legal system is not a system of law based on what is necessarily fair on any given set of facts, on this ground one judge commented ***"English law does not possess a jurisdiction to administer palm tree justice."*** [1]

Equity to a layman means fairness and justice; the latter was defined by the **Roman Emperor Justinian** as the set of constant purpose which gives every man his due. Clearly it can be defined as right doing, good faith, honest and ethical dealings in transactions or relationships between individuals. Equity is whatever is right and just in all human relations and transactions, therefore it can be said that equity is based on morality and is clearly linked to what is normally exhorted or taught in churches and mosques and in any other religious establishments.[2]

The **term equity** has a broad popular sense and a narrow technical sense, in its popular sense, equity is practically equivalent to natural justice or morality

[1] Pearson Introduction to Equity Higher Edition
[2] D.J Bakibinga Equity and Trusts pg.1

yet, it would be a mistake to suppose that the principles of equity as administered in the courts and described are co-extensive with the principles of natural justice.[3]Equity is a doctrine which permits judges to make decisions based on fairness, equality, moral rights and natural law.

1.2 The common law

The common law is a body of English law which originated with an oral tradition of tribal justice in Britain thousands of years ago and which developed into a unique, cohesive national body of law (the realm) developed and set to writing by English judges over time, and which was eventually imported as the law of British colonies throughout the world such as Uganda and India.[4]

In fact it is the legal setting of England and it was through the Royal courts of Justice that the common customs of the Realm were transmitted into common law. In **R Vs Rusby**[5], Justice Kenyon wrote,

"the common law, though not to be found in the written records of the realm, yet has been long well known. It is coeval with civilized society itself, and was formed from time to time by the wisdom of man."

Before the advent of equity in England, there **was common law** which was administered by the king's council, the council carried out three main functions of state namely, legislative, executive and judicial. It dealt with all cases in which the king had a direct interest like breach of the peace.

Eventually, the courts split off from the council and formed the main common

[3] R.E Megarry & P. V Baker Snell's Principles of Equity pg. 5
[4] Emmerglick LJ, 'A Century of the New Equity (1945)
[5] (1800) 170 ER 241

law courts, the court of Exchequer which dealt with the collection of revenues was the first to separate, in the reign of Henry 1 (1100-1135), the court of common plea stayed in Westminster Hall to deal with disputes between individuals, while the king's council travelled round the country and the court of king's Bench separated sometime after 1230.

Under the common law, the most prevailing system was the **writ system** whereby any proceeding had to be started with the issue of an original writ. A **writ** is a formal document addressed to the sheriff of the county where the defendant resided commanding him to secure the presence of the defendant at the trial and setting out the cause of action or the ground of the claim of the plaintiff.[6]

The writs were very specific and if there was no writ suitable to the civil claim made or the relief required by the law was inadequate, the plaintiff was at a severe disadvantage, so it can be said that the writ system dominated the civil law. Where ***there was no remedy, there was no right***. Over a long period of time, the writ system became extremely formal and beset with technicalities and claims would only be allowed if they could fit into an existing writ. The rule was ***no writ no remedy*** for example certain writs of trespass would only be issued for those acts done with force and arms against the king's peace. If the two requirements were not met, a person had no claim.
Even when a writ was obtained, the judges would spend more time examining the validity of the writ than the merits of the claim. Attempts to alleviate this writ system was made for example issuing new writs thus expanding the rights available, this was through the **Statute of Westminster II** which authorized the clerks to issue new writs but only if they were in like cases to those before 1258, this was restrictive and made further development of common law very technical.

[6] Colin Padfield Law Made Simple pg. 14

But later on, the provisions **of Oxford 1258** forbade the practice of creating new writs and as a result, certain wrongs went unremedied merely because they did not fall within the limits of the existing writs. **Disappointed litigants** began to petition the king as the fountain of justice, the procedure being to present a petition or a bill asking him (the king) to do justice in respect of some complaint. For a time being, the king in council determined these petitions himself but as the work increased, he passed them to the **chancellor as the keeper of the king's conscience**.

1.3 The development of equity.

Equity in its broad understanding has long been a fundamental part of the law, its history may be traced through principles illustrated in the Old testament of the Bible for example in Deuteronomy and in various formulations, through ancient Greek and Roman legal constructs as well as in natural law and common law.

The period of the **Norman Conquest** to the reign of Henry III in the 13th century witnessed the inception and rapid growth of the common law which was administered by the king's justices on circuit.

By then, the need of a separate court of equity was not yet felt, for the king's court which was not so much hampered by many statutes or accurately by formulated case law was able to administer equity.

Thereafter, the common law courts were fettered by both precedents and by provisions of **Oxford 1258** which restrained the chancellor from issuing new types of writs in his own initiative.
Although common law continued to develop, perhaps under the somewhat limited authority of **the Statute of Westminster II 1258**, prevented it from

developing fast enough to do justice in all cases.

In the rough days of the 13th century, a plaintiff was unable to obtain a remedy in the common law courts**. Other faults** in the common law were common law courts used juries who would be intimidated and corrupted, common law had only one remedy damages which was often inadequate. Further, common law paid much attention to formalities for example if a contract was made which required written evidence for its enforcement, then lack of such evidence meant that the common law courts will grant no remedy.

In the early development of equity, equity was developed by the court of chancery in the medieval ages to iron out the deficiencies of the common law and correct unconscionable conduct. The need for a separate court to administer equitable relief arose from the deficiencies of the common law in the middle ages in particular the common law failed to address new legal problems simply because of the rigidity of the writ system that is unavailability of a writ to initiate proceedings because of no recognized cause of action.[7]

Even where a recognized action existed, there was the problem of an appropriate remedy to resolve the dispute between the defendant and the claimant. However it was not simply the fact that a remedy was inappropriate.

In many cases even though a remedy existed, it was simply not forthcoming for the claimant, the principal reason being for this was that in many cases, the rich and powerful individuals could influence both the courts and he jury resulting in the fact that justice was simply not forthcoming for the very weak and vulnerable, equity as administered by the early chancellors was not defeated by those constraints.

In **1474**, the chancellor issued the first decree in his own name, which began

[7] Pearson (ibid)

the **independence of the court of chancery from the king's council**. Equity was not bound by the writ system and cases were heard in English instead of Latin, the chancellor did not use juries and he concerned himself with questions of fact.[8]

1.4 Equity in Uganda

Broadly Africa in general has diverse legal systems with each system having its own strengths and weaknesses, while some countries have a civil law system for example South Africa, Mozambique, Rwanda, Namibia and Burundi, other countries have a common law system for example Tanzania, Kenya, Malawi, Zambia, Zimbabwe and Uganda. Given the immediacy of the colonial past, it comes as no surprise that English ideas and values are prevailing in Ugandan law. [9]

In Uganda, **before colonialism** or rather **pre-colonial Uganda** was made up of a diversity of socio-political organizations ranging from powerful kingdoms for example Buganda and Bunyoro-kitara with their million subjects[10] to small non-centralized societies such as Bamba, Bakonjo, Bagisu and Bakiga whose organization was based on clans and lineages.

These pre-colonial communities had their own laws which governed them as they lived peacefully among themselves because of the laws, these laws were native and customary laws which were administered by the king in societies which had kingdoms, by chiefs in societies which had chiefdoms, by clan leaders in societies with clans and also elders played a very big role.
Until 1894, the sovereign state we now know as Uganda was in constitutional

[8] Equity Lecture notes-law teacher
[9] Evelyn B. Edroma Sector Wide Application in Justice, Law and Order
[10] Accordint to William Kaberuka, the political, economic of Uganda 1890-1979 (A case study of colonialism and under development pg. 33, Bunyoro Kitara embraced the whole of western, central and southern Uganda while Buganda embraced Busoga, Koki and Kiziba.

terms unknown even though its constituent parts predated it having been in existence long before it was made a state, thus it was born in**1894** when it was declared a **British protectorate**[11]. With this declaration, Uganda came into the ambit of **the Africa Order in Council 1889** which authorized the local consul to establish local jurisdiction under which he was to exercise power.

Equity like any other law of England was received through the **Uganda Order in Concil1902** which formalized colonial rule in Uganda and was the fundamental law of the protectorate through the reception clause . **Section 15(2)** thereof contained the Reception clause which empowered the commissioner to apply any law of the United Kingdom in Uganda. Through this the Evidence Act cap 43, the Contract Act cap 75, Companies Act cap 85, Penal Code Act cap 106 from India came to Uganda and the Reception date of Uganda was **11 August 1902**.

The 1902 Order in Council started with the following opening statement
"whereas by treaty, grant, usages, sufferance and other lawful means, His Majesty has power and jurisdiction in the Ugandan protectorate now therefore by virtue and in exercise of the power conferred on His Majesty by the Foreign Jurisdiction Act, it is ordered as follows....."[12]

Importantly to equity was **the Reception clause** under the **1902 Order in Council** which empowered the commissioner to apply any law of the United Kingdom to the protectorate of Uganda that is how common law and equity and statutes of General Application came to be administered in Uganda.
Further, also important to note is the **Repugnancy clause** which was so important in relation to the introduction of equity in Africa in general and in Uganda in particular. The clause recognized native laws and customs subject

[11] G . W Kanyeihamba, Constitutional and Political History of Uganda from 1894 to present pg. 1
[12] 1902 Order in Council Preamble

only to whether they were in conformity with the rules of good conscience, natural justice and morality.

Further more this order in introducing the **Repugnancy clause** provided under **section 20 (a)**, that in all cases in which parties are natives, every court was to be guided by native law so far as it was applicable and not repugnant to justice and morality or inconsistent with any Order in Council or ordinance, regulation or rule. [13]

This was majorly intended to remove those native laws and customs which were seen as backward, the subject test was that applied to the morals and standards of an English person.[14] In **R Vs Amkeyo**[15], the question was whether the relationship between the accused and a woman was one of marriage, the features of the relationship that a woman was not a free contracting, the woman was treated as a chattel and that the relationship was polygamous. With this, ***the court held that the relationship did not fit the idea of marriage, that the alleged custom was implicitly repugnant to natural justice, morality and good conscience.***

Thus it can be concluded that equity in Uganda was introduced through the **Uganda Order in Council 1902 by the Reception clause** which empowered the commissioner to apply any law of the United Kingdom to the protectorate of Uganda.

1.5 Statement of the problem

The English legal system and laws are predominating Uganda as it was governed by England for a long time thus the Ugandan legal system is mainly

[13] The Uganda Living Law Journal pg. 26
[14] Google-wwwlaw teacher. Net>equity law>essays
[15] Amkeyo case was followed in Muhammed Vs R (1963) EA 188

based on English law which contains common law , equity and customary law.

The applicability of equity in Uganda mostly depends on the discretion of the judicial body and can not apply when not invoked, equity as a law has been criticized even back from its development that it had no fixed rules of its own with the Lord Chancellor judging from the main according to his own conscience.

According **to D. J Bakibinga**[16], the general juristic sense of equity means the power to meet the moral standards of justice in a particular case by a judicial body possessing the discretion to mitigate the rigid application of strict rules in order to adapt the judicial relief to the peculiar circumstances of the case, therefore it is the liberal and humane interpretation of the law in general so far as that is possible without actual antagonism of the law itself.

Principles of justice and the insistence upon acting according to one's conscience are the basis of equity jurisdiction. It is fluid in nature and at times incapable of enforcement, so the prevalent question asked is ***what sort of equity is enforceable by the courts or is justifiable*** as it is stressed out that equity is incapable of enforcement. **D. J Bakibinga** illustrates that even in the constitutional context, **the Objectives and Directive Principles of State Policy** which implicate equity are mere guidelines to implementing persons and bodies in enforcing relevant laws.

Equity per say is not written and its application is less or more based on application of its principles most prevalent being fairness, justice, fair play, adequacy, clean hands and estoppel.

In Uganda, equity as a law is upheld in various laws and there is always

[16] Equity and Trust in Uganda pg.2s

insistence on its applicability and the grundnorm stipulates it clearly that in the administration of justice, substantive justice shall be administered without undue regard to technicalities. [17]*Literally meaning that if it is for the sake of justice, courts will look at the substance and not the form, thus this leaves the law to one side that is looking at substance rather than form as the ultimate result of the law and courts is to achieve justice.*

But clearly for justice to be attained at its fullest, form has to be taken into consideration thus rendering **Article 126 (2) (e)** irrelevant and with no importance as it has been observed by many that **Article 126 (2) (e)** (which stipulates equity in administration) is just used by weak lawyers who are not ready to proceed and have faults in their court documents thus clinging and urging court to administer justice without undue regard to technicalities. In **Serapio Rukundo Vs Attorney General**[18], it was held inter alia that procedures are hand maidens of justice and thus should be upheld.

The debate is still reoccurring and court decisions have proven to bring the matter home as they insist on procedures being strictly followed but also still call for a liberal approach to technicalities by applying **Article 126 (2) (e)** so as to soften and provide room for substance.

Procedures of law should be followed strictly as actually justice can not clearly be administered without procedures to be followed, actually they are handmaidens of justice **BUT** equity (substance) of every matter should be clearly scrutinized by courts rather than clinging to technicalities of law as was witnessed in **Joyce Nakacwa Vs Attorney General**[19]**.....**

[17] Article 126(2)(e) of the Constitution of Uganda 1995 as Amended.
[18] Constitutional Petition No.3 of 1997
[19] Constitutional Petition No.2 of 2001

1.6 Justification of the study

In this study, it is imperative to show the justification of the study and here under are the justifications;

Equity is based on **principles of justice and fair play** in the administration of the law, at times the law is not perfect or rather is somehow defective. However much it is conceded that the aim of the law is to maintain justice, practically this has not been achieved. This explains why equity has to be applied whose main objective to correct injustices caused by the strict application of the law.

The law is uniformly and rigidly applied thereby not catering for **exceptional circumstances**, so it is those exceptional circumstances that equity tends to accommodate and cater for. On this ground, **Jegede**[20] observed that the *contemptuous disregard of the common law for human values aided the expansion of the chancery division in Britain in that the latter gave effect to the accepted elementary principles of social justice.*

Further **equity mitigates the rigidity of the application of the law** and it has been described as a kind of justice superior to legal justice, in fact a correction of the law where it is defective owing to its generality.[21]

1.7 Objective of the study

The broad objective of the study was to critically examine the application of the doctrine of equity in the Uganda legal system.

[20] Principles of Equity (Ethiopie) pg. 10
[21] Ross D. Aristotle (ethics) pg 215

1.8 Specific objectives of the study

There are some particular targets that I looked forward to achieve and accomplish at the end of the study or particularly within the course of the study. Some of these objectives are as follows as hereunder;

To understand the challenges facing equity applicability in the Ugandan legal system.

To understand the legal set up of equity as a law commonly applied in Uganda that is which laws provide for the application of equity in Uganda.

To find a clear distinction between equity and the law especially statutory and customary law.

To learn more about the application of equitable doctrines in the Ugandan perspective.

To elucidate the relevancy of equity in the Ugandan legal system.

1.9 Significance of the study

In this research, it is imperative and so cardinal to scan the significance of the study and its worthiness, they include the following;

This study is pursued on pretext that it will be of benefit to policy makers and implementers, researchers and academicians as well as to the public.

The study is expected to contribute towards improvement of the law relating to the application of equity by providing immediate remedies to the gaps identified in applying its principles and doctrines.

The public is expected to benefit from an improved understanding of equity as a principle used in adjudicating and dispensing of cases both in civil and criminal procedures.
The findings will be an added knowledge to the existing database and a guide to academicians and researchers for referential purposes and on top of this, it is expected to enrich the researcher's skills and knowledge.

The study has helped us in understanding of the way equity applies in the Ugandan legal system though not written.

1.10 Methodology

The methodology which was employed was tied up with the objectives and purpose of the research, this research paper was mainly library and legal research ranging from text books, searched papers covering the period from 1995 and on. On top of that, laws of different kinds inter alia which talk about equity and its application in the Ugandan legal system was used.
Information conversed from different judicial officers concerning administration of cases using equity as a law was used in the study.

1.11 Data collection

Most of the data was collected through extensive reading of already available information about the topic, on the internet, text books, previously written research on the topic of the study.

1.12 Data analysis

After getting data from text books and journals, internet, sorting and coding was done to ensure the relevancy of the information in order to internalize the topic and find out the relationship between written down law and its application to the Ugandan legal system.

CHAPTER TWO

LITERATURE REVIEW

2.1 Introduction

This chapter illustrates the literature review that gives a historical background of what other writers have put down concerning the doctrine of equity. It attempts to relate the supporting theories and global developments of equity as a law and its application. It further narrows down to texts from Uganda.

This research was carried out at a time when equity has become redundant and its use criticized by legal practitioners. When a person invokes application of equity especially in the courts of law, he or she is labeled a weak counsel/lawyer who only wants refuge in the courts of law because he or she has failed to adhere to the procedures of the law.

Generally, there is limited literature on the subject of application of equity in Uganda and how justice can be administered using equitable principles and doctrines, however a few commentaries from within Uganda by different writers have been considered and also from other jurisdictions as well as statutory law and case law.

Harold and Ronald[22] looked at equity as a branch of the law which before the **Judicature Act of 1873** came into force was applied and administered by the chancery and it was basically founded on one's conscience.

Harold J. Grilliot[23] defined equity in the United States as that portion of remedial justice that was formerly administered in England by the court of

[22] Modern Equity
[23] Introduction to law and the legal system

chancery which was a tribunal apart from the common law court. He further stated that the common law system of justice was deficient in that its procedural requirements were rigid and highly technical; these requirements confined the courts to addressing wrongs usually by just awarding money damages to an injured party.

The underlying concepts of law and equity have been retained in the United States although the formalism that historically distinguished the two has largely disappeared. Much equity doctrine was established of which some still is used today for example the practical enforceability of the remedy was taken into consideration in granting equitable relief since the Chancellor did not want enforcement to be too burdensome.[24]

Today in the United States, before a court commands someone to do something or to refrain from certain actions, it examines the practical enforceability of the relief[25]. Likewise in Uganda, before any equitable remedy for example injunction or specific performance is granted, issues like balance of convenience is looked at to measure enforceability for in **Madhavani Vs Madhavani**[26], it was held that an injunction should not be used as an instrument of oppression where there is a reasonable alternative.

Further, **Colin F. Padfield**[27] defined equity in a general sense to mean fairness in the adjustment of conflicting interests, or the application of principles of good conscience to settlement of controversies[28]. That English lawyers call it ***a portion of natural justice which though capable of being enforced by the courts of common law was originally enforced by the court of chancery.***

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[4] Ibid pg.189
[5] Ibid pg.190
[6]
[7] Law made simple pg 15
[8] Ibid pg.15

Equity as thus understood had been described as a gloss (meaning a supplement) on common law filling in the gaps and making the English legal system more complete. When people failed to obtain justice in common law courts, they were requested to petition the king as "Fountain **of justice**", these petitions were examined by the king and his council and later were sent to the lord chancellor who was the chief secretary of the state and keeper of the king's conscience. fotnot)

By the **15th century** application of equity was strong and vibrant as the chancellor had set up his own court and was dealing with petitions for relief. The chancellor was not bound by the writ system or the technical and formal rules of the common law and he considered petitions on the basis of **conscience** and what is right, with this the court of chancery proved popular with litigants and caused friction with common law courts.

According to **Colin Padfied** equity is based on conscience and what is right but a question is asked what tantamounts to something being right and fair as a saying goes ***"one man's meat is another man's poison*** ". For example equality can mean all people being treated equally or a certain group to be treated in a different way from others.

He further elucidated that in general sense equity means fairness in the adjustment of conflicting interests, or the application of principles of good governance to settlement of controversies that is natural justice. In a special sense adopted by English laws, equity means that portion of natural justice though capable of being enforced by the courts of common law, was originally enforced only by the court of chancery.

Equity thus as understood had been described as a gloss (meaning a supplement) on common law, filling in the gaps and making the English legal system more complete.

When people failed to obtain justice in courts, they were requested to petition the king as "fountain of justice", these petitions were examined by the king and his council and later were sent to the Lord Chancellor who was the chief secretary of the state and keeper of the king's conscience. So by the 15th century, application of equity was strong and vibrant as the chancellor had set up his own court and was dealing with petitions for relief.

According to **Megarry**[29], equity has a broad popular sense and a narrow technical sense and that in its popular sense equity is practically equivalent to natural justice or morality, yet it would be a mistake to suppose that the principles of equity as administered in the courts and described are co-extensive with the principles of natural justice.

Pearson on equity says to understand the application of equity, you look at statements which were made 400 years ago which provide explanation of the touchstone for application of equity and equitable doctrines to given factual situations.

The first statement is that of Lord Ellesmere who once commented in the famous **Earl of Oxford's case**[30] that ***"men's actions are so diverse and infinite that is to say it is impossible to make any general law which will aptly meet every particular and not fail in some circumstances. The office of the chancellor is to correct men's consciences for fraud, breach of trust, wrongs and oppressions of what nature so ever they be and soften and mollify the extremity of the law."***

The idea that equity is essentially conscience driven was recently re- affirmed by the House of Lords in **Westdeutsche Vs Islington London Borough**

[29] Introduction to equity- Higher Education
[30] (1615) 1 Rep Ch 1

Council[31] where Lord Browne Wilkinson commented in the context of trusts that equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied) or which the law imposes on him by reason of his unconscionable conduct.

Further he said that equity is susceptible to a number of different meanings, he defined equity as what is fair and just and is therefore undistinguishable from the general concern of any system of laws which is that all laws should be fair and just, however another somewhat narrower sense of the word is that equity is that specific body of law which supplements the common law and is invoked in circumstances where the conduct of the defendant is deemed unconscionable.

Additionally, the defendant's unconscionable conduct will have resulted in the defendant acquiring some advantage whether personal or proprietary which can not be rightfully retained by the defendant. In most cases, the defendant's unconscionability will have arisen from the strict and rigid application of a rule of common law where such unconscionable conduct has arisen, the role of equity is to temper the rigor of the common law by the award of an appropriate equitable remedy.

Further more, **Pearson his book** talks about equity as a system of law historically developed in the court of chancery correcting unconscionable conduct on the part of the defendant unlike common law which is defeated by failure to comply with form. It is often said that equity looks to matters of substance rather than form so where there has been a failure to comply with form, equitable relief is not necessarily prevented from being given if as a matter of substance, court decides that equitable relief should be given.

[31] (1996) AC 699 HL at pg.705

As to what matters of substance will persuade a court to grant equitable relief, the court will look to the underlying question of conscience. In particular, equity's concern is over the conscionable conduct of the defendant.

Equity is again talked about by **John Duddington**[32] to mean fairness or justice, however he examined that this is too general on its own as it takes a wider debate about what precisely fairness and justice mean.

He talks about the basis of equity being the conscience. He illustrates that the term equity has a long history in equity as the chancellor who exercised equity (that is before the fusion) was known as the keeper of the king's conscience. That now courts use the term unconscionability which is at least derived from conscience.
He elaborates that equity comes into play or will intervene when the application of a strict rule of law would cause injustice for example it might allow a mortgage to be redeemed even though the actual redemption date had passed.

D.J Bakibinga[33] defined equity in a general juristic sense and said it means liberal and humane interpretation of the law in general so far as that is possible without actual antagonism of the law itself. It is the judicial body's power to administer the law justly taking into account the special facts of the particular case. He further illustrates that this conception is recognized in the constitution that in the adjudication of cases both of a civil and criminal nature, the court shall subject to the law apply substantive justice without undue regard to technicalities and thus in applying **Article 126 (2) (e),** the supreme court **in Stephen Mabosi Vs Uganda Revenue Authority**[34] held that a memorandum of appeal filed out of time could not be rejected because the appellant could not file it before obtaining the official record of proceedings

[12] Equity and Trusts 2nd Edition
[13] Equity and Trust in Uganda pg 2
[14] Civil Application no.16 of 1995

from the high court which were released after 60 days period for filing the memorandum had elapsed.

Equity application in Uganda is been basely engineered from **Article 126 (2) (e)** and thus equity has become part of the law widely applied in Uganda because of the substance structure it gives over technicalities. It should be noted that equity developed to mitigate the rigidity of the application of the law and it has been described as a kind of justice superior to legal justice in fact a correction of the law where its defective owing to its generality.[35]

In Uganda as D.J **Bakibinga** stipulates that equity gives a liberal and humane interpretation of the law in general, equity as applied has provided some recourse to softening procedural rules which seem so strict in application as seen in **Stephen Mabosi (supra)**. Further in **Serapio Rukundo Vs Attorney General**[36], it was held that while in constitutional matters particularly in matters of human rights, courts should ignore minor technicalities, its important that rules of procedure should be followed to ensure smooth and predictable conduct of constitutional petitions as certainty and predictability are some of the cornerstones of justice.

Equity was received through the **Reception Clause** of the ***Uganda Order in Council 1902***[37] which formalized colonial rule in Uganda as it was the fundamental law of the protectorate and this laid the legal base of equity. The Reception Clause under the 1902 Order in Council empowered the commissioner to apply any law of the United Kingdom to the protectorate of Uganda and this included equity.

Importantly, it was in fact the **Repugnancy clause**[38] in the 1902 Order in

[35] Equity and Trust in Uganda pg. 3
[36] Constitutional Petition No.3 of 1997
[37] Section 15 (2)
[38] Section 20

Council that clearly laid the foundation of equity as the clause made it clear that native laws and customs were to be recognized only if they were to be in conformity with rules of natural justice, morality and good conscience and that every court hearing a case between natives was to be guided by native law so far as it was applicable and not repugnant to any Order in Council or ordinance, any regulation or any rule[39]. **Park observed that *the expression natural justice, morality and good conscience refer to equity in a general juristic sense.*** [40]

[39] The Uganda Living Law Journal pg.16
[40] Nigerian Law pg.73

CHAPTER THREE

LEGAL SYSTEM OF EQUITY AND ITS PRINCIPLES.

3.0 Introduction

This chapter introduces the legal regime of equity and the various laws where equity is embedded, it further elucidates the principles which guide courts in administering and applying equity.

3.1 The legal system of equity.

Currently the legal system of equity is prevailed as hereunder;

For starters, under **the Constitution** which is the grundnorm of the land, equity is first closely illustrated under the **National Objective and Directive Principles of state Policy Objective XII** which is clear that the state shall adopt an integrated and coordinated planning approach, the state shall take necessary measures to bring balanced development of the different areas of Uganda and between the rural and urban areas and that further the state shall take special measures in favor of the development of the least developed areas.

Further the constitution under **Article 2(2)** provides that any other law or custom which is inconsistent with any of the provisions of the constitution shall be declared null and void to the extent of its inconsistency. This emphasizes equity application as equity is fully consistent with the constitution hence its application in courts and laws of Uganda.

More to that, the Constitution further embarks on equity under **Article 29 (1) (b)** when it elaborates that every person shall have a right to freedom of

thought and conscience and belief which shall include freedom in institutions of learning. This is one of the strongest bases of equity application as equity is based on conscience which is recognized by the constitution.

Article 126 (2) thereof illustrates that in adjudicating cases of both a civil and criminal nature, the courts shall subject to the law apply the following principles; **clause (e)** thereof is clear that substantive justice shall be administered without undue regard to technicalities. This Article has been upheld, recognized and applied in various cases vis in **Stephen Mabosi Vs Uganda Revenue Authority (supra)**, the Supreme court in applying **Article 126(2) (e)** held that a memorandum of appeal which was filed out of time couldn't be rejected because the appellant could not file it before obtaining the official record of proceedings from the High court which were released after the 60 days period required for filing the memorandum had elapsed.
More to that, the **Judicature Act**[41] clearly **section 47** thereof is sometimes taken as the Reception clause as it allows for the application of certain laws of the United Kingdom to be applied in Uganda. Further under **section 14 (1) of the Judicature Act** it is stated that, the applied law, the common law and the doctrines of equity shall be in force only insofar as the circumstances of Uganda and of its peoples permit, and subject to such qualifications as circumstances may render necessary. This clearly means that equity is applicable in Uganda.

Section 14(2) thereof illustrates that subject to the constitution and this Act, the jurisdiction of the High court shall be exercised **(a)** in conformity with the written law including any law in force **(b)** subject to any written law and in so far as the written law does not extend or apply in conformity with the common law and the doctrines of equity.

[1] Cap 13

The High court in the Judicature Act has power to grant redress which include the equitable injunctions; **section 38(1)** of the same is to the effect that the court shall have power to grant an injunction to restrain any person from doing any act as may be specified by the High court. Subsection **(3)** thereof provides that where before, at or after the hearing of any cause or matter, an application is made for an injunction to prevent a threatened or apprehended waste or trespass, an injunction may be granted, if the High Court thinks fit; where or not the person against whom the injunction is in possession under any claim of title or claims a right to do the act sought to be restrained under any color title and whether the estates claimed by the parties or any of the parties legal or equitable.

The Magistrates Courts Act which governs proceedings in magistrate courts also provides for application of equity under **section 10 (3)** which provides that in civil causes or matters, where no express rule is applicable to any matter in issue, a magistrate court shall be guided by the principles of justice, equity and good conscience.

There are various other laws which provide for application of equity for example in commercial transactions like in contracts, in insolvency proceedings, the **Insolvency Act**[42] under section 264 stipulates that the rules of equity and common law applicable to corporate insolvency and bankruptcy of individuals and receivership shall continue in force except as they are inconsistent with this Act

3.2 General principles

3.2.1 Introduction

Any case of equity involves questions of discretion in judgments or possibly principles of justice and conscience rather than strict legal rules; for traditional

[42] Act 14-2011

equity is based on an analysis of concepts like adequacy, practicality, clean hands, estoppels and hardship.

In application of equity, there are principles which guide courts and help to explain the essence of equity and further help to indicate situations in which equitable rules would or would not be applied, they are at times referred to as **maxims**. These include the following as seen below;

3.2.2 Equity will not suffer a wrong to be without a remedy

It clearly means that "***where there is a right, there is a remedy***", this idea is expressed in the Latin maxim "***ubi jus ibi remedium.***" It means that any wrong should not go unredressed if it is capable of being remedied by the courts. This maxim indicates the width of scope and basis on which the structure of equity rests, it imports that where the common law confers a right, it also gives a remedy or a right of action for interference with or infringement of that right.[43]

It should be noted though that there may be situations where equity cannot provide a remedy for example in situations of unfair trade competition, in contracts requiring constant supervision or those involving personal services.

Other **limitations** to this principle of equity include; if the breach is for a moral right only, if the right and remedy are both in the jurisdiction of a law court and also where due to his or her own negligence, a party either destroyed or allowed to be destroyed the evidence in his own favor or waived his right to an equitable remedy.

[43] Equity and Trusts in Uganda pg.16

3.2.3 Equity follows the law.

This maxim indicates the discipline which the chancery courts observed while administering justice according to conscience. As has been observed by **Jekyll (M.R)** that,

"the discretion of the court is governed by rules of law and equity which are not to oppose each in turn to be subservient to the other."

Maitland further illustrates that equity came not to destroy the law but to fulfill it, to supplement it, to explain it.

The goal of equity and the law is the same but due to their nature and due to historical accident, they choose different paths, equity respected every word of law and every right at law but where the law was defective, in those instances, the common law rights were controlled by recognition of equitable rights. **Snell** explained this maxim in slightly a different way "***equity follows the law, but not slavishly, nor always.*** "So if the rules of law are too rigid, ancient or archaic, equity won't follow them.

It should be noted that, this principle is limited were the rule of law did not specifically and clearly apply, equity won't apply.

3.2.4 He who seeks equity must do equity

It means that to obtain an equitable relief, the plaintiff must himself be prepared to do equity that is plaintiff must recognize and submit to the right of adversary. Scriptures of Islam also inform us to be conscientious ***"woe to those who stint the measure, who when they take by measure from others, exact the full, but when they measure to them or weigh to them, minsh"***

This principle is applied in various circumstances for example, in the **doctrine of election,** it is emphasized that a person may not take a benefit and reject an associated burden or a person should not choose between parts of a single transaction, that is a volunteer who takes a bequest under a will must give effect so far as possible to everything contained in the will.

Further it is applied in **mortgages** that if a mortgager wants to exercise the equitable right of redemption, she or he must give reasonable notice to a mortgagee of his or her intention to do so.
This principle is limited as it is only applicable to a party who seeks an equitable relief.

3.2.5 He who comes to equity must come with clean hands.

This is a fundamental maxim of equity that requires that he who seeks intervention of a court of equity in matter must ensure that he does nothing to tarnish his application. Anybody praying for an equitable relief over a particular matter should show that she or he behaved honestly and fairly in regard to that matter.

In **Kellog vs. kellog**[44], the wife sued for divorce on grounds of extreme cruelty and the husband cross petitioned on grounds of extreme cruelty and adultery. **Justice Stone** in dismissing the petition said,
"divorce is remedy for the innocent as against the guilt and should not be granted were both parties are at fault. This is no more than the application of the equitable rule that one who invokes the aid of court must come into it with a clear conscience and clean hands"

For an equitable conduct to amount to unclean hands, it need not be illegal

[44] 171 mich 518 (1912) 137 N.W 249 (1912)

strictly as required by law, it is sufficient if the conduct is unconscionable and morally reprehensible and need not have been to the other party to the action or suit[45]. In **Gascoigne Vs Gascoigne[46]** where a husband conveyed property to his wife so as to protect it from his creditors, an action by the husband to claim the property back may be denied on ground of inequitable conduct to his creditors.

3.2.6 Equality is equity

This principle basically applies in three broad circumstances vis **presumption of tenancy in common** as equity operates against joint tenancies, there is a right of survivorship (jus accrescendi), so equity acts against that right of survivorship and presumes a tenancy in common. In a tenancy in common, the share of the deceased tenant passes to those who are entitled to his or her property under his or her will and under the rules of intestacy, the **Succession Act** under **section 25** specifically provides that all property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under this Act. Such persons are stipulated under **section 27** thereof and include the customary heir, spouses, dependant relatives and lineal descendants.

It also applies under the **principle of equal division** which states that where there is no basis for distributing property between two or more rival claimants, the court may apply the maxim equality is equity to divide the property equally as clearly stipulated under the Partnership **Act section 28(1).**

It further applies in instances where the trustees are unable to exercise a trust power to divide the property, court may divide the trust property equally among

[45] Equity and Trusts in Uganda pg.23
[46] (1918) 1 KB 223

all the members of the class of beneficiaries.

In Jones vs. Maynard[47], court observed that even when a husband and wife divorce or separate but have each contributed to the purchase of the matrimonial home and operation of a bank account, court held that in such a case, it will divide the property equally between them irrespective of their contributions.

3.2.7 Equity looks at substance rather than form.

As we have seen above that before the advent of equity, the common law attached a lot of importance to the use of correct forms and procedures in relation to any act and failure to comply with such forms invalidated actions whether these were suits or agreements.,

Equity per say developed with the aim of achieving justice rather than sticking strictly to procedures or forms. This approach to technicalities has constitutional backing which requires courts to administer justice without undue regard to technicalities. This is stipulated under **Article 126 (2) (e)** and this Article has been approved and applied in **Uganda Revenue Authority vs. Stephen Mabosi (supra)** where the supreme court of Uganda held that, held that a memorandum of appeal filed out of time could not be rejected because the appellant could not file it before obtaining the official record of proceedings from the high court which were released after 60 days period for filing the memorandum had elapsed.

This Article is intended to examine instances where equity has intervened to ensure that substance is upheld over technicalities, in **Joyce Nakacwa Vs Attorney General (supra),** a case filed out of time was allowed by court as court looked at substance of the matter and human rights of the petitioner.

[47] (1951) 1 Ch 572

CHAPTER FOUR

RELATION BETWEEN EQUITY, COMMON LAW AND CUSTOMARY LAW.

4.1 Introduction

This chapter contains an analysis of the relationship between equity and the various laws applied in Uganda basically the written law, the common law and customary law. This chapter analyses how equity relates both to common law and customary law in the way of integrating to be one law and also how it clearly differs from all of them.

Equity in its broad understanding has long been a fundamental part of law, its history may be traced through principles illustrated in the Old Testament and in various formulations, through ancient Greek and Roman legal constructs as well as in natural law and common law. While the historic presence of equity within various systems of law is unquestioned, the jurisdiction of equity within the contemporary legal system has been a matter of significant debate and confusion.

4.2 Relationship between equity, law and common law.

Before the adoption of the Judicature system, principles of common law and equity were administered in separate courts, this meant for example that equitable obligations were unknown to the common law therefore not amenable to the common law remedy of damages, thus in **Coroneo Vs Australian Provincial Association ltd**[48], chief Justice Jordan ruled that a breach of the

[48] (1935) 35 SR (NSW) 319 at 394-5

equitable obligation of a mortgagee exercising power of sale did not attract the remedy of common law damages. In such a case, the mortgagor had to seek appropriate relief from the court of equity.

This system was later abolished with the introduction of the Judicature system where the separate courts were fused into one which recognized and applied the principles of common law as well as equity.

An issue arises as to whether, the Judicature Act in regard to the relationship between law and equity and common law emerged to form one rule. It is believed that if there is any conflict between law and equity, it is simply jurisdictional and that ***equity came not to destroy the law but to fulfill it.***[49]

Further, there is a controversy as to whether the **Judicature Act 1873-75** simply fused rules of administration of equity and the law.

One view is clear that the Acts achieved a fusion of both administration of justice and the fusion of law and equitable rules with the result that there is now one common law rule. In **Walsh Vs Lonsdale**[50], it was observed that there is indeed a fusion as court held that law and equity are both applied in the same division, so the court and practitioners are faced with the necessity of pooling together the sum of resources of the two systems and aiming at a composite result.

The opposing view is that the effect of the Act was only to create a common court for administration of law and equity and not a fusion of law and equity, that ***equity and law are streams of the same river but their waters will never meet.***

[49] Equity and Trust pg.17
[50] (1886) 21 ChD 9

In 1933, a well known statement concerning the relationship of law and equity appeared in **Walter Ash burner's book called Ash burner's Principles of Equity**[51] in function of the nature and function of the Judicature Act 1873. The learned author stated that,

"the two streams of jurisdiction, though they are in the same channel and ran side by side do not mingle their waters. The distinction between legal and equitable claims, between legal and equitable defenses and between legal and equitable remedies has not been broken down in any respect by recent legislation."

The view expressed in **Ash burner's Principles on Equity** was the traditional interpretation of the relationship of law and equity. Under this approach, a court exercising jurisdiction in both law and equity was required to maintain the separation of the equitable doctrines and common law rules and vice versa. Proponents of this traditional approach have greeted any attempt to rationalize and integrated legal and equitable causes of action and remedies with suspicion and have described these attempts as examples of the fusion fallacy. However recent case law indicates that, in at least some areas, the approach enunciated in Ash burner's principles of equity as held by some eminent commentators is now open to question.

The statement by Lord Diplock in **United Scientific Holdings ltd Vs Burnley Borough Council**[52] is considered as the most famous early exponent of the view that the fusion of common law and equity is fact, this case concerned a rent review clause in a long term lease contract of commercial premises. The landlord had served a notice to increase rent arrears for the premises and a question arose as to whether time was of essence in the agreement. There was a reliance on **section 41 of the law of Property Act of 1925** which stated that *stipulations in a contract, as to time or otherwise which according to the rules of*

[51] Brown D.Ashburners Principles of Equity, 2nd Ed(1933) London Butterworths
[52] (1978) AC 904

equity are not deemed to be of essence of the contract, are also constructed and have the effect at law in accordance with the same rules.

The above section was interpreted as providing a fusion of equity in the body of existing legal rules. In this case, Lord Diplock referred to Professor Ash burner's fluvial metaphor and concluded that it was mischievous and deceptive. He then went on to state that, ***"if professor Ash burner's fluvial metaphor is to be retained at all, the waters of the confluent streams of law and equity have surely mingled now."***

This was interpreted to mean that there was no more distinction between common law and equity and the system was totally fused. Lord Diplock's views on this matter were supported by many of the best legal minds of the time. **Jones and Goodhart** in their book titled Specific Performance[53] have relied on the **United Scientific case (supra)** as an authority for the proposition that law and equity are fused.

Another case in support of the fusion of common law and equity is **Walsh Vs Lonsdale (supra),** this is one of the most frequently cited authorities on the effect of the Judicature Acts so far as the fusion of law and equity is concerned. It concerned the question whether the defendant could bring a legal remedy (distress) with respect to a lease which formerly would have been regarded as equitable only (effectively an agreement to grant a lease rather than one in proper legal form). In this case Sir George Jessel said, ***"there are not two estates as there was formerly, one estate at common law by reason of the payment of rent from year to year and an estate in equity under the agreement. There is only one court and equity rules prevail in it. "***

Lord Denning was considered a proponent of this view and his belief in it was

[53] Jones G and Goodhart W, specific Performance (1986) London Butterworths at 3 and 21

second only to Lord Diplock. In **Seagar Vs Copydex**[54], Lord Denning suggested that damages were available in response to a breach of an equitable obligation. In this case, the principle that even if you do not have confidentiality agreement in place, under equity law a person who has received information in confidence cannot take unfair advantage of it. That person must not make use of it to the prejudice of the person who gave it without obtaining his consent. The argument by Lord Denning in this case was that the Judicature Act of 1873 had fused law and equity and that the fusion was complete.

In **Waltons stores (Imertsate) ltd Vs Maher**[55], Justice Dearie not only suggested that law and equity are fused, but that to consider otherwise is to risk the future development of an orderly system. He said,

"***knowledge of the origins and development of common law and equity and an awareness of the ordinary and continuing distinctness of controlling equitable principles are prerequisites of a full understanding of the content of a fused system of modern law. To ignore the substantive effects of the interaction of doctrines of law and equity within that fused system in which unity, rather than conflict, of principles is now to be assumed is, however, unduly to preserve the importance of past separation and continuing distinctness as a barrier against an orderly development of a simplified and unified legal system which fusion was intended to advance...***

Further in **Central London Property Trust ltd Vs High Trees House ltd**[56], Lord Denning observed that at this time of the day it is not helpful to try to draw a distinction between law and equity. They have been joined together now for over 70 (seventy) years, and the problems have to be approached in a combined sense.

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[54] (1967) 2 ALLER 415
[55] (1988) 76 ALR 513
[56] (1947) KB 130

A clear **relationship between law and equity** is seen in one of the principles of equity that **equity follows the law**. This principle indicates the discipline with which the chancery courts observed while administering justice according to conscience. As was observed by **Jekyll (M.R)** that the discretion of the court is governed by rules of law and equity which are not to oppose but each in turn to be subservient to the other.

Maitland[57] also illustrated that equity came not to destroy the law but to fulfill it, to supplement it, to explain it. The goal of the law and equity is the same but due to their nature and historic accident, they chose different paths, and equity respected every word of law and every right at law but was controlled by recognition of equitable rights.
But surprisingly **Snell** explained this principle in slightly different way Vis; equity follows the law but not slavishly nor always and that if the rules of law are to be rigid, ancient or archaic, equity will not follow them.

Much as Lord Diplock and other legal minds argue in favor of the fusion of common law and equity after the **Judicature Act of 1873**, there are instances that clearly show the presence of distinctions between these two bodies of law. These instances dismiss the notion of the complete fusion of the two advocated for by Lord Diplock. **These distinctions are observed to occur in the following instances**;

The first distinction occurs in **trusts**, the difference here is that whereas the common law seeks to establish a form of law applicable uniformly to all through enforceable rights, equity seeks to restrain the unconscionable exercise of those rights and to overcome the injustice that may be caused by the general application of common law, which does not differentiate between individual circumstances. This is stressed in the equitable maxim "*equity looks*

[57] Maitland F.W, 1947, Equity, a course of Lectures, Cambridge at the University Press.

at intent rather the form in so far as equity's concern for substance over form."

This view is exemplified in the example of trusts. In trusts there is a distinction between legal and equitable interests and the right to trace property in equity depends on the existence of fiduciary relationship. This principle was introduced in the case of **Mushinski Vs Dodds**[58] where both plaintiff and defendant had purchased land as tenants and had a defacto and commercial relationship. Although Mushinski provided the purchase price of the property, it was intended that Dodds would provide the time and the funds to develop the property and make other payments.

Another manner in which equity works in a different way to that of common law is through the **distinct remedies**, which aim to rectify any conscious element hence the equitable maxim the equitable maxim *equity will not suffer a wrong to be without a remedy.* This is to say where the law does not provide a remedy, equity will.
The most common civil remedy a court of law can award is monetary damages, equity however enters injunctions or decrees directing someone either to act or to forbear from acting. This form of relief is in practical terms more valuable to a litigant.

But it should be clearly understood that a litigant cannot obtain an equitable relief unless there is no adequate remedy at law that is a court will not grant an equitable injunction unless when monetary damages are an inadequate remedy for the injury in question.

In **Kiyimba Kaggwa Vs Katende**[59], the applicant was a registered owner of the suit land which was disputed between himself and the defendant who had brought a tractor and began cultivating the land. The plaintiff applied for a

[58] (1985) 160 CLR 583
[59] (1985) HCB 43

temporary injunction. Justice Odoki held that the conditions for the grant of an interlocutory injunction include that the applicant must show a primafacie case with a possibility of success, that he is likely to suffer irreparable damage which will not adequately be compensated by an award of damages.

In **Doreen Kalema Vs NHCC**[60], it was held that a temporary injunction could only be granted to an applicant who is likely to suffer irreparable and substantial injury which could not adequately be compensated for by damages. Housing was acute in Kampala and the applicant was likely to suffer irreparable injury if the intended execution was carried through thus grant of a temporary injunction.

In Uganda, the dual system of administration of law and equity in England before the **Judicature Act of 1873-75** does not exist in the system. By the **Order in Council 1902-11** which received English law in Uganda, equity and common law were to be administered concurrently and where there was a conflict or variance between rules of equity and common law with reference to the same subject, rules of equity would prevail.[61]

Section 14 (4) of the Judicature Act is clear that subject to **subsection (2),** in every cause or matter before the High court, the rules of equity and the rules of common law shall be administered concurrently and if there is a variance or conflict between the rules of equity and rules of common law with reference to the same subject matter, rules of equity shall prevail.

Further the **Magistrates Court Act** also illustrates under **section 11(1)** that in every civil cause or matter before a magistrate court, law and equity will be

[60] (1987) HCB 73
[61] Equity and Trusts pg 15

administered concurrently. This clearly reflect the **Earl of Oxford case**[62] which is a fundamental case for the common law world that equitable principles take precedence over common law. In this case the judgment of chief Justice Coke was obtained by fraud whereof Lord Ellesmere issued a common injunction prohibiting the enforcement of the common law order.

With this, there was a conflict between the common law and equity and when the two courts became locked in a stalement, it was referred to the Attorney General Sir Francis Bacon by authority of the King James 1, the common injunction was upheld and it was decreed that if there was a conflict between common law and equity, equity will prevail.

Conclusively, it can be said that though the **Judicature Act of 1873-75** merged equity and the law, still there is no clear unification even though both laws are administered by the same courts and same judicial officers. I take the wise words of Prof. Ashburner the learned author that the *two streams of jurisdiction though they are in the same channel and their waters run side by side, they will never mingle.*

4.3 Relationship between equity and customary law

In defining customary law, it is suffice to note that it is a body of rules whereby the rights and duties acquired or imposed or established by the usage in African communities are accepted by such communities in general as having the force of law including any declaration or modification of customary law made under the Local Government Ordinance.[63]

The sources of customary law include the Evidence Act, Judicial Notice, Case

[62] (1615) 1 Ch Rep 1
[63] Wiki Ans . com> countries, states and cities (uganda)

Law, text books, witnesses and assessors plus judicial decisions for example in **Felisat Nakawuka Vs Uganda**[64]_____.

Further customary law was upheld in the famous case of **Bruno Kiwuuwa Vs Sserunkuma**[65] _____

Inspite the introduction of English law in to Uganda, courts are still enjoined to observe or enforce the observance of any existing custom which is not repugnant to natural justice, equity, and good conscience and not incompatible with any written law thus any existing custom can only be enforced if it does not infringe natural justice, equity and good conscience.

On that ground, **the Judicature Act under section 15(1)** stipulates that nothing in this Act shall deprive the High court of the right to observe or enforce the observance of or shall deprive any person of the benefit of any existing custom which is not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.

In line with the above, **section 10(1) of the Magistrate's Courts Act** is clear that subject to this section, nothing in this Act shall deprive a Magistrate's court of the right to observe and to enforce the observance of or shall deprive any person of the benefit of any civil customary law which may be applicable that is not repugnant to justice, equity or good conscience or incompatible either in terms or necessary implication with any written law for the time being in force.

Writers argue that natural justice, equity and good conscience have one meaning that is to achieve social justice in the administration of the law[66]. In this vein, it is contended that the idea behind the introduction of the

[64](1972) 1 ULR 3

[65]

[66] Bakibinga Equity and Trusts pg 15

repugnancy doctrine is that the court in the process of ascertaining and applying an alleged rule of customary law should recognize and apply equity in its broad sense, **that is giving a humane and liberal interpretation to any alleged rule of customary law.** [67]

The approach is that the expression natural justice, equity and good conscience refer to **equity in a general juristic sense**, so a custom should be given a liberal and humane interpretation, to do otherwise would be to judge African customs by the standards of equity developed in Britain[68] and this would practically nullify all customs, in other words Ugandan customs should not be judged relative to equity in the technical juridical sense.

A few illustrations indicate the dilemma of judging indigenous customs by British standards of equity for example **Rex Vs Amkeyo**[69] where the court presided over by a British judge held that the so called marriage by native custom of wife purchase is not a marriage within the meaning of **section 122 of the Indian Evidence Act** and that a party to such a union cannot claim the protection granted by the section that a wife not being a compellable witness to proceedings to which a spouse is a party.

The African indigenous custom was clearly judged by the British concept of monogamous marriage unaccompanied by dowry.

Generally though many decisions have invalidated customs for being repugnant to natural justice, equity and good conscience, again customs which promote slavery, female genital mutilation, wife inheritance, inequity within family relations or marriage, witch craft or sorcery and those which overlook vigilance in pursuing rights were declared null and void.

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[67] Jegede pg 6
[68] Park, Sources of Nigerian Law pg 73
[69] Amkeyo case was followed in Muhammed Vs R (1963) EA 188

For example wife inheritance was illustrated in **Maliam Adekur Vs James Opaja and another**[70] where the brother of the deceased husband wanted to inherit the widow and take over all the property, it was held that wife inheritance was in violation of equity and good conscience and also the rights of a widow under **Article 31(3)** of the constitution.

Further a case of family dispute was clearly shown in **Ephraim Vs Pastory**[71] where Pastory had inherited land from her father via a valid will, finding that she was getting old, she decided to sale the clan land to a stranger and non member of the clan. Ephraim filed a suit in the primary court praying for a declaration that the sale of clan land was void under customary law where a woman or females do not have the power to sell land. The primary court granted the prayer whereof the defendant appealed to the District court which set aside the judgment on grounds that it violated Tanzanian constitution which forbade discrimination on the basis of sex, equity and good conscience.

It has been questioned whether repugnancy clauses which subject customary law to natural justice, equity and good conscience are desirable in independent African countries, thus Professor Harvey states,

"Since repugnancy clauses served as the vehicles by which the dominant colonial power condemned and rejected customary African norms, it would not be surprising if they had been repealed promptly when independent African governments succeeded to power." [72]

When discussing equity and custom, there is a controversy which always arises as to what takes **precedence between customary law and equity**. Some say customary law takes precedence that it follows just next after statutory instruments and the constitution and that rules of equity and common law will

[70] Constitutional Petition no. 21 of 1997
[71] (1990) LRC (Const) 757 (TZ HC)
[72] Harvey op. cit pg. 524, such clauses were repealed in Ghana and Tanzania but retained in Uganda and Kenya.

follow there after but others object to that.

In a decided case **Kabaka's Government Vs Musa Kitonto**[73], it was stated that where common law and customary law conflict, customary law prevails. This should be understood clearly common law is foreign law as much as it applies to Uganda because of the fact that Uganda is a common wealth member, customary law is the home made law accepted by the people, customary law governs the law of life of the different members of each individual society in the country which has come from a multiplicity of tribes in Uganda.

With that aside, the only issue which can arise is incase of a conflict between tribes of a totally different culture, what law will be applied. This will strongly depend on the applicability of the law for example **Magistrates Court Act section 10 (1)**, the parties involved and the law applicable at this point shall be the constitution as it binds all persons in Uganda.

[73] (1965) EA 278

CHAPTER FIVE

DOCTRINES OF EQUITY

5.0 Introduction

This chapter contains an analysis of the doctrines of equity in there generality and how they relate to the Ugandan perspective specifically. The chapter contains mostly the common doctrines of equity as applied in Uganda.

The question which was and is still raised is whether equity has passed child bearing and is now as established and rigid as the common law. It was however observed in **Eve Vs Eve**[74] that equity is not past the age of child bearing. Thus many doctrines of equity have been formulated and will continue to be formulated, here are some of the doctrines which have gained prominence in Uganda and have been used to solve some legal issues. These include the following;

5.1 Specific performance

Specific performance is an order of court compelling the defendant personally to do what she or he promised to do[75]. It is an equitable remedy and is governed by three main principles viz where common law remedies are inadequate, if the discretion of court permits it and if court is satisfied that it will be observed in line with the maxim that equity does not act in vain.

Specific performance is only given to enforce positive contractual obligations and can be granted where the defendant can only comply with the order, in

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74

75 D.J Bakibinga, Equity and Trusts in Uganda pg 73

Jones Vs Limpman[76], the defendant concluded a binding contract to sell land to the plaintiff and after the date of contract changed his mind and tried to avoid specific performance by selling his land to his company acquired by him for that purpose. Court held that, the defendant could not resist the order of specific performance and Justice Russell further "argued that the company was the creature of the vendor, a device and a sham, mask which he holds before his face in an attempt to avoid recognition by the eye of equity." Court therefore ordered specific performance against the vendor and the company.

As earlier noted that specific performance is granted where common law remedies are inadequate thus it was held in **Hajji Lutakome Vs Sentongo**[77] that the general rule is that specific performance is not granted if the plaintiff would be adequately compensated by the common law remedy of damages. But there are instances where specific performance may be granted bearing in mind the principles underlying such jurisdiction. This is especially in contracts relating to contracts of sale of land.

Courts normally grant the order of specific performance to enforce contracts to convey or create legal estate in land such as a sale of land or lease and the remedy is subjected to the discretion of court and is not granted as of right, this is because a piece of land is unique and it is generally accepted that the award of damages is not an adequate compensation for the purchaser or lessee thus consequently court can order specific performance for the purchaser or lessee even when monetary payment is adequate.

5.2.1 Defenses

There are several **defenses to the doctrine of specific performance** as a remedy which are available to the defendant, these include the following;

[76] (1962)1WLR 832
[77]

The conduct of the plaintiff may disqualify him or her from the entitlement to specific performance which as a remedy requires the plaintiff to come to equity with clean hands and must be prepared to do equity. Practically the plaintiff must have performed his part of the contract.

Laches and acquiescence on the part of the plaintiff may bar the grant. This is an unreasonable delay in pursuing a right or claim in a way that prejudices the opposing party. When asserted in litigation, it is an equitable defense. The person invoking laches has to assert that the opposing party slept on his or her rights and a result of his delay or acquiescence, circumstances have changed such that it is no longer just to grant the plaintiff's original claim. So clearly put, failure to assert one's right in a timely manner can result in a claim being barred by laches.

Specific performance may be refused if the **hardship** will be caused to either of the parties or third parties. In **Wroth Vs Tyler**[78], the defendant contracted to sell property to the plaintiff whose wife registered a charge on the land thereof and refused to remove it thus the defendant could not complete the contract. The plaintiffs sought specific performance or damages in lieu, court refused to order specific performance on grounds first that specific performance would involve the husband suing his wife to dispose of the charge created by her, second that the remedy could not be granted subject to the wife's right of occupation as this would lead to the eviction of the wife and the daughter with the result that the family would split.

5.3 Trusts

A trust was defined[79] as relationship which arises where property is vested in a

[78](1974) Ch 30
[79] D.J Bakibinga, Equity and Trusts in Uganda pg. 106

person or persons known as trustees who are under a duty to hold for the benefit of other persons known as cestui que trust or beneficiaries.

This is one of the ways in which equity recognizes equitable interests as in law it is the trustee who holds the legal interest and the beneficiary holds equitable interest in the property vested in the hands of the trustee, thus the beneficiary's interest is proprietary in the sense that it can be bought, sold, given away or disposed of by will and it ceases to exist where the legal interest in the property passes to a bonafide purchaser for value of the legal estate without notice of the trust.

It follows however that where the trustee disposes of trust property, the beneficiary can claim and recover it if it is identifiable through the remedy of tracing.[80]

In Uganda, there are indeed various laws which provide for this equitable principle or doctrine of trusts; these include the Succession Act, the Administrator General's Act, and the Public Trustee's Act. **The Succession Act**[81] clearly stipulates that all property of the deceased devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under the Act. Further for a person who has died testate (with a will) the property vests in the executors/executrix in trust for the beneficiaries.

There are various types of trusts which include express, implied, resulting, constructive, statutory, public and private trusts, charitable trusts and many others. But my emphasis is on **resulting trusts** which are so much created in Uganda but there are a few or no precedents on the same. Resulting trusts accrue to people by virtual of their authority as sometimes heirs or executors and or administrators of the estates of the deceased persons.

[80] Trust property can be recovered through the remedy of tracing- Re. Hallet's Estate (1880)13 Ch D
[81] Section 25

A Resulting trust was defined by chief justice Moyer in **Stevens ET Vs Radey (Trustee)**[82] as one that the court of equity declares to exist where the legal estate in property is transferred or acquired by one under circumstances indicating that the beneficial interest is not intended to be enjoyed by the holder of the legal title.

He further explained that such equitable constructs can be created to transfer the surplus of a trust to the settler's next of kin or residuary legatee after the purposes of the original trust are fulfilled thus the person seeking recognition of a resulting trust bears the burden of justifying its existence with clear and convincing evidence.

In Uganda, resulting trusts appear in a way where a deceased person dies intestate and a customary heir inherits the property of the deceased, if there was no transfer of the same property to him or her when the deceased was alive, the heir will have to hold the property on trust for the others. In **Reverend Onesifolo Nganga and Robinah Nganga Vs Moses Matovu and James Mulumba Musiisi**[83]**,** justice Kavuma quoted and said, *It needs no emphasis that being customary heir is a cultural function which does not bestow legal authority on a person to deal with property of deceased, but is essentially meant for someone to "step into the shoes" of the deceased, as it were, solely for cultural functions. However, when it comes to the deceased's property and its administration the customary heir must first obtain the legal authority even if he or she may be a beneficiary; in absence of which he or she invariably becomes an intermeddler in the estate of the deceased.*

Though this principle of resulting trusts in the doctrine of trusts in Uganda has not yet received a lot of court pronunciation, it is a principle which is always practiced.

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[82] (Cite as Stevens v. Radey, 117 Ohio St. 3d 65, 2008-Ohio-291)

[83] Civil case no.107 of 2013-High court Jinja

5.4 Estoppel

Estoppel is a doctrine that may be used in certain situations to prevent a person from relying upon certain rights or upon a set of facts for example words said or actions performed which is different from an earlier set of facts. Estoppel could arisen in a situation where a creditor informs the debtor that a debt is forgiven but then later insists upon repayment, in such a case, this creditor may be estopped from relying on their right to repayment, as the creditor has represented that she or he no longer treats the debt as existent.

This is one of the most famous doctrines of equity, it was developed and celebrated in **Central London Property Trust Vs High Trees House**[84] where Lord Denning in that case observed that, ***if I were to consider this matter without regard to recent developments in the law, there is no doubt that the plaintiffs claimed it, they would have been entitled to recover the ground rent at a rate of 2500 a year from the beginning of the terms, since the lease under which it was payable was a lease under seal which according to the old common law could not be varied by an agreement by parole (whether in writing or not) but only by deed.***

Equity however stepped in and said that if there has been a variation of a deed by a simple contract which in case of a lease required to be in writing, would have to be evidenced by writing, the courts may give effect to it.

I am satisfied that the promise such as that to which I have referred is binding and the only question remaining for my consideration is the scope of the promise in the present case. I am satisfied that the promise here was that the ground rent be reduced thus they are stopped from alleging otherwise.

[84] (supra)

In Uganda, this doctrine is illustrated in **section 114 of the Evidence Act** that when a person by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed in any suit or proceeding between himself and herself and that person or his or her representative to deny the truth of that thing.

In practice, estoppel is a rule by which a party to litigation is stopped from asserting or denying a fact. It is thus a rule of exclusion making evidence in proof or disproof of relevant facts inadmissible, it prohibits disprove by a party against whom it is raised "***estoppel denier***" and dispenses with proof by a party relying upon it "**estoppel asserter.**"

It should be noted though that estoppel operates as a shield and not as a sword as this was clearly illustrated in **Mbarara Coffee Curing Works Vs Greenland Bank Ltd**[85], where justice Ssekandi(as he then was) held that estoppel provides a defense but does not create a cause of action.
The general conditions pertaining to the application of estoppel include; estoppels must be reciprocal or mutual which means that an estoppel must bind both parties to the litigation, estoppels must be certain that is to say they must be clear, precise and unambiguous, estoppel can not circumvent the law, this is mainly exemplified in situations like contractual capacity of a minor can not be evaded by any estoppel against his infancy. Also when estoppels conflict, they are both cancelled and the matter is left at large.

[85](1976 HCB 167)

CHAPTER SIX

CHALLENGES FACING THE APPLICATION OF EQUITY

6.1 Introduction

This chapter contains and explores the challenges facing the application of equity, first it tackles the general challenges equity faced straight from its inception and also in the various parts of the world. Then it tackles the challenges equity faces in Uganda.

6.2 General challenges faced by equity.

Despite the early popularity of equity, its administration in the Chancery Court was subject to criticism. Its initial flexibility led to uncertainty in the 17th century and a famous Jurist of the time **John Selden** observed that "*equity varies with the strength of the chancellor's foot*" as equity was a matter of conscience thus unpredictable and the relief granted by one chancellor might be refused by his successor.

Henry Maine on the same said, "equity refers to the length of the chancellor's foot" yet some chancellors went further in the exercise of equitable relief than others

A historic criticism of equity as it developed was that it had no fixed rules of its own with the Lord Chancellor occasionally judging in the main according to his own conscience. The rules of equity lost much of their flexibility and from the 17th century onwards, equity was rapidly consolidated into a system of precedents much like its common law cousin.

In the critique against equity **Thomas Jefferson** explained in 1785 that there are three main limitations on the power of a court of equity, if the legislature means to enact an injustice however palpable, the court of chancery is not the body with whom a correcting power is lodged. That it shall not impose in any case which does not come within a general description and admit of redress by a general and practicable rule.

Since the time of **Lord Eldon**, the system of equity for good or evil has been a very precise one and equitable jurisdiction is exercised only on well known principles. However the creation and working out of any new doctrine by judicial decisions is a long and difficult process and with parliament far more ready to bring about law reform than it was in the formative years of equity, the prevailing judicial climate seems to favor the refinement of existing rules rather than the creation of new doctrines.

Maitland (supra) observed with much clarity that equity was a mere gloss on the common law, whatever its defects the common law was predictable, uniform and coherent body of law which served its purpose in society and would even if all the statutes and rules of equity were expunged, still provide the basic rules of equity for a society. Equity however could not exist on its own, it was not a self sufficient system but acted as an important supplement (gloss) to the common law making English law a complete legal system.

6.3 Challenges facing equity in Uganda

National Objectives and Directive Principles of State Policy especially Objective XII[86] which implicates equity are mere guidelines to all organs and or agencies of the state, all citizens, organs and or bodies and persons in applying or interpreting the Constitution or any other law and taking and

[86] Constitution of the Republic of Uganda

implementing any policy decisions for the establishment and promotion of a just, free and democratic society. It can be interpreted that they do not have a detached role they play but help in guiding persons, bodies and other organs of the government.

Article 126 (2) (e) which is the basis of equity jurisdiction and its application in Uganda is taken for granted. It has been referred to by many as a *"weak counsel's defense"*, when raised in court even if for a good cause, the adversary will presume that counsel wants to do away with the procedures of the law thus using Article 126 (2) (e) as a shield.
In **Serapio Rukundo Vs Attorney General** (supra), it was held that while in constitutional matters particularly in matters of human rights, courts should ignore minor technicalities, its important that rules of procedure should be followed to ensure smooth and predictable conduct of constitutional petitions as certainty and predictability are some of the cornerstones of justice.

In **Stephen Mabosi Vs URA** (supra), the respondent in an application to strike out its notice of appeal for failing to take certain steps within the prescribed time sought in aid of Article 126(2) (e) urging that the objections of the applicant were mere technicalities meant to defeat substantive justice. The Supreme Court did not in its decision consider Article 126 (2) (e) but proceeded to construe and apply the rules liberally in order to give a just decision lest it would be unjust to drive the respondent away from the judgment seat.

From the fore going it can be argued that it could after all have been better not to have Article 126 (2) (e) as the court did not rely on it yet came to a just decision by ignoring technicalities.

Equity faces a challenge in situations when equitable remedies are to be granted especially injunctions and specific performance. It is clear that they can only be granted when common law remedies prove inadequate and any

party can not invoke equitable remedies without exhaustion of all other recourse thus this limits the application of equity.

Exercise of discretion is one of the cores of equity but at times when judges apply their discretion in the times when they deem fit, they are always criticized, this was seen when Justice Ogoola granted Dr. Kizza Besigye[87] interim bail which was persay unheard of and caused a lot of discussions on the same and in fact a point of long discussion. Following the grant of the interim bail, the Army invaded the High court in what was termed as *"a rape of the holy temple of justice"*. Thus equity faces a challenge as now judicial officers do not have authority over their own conscience as there is too much intimidation both from the public and the government.

6.4 Conclusion

I conclude with the words of **Lord Eldon** who was so fundamental in the establishment of equity, he remarked, *"nothing would inflict on me greater pain in quitting this place than the recollection that I had done any thing to justify the reproach that equity of this court varies like the chancellor's foot."*

[87] Dr. Kiiza Besigye Vs. Uganda, High Court Criminal Misc. Application No.229 of 2005 (unreported)

CHAPTER SEVEN

7.0 Introduction

This chapter provides the summary, recommendations and the conclusions to the various stakeholders, including the policy makers and law reforms which can be useful for the clear applicability of equity in Uganda.

7.1 Various recommendations

In the **Earl of Oxford's case (supra)**, the common law court headed by Chief Justice Coke gave a judgment which was alleged to have been obtained by fraud. The chancellor, Lord Ellesmere issued an injunction preventing the successful party from proceeding to enforce the judgment where upon the dispute was referred to the King for decision. The king sought the views of Sir Francis Bacon (Attorney General) who advised that where common law and equity conflicted, equity should prevail.

In most countries' laws this principle is basically celebrated but the issue which will always arise pertains to its flexibility as equity is too flexible and this can lead to its unenforceability. It can be argued that between flexibility and certainty, there is much tension. From time immemorial up to now, flexibility has been and is advantageous because it gives relief from the rigidity of law but still could be disadvantageous and dangerous if it leads to uncertainty and hardship.

Scholars have advised that, and **Lord Nottingham** has declared and held that equity should be administered where possible in accordance with known principles and not arbitrary discretion. Only where there was no precedence or

where there was a conflict in rules or principles should the chancellor's own conscience determine the suit or matter.

Further **Lord Nottingham** lamented that any judge exercising equity jurisdiction should follow existing principles. With the adoption of the system of precedents, equity became predictable intelligent.

With the application of **Article 126(2) (e),** I recommend the remarks in the case of **Banco Arabe Vs Bank of Uganda**[88] where it was held that a general trend is towards taking a liberal approach in dealing with defective affidavits. This is in line with the constitutional directive enacted in Article 126 (2) (e) of the constitution that courts should administer substantive justice without undue regard to technicalities. Rules of procedure should be used as handmaidens of justice but not to defeat it.

Equity developed to do away with injustices that came with strict application of the law thus equity as a rule of fairness should be granted a platform from which it clearly gains momentum for example a statute to be drafted so as equitable rules and doctrines should be applied not basing on any other laws but basing on its own rules and principles.
In line with the above, the cases of **Attorney General Vs Major General David Tinyefunza** and **Uganda Association of Women Lawyers Vs Attorney General**[89] have given a new light to constitutionalism in Uganda and the same should be followed. The cases highlighted the trend which the courts should take with regard to procedural rules as against substantive justice illustrated under Article 126 (2)(e) that procedures can be compromised to deliver justice as it is clear that the constitution is meant to safeguard rights and not procedures.

[88] Civil Appeal No.8 of 1998
[89] Constitutional Application No.1 of 1997 and Constitutional Petition No. 2 of 2003 respectively-concerning Article 126(2)(e).

7.2 Conclusion

From the foregoing discussion, this is what can be drawn there from in conclusion;

Equity is embedded in our laws but there are no clear procedures to be followed in its application thus what is probably used in practice are the ethical statements known as maxims of equity that majorly guide the application of equity together with principles of fairness and natural justice.

Equity as a law has to be strengthened not only in theory but also in practice as the various laws straight from the Judicature Act of England back to the Ugandan **Judicature Act Cap 13** all stipulate it clearly that when there is a conflict or variance between the law and equity with reference to the same subject matter, equity shall prevail. Thus if that can ultimately be upheld, the equitable jurisdiction in Uganda is going to cherish and develop more and more doctrines as equity is not past the age of child bearing, rather more doctrines can still be introduced to widen the scope of equity jurisdiction.

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