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Editor’s Note


The Journal is a publication of the Chartered Institute of Arbitrators, Kenya Branch. It provides a platform for scholarly debate and in-depth investigations into both theoretical and practical questions in Alternative Dispute Resolution.

The Journal covers pertinent and emerging issues across all ADR mechanisms including arbitration, mediation, negotiation, adjudication and traditional justice systems.

The Journal has witnessed tremendous growth in terms of its readership since it was launched. It is now one of the most cited publications in the fields of ADR and Access to Justice in Kenya and across the globe. I wish to thank our global audience for enabling the Journal to reach these heights. We welcome feedback from our readers to enable us steer the Journal to even greater standards.

The Journal is peer-reviewed and refereed in order to ensure credibility of information and validity of data.

This volume exposes our readers to a variety of salient topics and concerns in ADR including *Reframing Conflict Management in the East African Community: Moving from Alternative to ‘Appropriate’ Dispute Resolution; Does The Work Injury Benefits Act Fit in The Alternative Dispute Resolution Framework? Rethinking The Work Injury Benefits Act in Kenya; Using Artificial Intelligence (AI) To Address Contemporary Concerns About Arbitration as an Alternative Dispute Resolution Mechanism in Kenya; Towards Enhanced Access to Justice: Leveraging the Role of Law Schools in Promoting ADR; The Alternative Dispute Resolution (ADR) Framework for Tax Dispute Resolution in Kenya; Resolving Oil and Gas Disputes in an Integrating Africa: An Appraisal of the Role of Regional Arbitration Centres; The promise of justice: Towards the effective resolution of family disputes; and Addressing Construction Related Disputes in Kenya Taking into Consideration Environmental Factors*. The Journal contains three case summaries titled *Efficiency in Arbitration and Multiple*

The Editorial Board encourages and welcomes submission of scholarly papers, commentaries, case summaries and book reviews aimed at providing critical analysis of developments in case law, legislation and practice in Alternative Dispute Resolution and related fields of knowledge. Submissions should be sent to the editor through admin@kmco.co.ke and copied to info@ciarbkenya.org. The Editorial Board considers each article submitted but does not guarantee publication. We only publish papers that adhere to the Journal’s publication policy after a critical, in depth and non-biased review by a team of highly qualified and competent internal and external reviewers.

CI Arb-K takes this opportunity to thank the publisher, contributing authors, editorial team, reviewers, scholars and those who have made it possible to regularly publish this high impact Journal that continues to shape the discourse on ADR and Access to Justice in Kenya and across the globe.

Dr. Kariuki Muigua, Ph.D; FCIArb; C.Arb
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Nairobi, July 2023.
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Reframing Conflict Management in the East African Community: Moving from Alternative to ‘Appropriate’ Dispute Resolution

By: Kariuki Muigua*

Abstract

The paper critically discusses the need to reframe conflict management in the East African Community (EAC) in order to fully capture the spirit of Alternative Dispute Resolution (ADR) mechanisms. The paper argues that ADR mechanisms in African societies including the EAC ought to be considered ‘Appropriate’ and not ‘Alternative’ in access to justice. It posits that ADR mechanisms have been part and parcel of African societies since time immemorial and were always the first point of call in management of disputes owing to their advantages. The paper explores the ADR framework within the EAC as set out under the Treaty Establishing the EAC. It further highlights challenges facing ADR mechanisms within the EAC. The paper further proposes interventions towards reframing conflict management in the EAC in order to fully capture the spirit of ADR as ‘Appropriate’ Dispute Resolution.

1.0 Introduction

Conflicts are a common phenomenon in human relationships and interactions. The term conflict has been defined as a situation in which two or more parties perceive that they possess mutually incompatible goals\(^1\). It has also been described as a process of social interaction involving a struggle over claims to resources, power and status, beliefs, and other preferences and desires\(^2\). Conflicts often occur as a result of incompatibility of goals and interests between

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two or more individuals\(^3\). They can also occur due to misalignment of goals, actions or motivations which can be real or only perceived to exist\(^4\). Conflicts are an undesirable occurrence in any given society since they can affect peace, sustainability and development. Development is not feasible in a conflict situation\(^5\). Consequently, there is need for effective and expeditious management of conflicts in order to spur development\(^6\).

Conflict management refers to the processes and techniques adopted towards stopping or preventing overt conflicts and aiding the parties involved to reach a durable and peaceful solution to their differences\(^7\). Conflict management thus involves handling all stages of a conflict as well as the mechanisms used in the management of conflicts\(^8\). Various approaches and techniques can be adopted towards managing conflicts ranging from the most informal negotiations between the parties themselves through increasing formality and more directive interventions from external sources to a full court hearing with strict rules of procedure\(^9\).

The process of conflict management can either result in settlement or resolution\(^10\). Settlement refers to an agreement over the issues in a conflict which often involves a compromise\(^11\). Settlement often seeks to mitigate a conflict

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\(^4\) Ibid


\(^6\) Ibid


\(^8\) Ibid


\(^10\) Ibid

without discovering or rectifying the underlying causes of such a conflict\textsuperscript{12}. Settlement mechanisms include litigation and arbitration. These mechanisms have been described as highly coercive, power based and involve a lot of compromise in addressing the conflict\textsuperscript{13}. They may be effective in providing an immediate solution to a dispute but fail to address underlying issues in a dispute leaving the likelihood of disputes remerging in future\textsuperscript{14}. Resolution on the other hand refers to a process where the outcome is based on mutual problem-sharing whereby parties to a conflict cooperate in order to redefine their conflict and relationships\textsuperscript{15}. Resolution mechanisms include most Alternative Dispute Resolution (ADR) processes such as mediation, negotiation and facilitation\textsuperscript{16}. These mechanisms are non-coercive, non-power based and focus on the needs and interest of parties\textsuperscript{17}. They result in mutually satisfying outcomes that address the root causes of conflicts thus creating long lasting outcomes.

The paper seeks to critically discuss the place of ADR in conflict management within the East African community. The East African Community (EAC) is a regional intergovernmental organisation of seven partner states which are: The Republic of Burundi, the Democratic Republic of the Congo, the Republic of Kenya, the Republic of Rwanda, the Republic of South Sudan, the Republic of Uganda, and the United Republic of Tanzania with its headquarters in Arusha, Tanzania.\textsuperscript{18} It is established pursuant to the Treaty Establishing the East African Community\textsuperscript{19}. The paper explores the role of ADR under the Treaty Establishing

\textsuperscript{12}Ibid
\textsuperscript{13}Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Op Cit
\textsuperscript{14}Mwagiru. M,’Conflict in Africa: Theory, Processes and Institutions of Management, Centre for Conflict Research, Nairobi 2006
\textsuperscript{15}Bloomfield. D., ‘Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland,’ Op Cit
\textsuperscript{16}Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Op Cit
\textsuperscript{17}Ibid
\textsuperscript{18}East African Community., ‘Overview of EAC.’ Available at https://www.eac.int/overview-of-eac (Accessed on 15/06/2023)
\textsuperscript{19}Treaty Establishing the East African Community., Available at
the East African Community. It highlights the challenges and opportunities for ADR within the EAC. The paper posits that there is need to reframe conflict management within the East African Community in order to fully capture the spirit of ADR as ‘Appropriate’ and not ‘Alternative’ Dispute Resolution.

2.0 Overview of Alternative Dispute Resolution (ADR) Mechanisms and their Role in Access to Justice

Alternative Dispute Resolution (ADR) is an all-encompassing term which refers to multiple non-judicial methods of handling conflicts between parties. ADR refers to a set of mechanisms that are used to manage conflicts without resort to courts. These mechanisms include negotiation, mediation, arbitration, neutral evaluation, enquiry, expert determination and conciliation. In Kenya, ADR mechanisms have been recognized under the Constitution which mandates courts and tribunals to promote alternative forms of dispute resolution.

ADR mechanisms have been classified by some authors into facilitative, evaluative and determinative processes. Facilitative processes such as mediation involve assisting parties to a dispute in identifying issues in dispute and in coming to an agreement about the dispute. Evaluative processes include early neutral evaluation and expert appraisal where a third party is more actively involved in advising the parties about the issues in dispute and various

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23 Constitution of Kenya, 2010, article 159 (2) (c), Government Printer, Nairobi


25 Ibid
possible outcomes. Determinative processes include arbitration and expert determination where a third party makes a determination after parties have presented their arguments and evidence in relation to a dispute. However, this classification leaves out negotiation which involves parties discussing the issues at hand so as to arrive at mutually acceptable solutions without the help of a third party.

ADR mechanisms have been hailed as being ideal in enhancing the right of access to justice that has been enshrined under the Constitution. The right of access to justice in Kenya, East Africa and Africa at large has hitherto been hampered by many unfavourable factors such high court filing fees, bureaucracy, complex legal procedures, illiteracy, distance from formal courts, backlog of cases in courts and lack of legal knowhow. ADR has the potential to address these challenges and promote the right of access to justice in Africa.

Most ADR mechanisms possess key attributes including informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes which makes them a viable tool of enhancing access to justice.

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27 Ibid
28 Ibid
29 Constitution of Kenya, 2010., Article 48
ADR mechanisms have been practiced in Africa for many centuries. African communities gave preference to values such harmony, togetherness, social cohesion and peace as expressed in terms such as ‘ubuntu.’ Such values contributed to social harmony that ensured the stability of African societies and were subsequently incorporated in conflict management strategies. African societies developed conflict management strategies that were based on institutions such as the council of elders who ensured that the values and principles of African societies were respected and upheld. The values inherent in African societies remain virtually unchanged. ADR thus still has an important role to play in conflict management in current African societies including the East African Community.

3.0 The ADR Framework within the East African Community
The legal basis for ADR mechanisms at the global level is set out under the Charter of the United Nations. It provides that the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. The Charter of the United Nations thus provides the legal basis for adoption of ADR mechanisms across the world.

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34 Muigua. K., ‘Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya.’ Op Cit
On a regional level, the Treaty Establishing the East African Community constitutes the East African Court of Justice (EACJ) as one of the principle organs of the EAC\textsuperscript{38}. The role of the EACJ as set out under the treaty is to be a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with the treaty\textsuperscript{39}. The EACJ has jurisdiction to hear and determine disputes arising from an arbitration clause contained in a contract or agreement which confers jurisdiction to it to which the community or any of its institutions is a party\textsuperscript{40}. It can also hear and determine disputes arising from an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the court\textsuperscript{41}. The EACJ is thus mandated to promote arbitration as a dispute management mechanism within the EAC. The EACJ has since formulated its own arbitration rules in order to effectively discharge its mandate\textsuperscript{42}.

In addition, the East African Community Customs Union (Dispute Settlement Mechanism) Regulations\textsuperscript{43} provide for the management of disputes through consultations in view of finding amicable resolution of disputes by the use of mechanisms such as conciliation and mediation. The Regulations further allow management of disputes through arbitration where parties consider it expedient to do so\textsuperscript{44}. The role of ADR mechanisms is thus firmly entrenched under these Regulations.

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\textsuperscript{38} Treaty Establishing the East African Community., Op Cit Article 9 (1) (e)
\textsuperscript{39} Ibid, Article 23
\textsuperscript{40} Ibid, Article 32 (a)
\textsuperscript{41} Ibid, Article 32 (c)
\textsuperscript{44} Ibid, Regulation 5 (8)
In addition to the foregoing provisions, various national Constitutions enshrine the use of ADR mechanisms in enhancing access to justice within the EAC. The Constitution of Kenya advocates the promotion of ADR mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms\textsuperscript{45}. The Constitution of Uganda also advocates the promotion of reconciliation between parties in the administration of justice\textsuperscript{46}.

ADR mechanisms are thus well stipulated under various legislations within the EAC. However, despite this recognition, several challenges hinder the efficacy of ADR mechanisms in the EAC.

4.0 Challenges Facing ADR in the EAC
Despite the efficacy of ADR mechanisms in conflict management within the EAC, several challenges hinder their uptake. These challenges are discussed below.

4.1 Inadequate Institutional Framework
It has been pointed out that one of major challenges facing the uptake of ADR mechanisms within the EAC is the issue of institutional capacity\textsuperscript{47}. There exists a challenge on the capacity of existing institutions to meet the demands of ADR mechanisms such as arbitration and mediation\textsuperscript{48}. The EACJ which is mandated to promote ADR mechanisms such as arbitration within the EAC cannot at the moment effectively promote mechanisms such as international commercial arbitration and international commercial mediation due to challenges related to personnel, funding and conflicting laws and policies in member countries\textsuperscript{49}.

\textsuperscript{45} Constitution of Kenya, 2010, Article 159 (2) (c)
\textsuperscript{46} Constitution of Uganda, Article 126 (2) (d), Available at https://www.parliament.go.ug/documents/1240/constitution (Accessed on 16/06/2023)
\textsuperscript{48} Ibid
\textsuperscript{49} Muigua. K., ‘Building Legal Bridges: Fostering Eastern Africa Integration through Commercial Arbitration.’ Available at
There is need to address such institutional challenges in order to foster ADR within the EAC.

4.2 Lack of Harmonized Legal Framework
There is lack of harmonized laws and rules within the EAC than could potentially hinder the use of ADR mechanisms. EAC member states generally fall into the category of Anglophone countries such as Kenya, Uganda and Tanzania and Francophone countries such as Rwanda, Burundi and the Democratic Republic of the Congo. Such differences result in different legal cultures, systems and laws. Consequently, the ADR framework varies from country to country within the EAC and it may be difficult to have a harmonized approach towards ADR with the exception of arbitration which is cross border in nature.

4.3 Interference by National Courts in ADR
Courts often get involved in ADR mechanisms such as court-annexed mediation and arbitration in aspects such as enforcement of mediation settlement agreements and arbitral awards and setting aside of arbitral awards. One of the major challenges facing ADR mechanisms such as international commercial arbitration is court interference on grounds such as public policy. Public policy is wide concept with no clear definition and this creates uncertainty and ambiguity when it comes to the enforcement of foreign arbitral awards.


Kariuki. F., ‘Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.’ Op Cit
investor seeking recognition and enforcement of an arbitral award is thus never sure whether a particular municipal court might adopt a reasoning towards public policy whose effect would be to annul an award or not\textsuperscript{54}. Court interference in ADR mechanism such as arbitration can intimidate investors and hinder the growth of ADR mechanisms in EAC\textsuperscript{55}. There is need to delimit the confines of court involvement in ADR in order to promote these mechanisms in the EAC.

### 4.4 Inadequate Marketing of the EAC in ADR

The EAC and Africa in general have been portrayed as less developed and ill equipped in promoting ADR mechanisms such as international commercial arbitration and international commercial mediation\textsuperscript{56}. Many people outside the continent still view Africa as lacking the capacity in terms of personnel and resources to promote these mechanisms and little has been done in marketing Africa as a hub of ADR\textsuperscript{57}. There is need to effectively market the EAC and Africa at large as an ideal destination for ADR mechanisms.

### 4.5 Bias and Perception of Corruption against the EAC

There is a general bias against Africa and Africans in the international community. Africa is generally viewed as a corrupt and uncivilized continent\textsuperscript{58}. Further, the governance concerns prevalent in some African countries often result in the international community viewing the entire continent in negative terms. This hinders the growth and use of ADR mechanisms such as

\textsuperscript{54} Ibid
\textsuperscript{56} Ibid
\textsuperscript{57} Ibid
international commercial arbitration and international commercial mediation since it creates the perception that it is impossible to attain justice in Africa\textsuperscript{59}.

4.6 Disregard for Some ADR Mechanisms such as TDRMs
ADR mechanisms such as TDRMs have often been looked down upon by formal justice systems. In Kenya, the Constitution provides that TDRMs shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality\textsuperscript{60}. Such labelling has resulted in disregard of TDRMs since it subjects them to the Western concepts of justice and morality yet African societies who have their own conceptions of justice and morality\textsuperscript{61}. There is need to redefine the conceptions of justice and morality in order to change the attitudes and perceptions towards ADR mechanisms such as TDRMs and elevate their role in conflict management in the EAC\textsuperscript{62}.

5.0 Way Forward
There is need to reframe conflict management within the EAC in order to fully capture the spirit of ADR. The process of conflict management is largely influenced by culture\textsuperscript{63}. Difference in cultural aspects such as belief systems, attitudes, religious practices, social stratification, language and economic practices could potentially take different forms in each culture\textsuperscript{64}. Culture therefore plays an important role in conflict management. African societies have

\textsuperscript{59} Ibid
\textsuperscript{60} Constitution of Kenya, 2010., Article 159 (3)(b)
\textsuperscript{62} Ibid
\textsuperscript{64} Ibid
since time immemorial ascribed to values aimed at promoting social cohesion\textsuperscript{65}. Such values include peaceful coexistence, harmony, truth, honesty, unity, cooperation, forgiveness and respect\textsuperscript{66}. Conflicts in African societies were thus viewed as a threat to peaceful coexistence and harmony\textsuperscript{67}. African societies thus adopted conflict management strategies that were aimed at amicable management of conflicts in order to preserve the social fabric which tied such communities together\textsuperscript{68}.

Conflict management in African societies was aimed at creating consensus, facilitating reconciliation, fostering peace, harmony and cohesion and gave prominence to communal needs over individual needs\textsuperscript{69}. ADR mechanisms were therefore the first point of call in conflict management in African societies. Conflict management amongst African communities has since time immemorial taken the form of informal negotiation, mediation, reconciliation and arbitration\textsuperscript{70}. These mechanisms were administered by institutions such as the council of elders which ensured compliance with their outcomes\textsuperscript{71}. ADR mechanisms have thus been part and parcel of the African culture\textsuperscript{72}. These mechanisms were considered as ‘Appropriate’ and not ‘Alternative’ in management of disputes since they were able to safeguard values that were inherent in African societies and foster peace and social cohesion\textsuperscript{73}. Colonization resulted in subjugation of ADR mechanisms where they were regarded as

\textsuperscript{66} Ibid
\textsuperscript{68} Ibid
\textsuperscript{69} Muigua. K., ‘Alternative Dispute Resolution and Access to Justice in Kenya.’ Op Cit
\textsuperscript{70} Kariuki. F., ‘Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities’ Op Cit
\textsuperscript{71} Ibid
\textsuperscript{72} Muigua. K., ‘Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.’ Op Cit
\textsuperscript{73} Adeyinka. A., & Lateef. B., ‘Methods of Conflict Resolution in African Traditional Society’ Op Cit
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‘Alternative’ to formal justice systems\textsuperscript{74}. In order to enhance access to justice through ADR in the EAC, there is need to reframe conflict management and consider ADR mechanisms as ‘Appropriate’ and not ‘Alternative’ in the quest towards justice.

In addition, there is need to enhance the capacity of ADR practitioners within the EAC through education, training and mentorship. There is need to set up more ADR institutions to facilitate training in ADR mechanisms such as arbitration, mediation and conciliation in addition to the existing institutions\textsuperscript{75}. Further, ADR institutions and practitioners should invest in modern technology such as virtual hearing infrastructure in order to fully promote ADR mechanisms such as international commercial arbitration, international commercial mediation and Online Dispute Resolution (ODR) especially in the face of rapidly growing networking and borderless legal practice\textsuperscript{76}. This will enhance efficiency, cost effectiveness and expeditiousness in the administration of justice which are salient features of ADR mechanisms\textsuperscript{77}.

The effectiveness of ADR mechanisms within the EAC can also be enhanced through adequate government support such as putting in place adequate legal regimes and infrastructure to enhance the uptake of ADR mechanisms\textsuperscript{78}. Governments can further enhance the role of ADR mechanisms within the EAC by designing laws that advocate for these mechanisms and institutionalizing ADR mechanisms in a manner which preserves there key


\textsuperscript{77} Ibid

\textsuperscript{78} Muigua. K., ‘Promoting International Commercial Arbitration in Africa.’ Op Cit
attributes such as flexibility, informality, privacy and confidentiality. There is also need to enhance good governance within the EAC in order to promote confidence among investors as to the ability of the region as an ideal venue for ADR.

Further, there is need to delimit the role of courts in ADR mechanisms in order to cure the challenge of court interference in these mechanisms. The role of courts should merely be facilitative in aspects such as granting interim measures of protection and enforcement of decisions and should not be designed to stop or delay ADR proceedings. Finally, there is need to market the EAC as an ideal destination for ADR. Practitioners and ADR institutions can use marketing tools such as ADR conferences and collaborations with institutions in other continents in order to enhance their visibility in the ADR spectrum. ADR practitioners can also tap into marketing tools such as publications, websites and social media in order to portray their skills and qualifications and promote confidence in people seeking their services. Through such measures, the role of ADR mechanisms in enhancing access to justice within the EAC will be enhanced.

6.0 Conclusion
The place of ADR mechanisms within the EAC is enshrined under the Treaty Establishing the EAC. ADR mechanisms such as negotiation, mediation, conciliation, traditional justice systems and arbitration have been practiced in Africa for many centuries. These were mechanisms were considered ‘Appropriate’ and not ‘Alternative’ in managing conflicts and were always the first point of call whenever disputes emerged. However, modern conceptions of

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79 Muigua. K., ‘Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges.’ Op Cit
80 Kariuki. F., ‘Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community.’ Op Cit
81 Muigua. K., ‘Promoting International Commercial Arbitration in Africa.’ Op Cit
82 ‘Treaty Establishing the East African Community.’ Op Cit
83 Kariuki. F., ‘Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities’ Op Cit
justice brought about by colonialism resulted in subjugation of ADR mechanisms where they were now considered ‘Alternative’ to formal justice systems. This has resulted in several challenges which hinder the efficacy of ADR mechanisms in the EAC and Africa at large. There is need to reframe conflict management in the EAC and correctly capture the spirit of ADR as ‘Appropriate’ and not ‘Alternative’ in the administration of justice. This will enhance the viability of ADR mechanisms in the EAC and promote the reputation of the region as an ideal venue for ADR. Reframing conflict management in the EAC is a noble idea.

84 Ghebretekle, T., & Rammala, M., ‘Traditional African Conflict Resolution: The Case of South Africa and Ethiopia’ Op Cit
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Efficiency in Arbitration and Multiple Appeals: Agrium V Orbis Engineering Field Services

By: Hon. Dr. Wilfred Mutubwa*

Facts

Agrium Inc. separately engaged Respondent Orbis Engineering Field Services Ltd and Elliott Turbomachinery Canada Inc. and Elliott Company (collectively, “Elliott”) to provide work and services relating to the upgrade of one of its production facilities.

Agrium drafted the purchase orders governing the work which contained a mandatory dispute resolution clause which provided that any dispute relating to Contract shall be resolved by arbitration in Calgary, Alberta, Canada, pursuant to the UNCITRAL Model Law and Rules. It also provided that the courts with exclusive supervisory jurisdiction with respect to the matters relating to the Contracts would be the courts of the Province of Alberta.

Two years later, a failure occurred at the production facility and Agrium filed a statement of claim suing Elliott and Orbis and seven other defendants for its loss. None of the agreements with the seven other defendants contained a mandatory arbitration provision. However, by the time Agrium served its claim on Orbis and Elliott, the parties claimed that the time limit for commencing an arbitration proceeding had already expired. Orbis and Elliott defended the claim on the basis of non-compliance with the dispute resolution provision and the two parties took steps to stay or strike the action pursuant to section 7(1) of the Act by filing a suit at the Master (Now referred to as a Judge).

The master dismissed Orbis and Elliott’s application to strike the action. It stated that it had discretion to determine if Orbis and Elliott had waived reliance on

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the mandatory arbitration provision and a submitted to the jurisdiction of the court. The master noted that although Orbis and Elliott took two years, and two years and three months, respectively, to move to strike down the action, the extent of delay is a factor to be considered.

Orbis and Elliott appealed the decision of the Master to the Court of Queen’s Bench. In return, Agrium applied to strike both appeals on the basis that section 7(6) of the Arbitration Act barred appeals from a Master’s decision. The court of Queen’s Bench held that, section 7(6) did not bar an appeal from a Master’s decision and that that Elliott and Orbis did not waive reliance on the mandatory arbitration provision in the Agrium Contract. The court allowed Orbis and Elliott’s appeal from the master, struck the claim, and dismissed Agrium’s application to strike the appeals. Consequently, Agrium appealed to the Canadian Court of Appeal.

Issues
1. Did the Justice of the Court of Queen’s Bench have jurisdiction to hear the appeal of Orbis and Elliott from the decision of the Master?

Analysis
Agrium argued that the Justice of the Court of Queen’s Bench did not have jurisdiction to hear the appeal of Orbis and Elliott from the decision of the Master. In its dissection of the issue, the court cited several principles of statutory interpretation and referenced the presumptions of consistency and coherence. The court noted that an appeal is not available pursuant to section 7(6) of the Act where the decision of a master was not appealed, the time for doing so has expired, or a justice of the Court of Queen’s Bench decided the issue. The decision of the majority held that this interpretation of section 7 of the Act respects the constitutional limitations on the master’s decision, the statutory right of appeal in the Court of Queen’s Bench Act, and the legislative intention that arbitration matters not be subject to multiple levels of appeal.
Conclusion

Section 7 of the Act allows the court to stay a proceeding where a party has commenced a court action in the face of a mandatory arbitration agreement. This issue often arises when a party has not followed the contractual dispute resolution process and has proceeded to file an action in court in ignorance or in an attempt to, perhaps, meet or preserve its limitation date. When that happens, the opposing party to the arbitration agreement can bring an application under section 7 of the Act to stay the proceedings. Section 7(6) of the Act states that, “there is no appeal from the court’s decision under this section.” Even so, the law in Alberta is that appeals from applications judge’s decisions under this section are permitted. The Court emphasized that the central aim of commercial arbitration is “efficiency and finality.” To the extent that Agrium v Orbis permits a further appeal from an applications judge, it arguably challenges those twin aims set out by the Supreme Court. Parties and their counsel should engage in a detailed review of the governing contractual provisions in the initial stages of a dispute to ensure that they are not bringing a court action in the face of a mandatory arbitration agreement or provision. Doing so carries risk that a court may dismiss the court action. This may then mean that the plaintiff is without legal recourse because they may similarly be unable to commence arbitration proceedings after the passage of some time.
Book Review: Nurturing Our Environment for A Green Tomorrow

By: Mwati Muriithi*

Title: Nurturing our Environment for a Green Tomorrow
Author: Dr. Kariuki Muigua, PhD, C,Arb
Number of pages: 724
Publisher: Glenwood Publishers Limited, Nairobi: Kenya (2023)
ISBN: 978-9966-046-31-4

The book contains a collection of independent papers written over time. The emphasis across the board is our duty to nurture and foster our Environment for the current and future generations and in order to achieve Sustainable Development.

The author, Dr. Kariuki Muigua, PhD, was declared the first ever winner of the CIArb (Kenya Branch) ADR Lifetime Achievement Award, the highest honour given by the Institute to one member for his immense contribution to the growth of practice, research and scholarship of ADR in Kenya and across Africa. The award came barely a week after he had won the coveted Law Society of Kenya ADR Practitioner of the Year Award at the 4th Edition of the Nairobi Legal Awards for his outstanding practice in ADR and especially arbitration and his role as a mentor to many lawyers venturing into the area.

He was also awarded the ADR Publisher of the Year for his scholarship, authorship and editorship of leading research and publications on ADR in Africa including the Journal of Conflict Management and Sustainable Development and the Alternative Dispute Resolution (ADR) Journal.

He was the winner of the African Arbitrator of the Year 2022 award at the 3rd African Arbitration Awards held at Kigali Rwanda beating other competitors

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from Egypt, Mauritius, Ethiopia, Nigeria and Kenya. The African Arbitrator of the Year award is the highest and most prestigious ADR and Arbitration Award in Africa.

He was also awarded the ADR Practitioner of the Year Award 2022 at the AfAA Awards. The award which was presented by the African Arbitration Association is awarded to the Arbitrator/ADR practitioner who is adjudged to have made outstanding achievements in, or contribution to, the development of Arbitration/ADR in Africa.

He was recognized and awarded for his role as the Chartered Institute of Arbitrators (CIArb) Africa Trustee from 2019 to 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022.

His book, Settling Disputes through Arbitration in Kenya, 4th Edition; Glenwood Publishers 2022, was awarded the Publication of the Year Award 2022 by CIArb Kenya Branch at the CIArb Kenya Branch ADR Excellence Awards 2022.

He is a member of the National Environment Tribunal which was awarded as the best performing Tribunal in Kenya for handling the most cases.

Chambers and Partners Global Guide 2023 has ranked Dr. Kariuki Muigua Ph.D in Band 1 of Dispute Resolution (Arbitrators) noting that he is “highly recommended as a leading lawyer”.

He was awarded for his distinguished service to the Law Society of Kenya at the Law Society of Kenya Annual Awards 2023. He was also awarded the Outstanding Mentor Award by his mentees in recognition and appreciation of his selfless mentorship and support.

Dr. Kariuki Muigua has demonstrated his prowess and sound understanding of Environmental Justice. He notes that degradation is a problem that should be dealt with head on and that biodiversity loss remains a key concern. A Clean,
Healthy and Sustainable Environment is now a human right that can be realized.

He further notes that the ideals envisaged in the 17 Sustainable Development Goals are achievable if we nurture our environment for a green tomorrow. The papers covered in this volume tackle some of these thematic areas with an emphasis on the African context.

In line with the book, Nurturing our Environment for a Green Tomorrow is an ideal whose time is now.

This book is a must read for students, teachers and the general public interested in acquiring knowledge on Environmental Justice and Sustainable Development.

Dr. Kariuki Muigua offered the book for free download in his law firm, Kariuki Muigua & Co. Advocates, website in a quest to realize the key objective of its publication and promoting knowledge on Environmental Justice and Sustainable Development: http://kmco.co.ke/wp-content/uploads/2023/04/Nurturing-Our-Environment-for-a-Green-Tomorrow.pdf

By: Wangunyu Cynthia Wambui* & Mohammed Abdullahi Hassan**

Abstract
There are different avenues of seeking justice as provided in the laws of Kenya, each depending on the multidimensional problems associated. Of focus in this Article is the Work Injury Benefits Act of 2007 and how it can be improved by the mechanisms of Alternative Dispute Resolution. The Work Injury Benefits Act (WIBA) is a crucial and fundamental legislative framework that aims to protect the rights and well-being of employees in Kenya who suffer work-related injuries or occupational diseases through a report to the director (as it is in the Work Injury Benefits Act) which is done by both the employer and the employee. However, in recent years, concerns have arisen regarding the effectiveness of the Act’s dispute resolution mechanisms in ensuring fair and efficient resolution of work injury claims. This paper critically examines the affinity of the Work Injury Benefits Act within the alternative dispute resolution (ADR) framework in Kenya, with the objective of proposing potential improvements.

This paper moves ahead to look into the loopholes within the act, how this can be properly be improved by integrating ADR mechanisms such as mediation and Arbitration which are constitutional prerogatives as per article 159. This article will also critique its

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framework since it came into force, how it has functioned, and if it is a commendable leeway for those anticipating compensation during injuries at the workplace.

Introduction
The corpus of law in Kenya dealing with occupational safety and health management is contained in the international legal instruments, which emphasize that everyone is entitled to the right to safe and healthy working conditions. The Constitution of Kenya postulates that the general rules of international law shall form part of the laws of Kenya. Article 41 of the Constitution of Kenya grants every worker the right to reasonable working conditions as well as the highest attainable standards of health. However, injuries and illnesses at work are an inevitable part of the employment environment, especially because most employers in Kenya have not taken it as their responsibility to ensure the working environment is safe, clean, and healthy. In cases where these injuries result from the job done in the course of their work duties, the employees are required to seek compensation under the Work Injury Benefits Act (WIBA), which came into force in 2007. Work-injury-related cases are taken to the Director of Occupational Safety and Health


Services, who determines the compensation to be accorded to the injured worker.5

The Office of the Director of Occupational Safety and Health Services only became fully functional after the ruling by the Supreme Court of Kenya in a judgment in Petition No. 4 of 2019-Law Society of Kenya v Attorney General & Another6 transferred the powers of hearing and determining work injury related claims to the office. The office was however created in 2008 but only became operationalized 11 years later.

Just after the Act came into place, the Law Society of Kenya petitioned the High Court, citing various sections of the WIBA as unconstitutional and overriding the former Constitution.7 The High Court allowed the petition hence the workers went back to the traditional way of taking work injury-related claims to court. Feeling aggrieved by the decision, the Attorney General appealed at the Court of Appeal in Civil Appeal No. 133 of 2011- Attorney General v Law Society of Kenya & Another.8 The Court of Appeal reversed the judgment rendered by the High Court, postulating that the provisions of the WIBA did not in any way whatsoever contravene the provisions of the former Constitution.9 The Supreme Court on a further appeal by the Law Society of Kenya upheld the decision of the Court of Appeal. In its judgment, the Supreme Court noted that the Act intended not to limit access to the court but to create a statutory mechanism where any claim by an employee under the Act is

5 Work Injury Benefits Act
6 Petition no. 4 of 2019-Law Society of Kenya v Attorney General &Another
8 Civil Appeal No. 133 of 2011- Attorney General v Law Society of Kenya & Another [2017] eKLR Available at Kenya Law Cases Database
9 Supra.
subjected to a dispute resolution mechanism, starting with an investigation and award by the Director. In the dispute, the court stated that it can be determined as an alternative dispute resolution mechanism envisaged under Article 159(2)(c) of the Constitution.

The Work Injury Benefits Act (WIBA)
The Work Injury Benefits Act (WIBA) came into force mainly to ensure that employees are protected should they get injured or contract diseases in the course of their work duties. Section 2 of the Work Injury Benefits Act describes an injury as a personal injury and includes contracting a scheduled disease. Every employer should take out and maintain an insurance policy, with an insurer approved by the Minister in respect of any liability that the employer may incur under this Act to any of his employees.

As Section 21(c) of the Work Injury Benefits Act of 2007 provides, a written or verbal notice of any accident that occurs at a place of work has to be given by or on behalf of the employee to the concerned employer, and a copy of the written or verbal notice has to be sent to the Director. This should be done within 24 hours of its occurrence in the case of a fatal accident. The Act goes on to explain that the employer should issue a notice to the Director regarding the injury or accident within 7 days of receiving the notice from the employee or after learning that the employee has been injured in an accident at work. The Director is then required to make the necessary inquiries to decide upon any claim or liability per the Work Injury Benefits Act. From this, we can already learn that this method of seeking justice is largely controlled by the Director.

10 Supra.
12 Section 7 of the WIBA, 2007
13 Section 21(c) of the WIBA, 2007
14 Section 22 of the WIBA, 2007
Both the employer and the employee are not in any way involved in the determination of compensation to be accorded to the employee.\textsuperscript{15}

Once a claim has been lodged with the Director, the employee submits to a medical examination as provided under Section 25 of the Act, in which they are allowed to have an independent medical practitioner, but at their expense. The employer who has received a claim, medical reports, or any other documents related to such a claim is expected to submit the claim, report, or other information to the Director within 7 days.

It is important to note that a compensation claim shall be lodged by or on behalf of the complainant in the manner provided in the Work Injury Benefits Act within 12 months after the date of the accident or, in the case of death, within 12 months after the date of death in respect to Section 26(1) of the Act otherwise, the right of benefits as per this Act shall lapse.\textsuperscript{16}

**Loopholes in the WIBA**

WIBA has continued to digress in a notable capacity, owing to the fact that most employees still move to court seeking compensation in cases of injuries at work, despite the progress that the Supreme Court is looking forward to after pronouncing itself on WIBA.\textsuperscript{17} Therefore, there is a need for amicable and pragmatic solutions among stakeholders, which may lead to a review of the WIBA.\textsuperscript{18}

About three years ago, after the Supreme Court pronounced itself on WIBA, some cases are still pending at the magistrate courts’ doors, while others were

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{15} Section 37(5) of the Work Injury Benefits Act
\item \textsuperscript{16} Section 26 of the WIBA
\item \textsuperscript{17} Supra para 3
\item \textsuperscript{18} Supra para 3
\end{itemize}
\end{footnotesize}
dismissed indefinitely after the ruling. The question is, where should these cases be taken as there is no recourse before the Director when an employee’s case has been dismissed at the magistrate court? Should the different alternative dispute resolution mechanisms chip in to aid in offering long-term solutions to the dispute between the employer and the employee?

The law appears to be silent on what happens should the employer refuse to abide by the director’s compensation. It is not clear whether the employee can then move to court to adopt the ward for purposes of enforcement by way of execution as if it were a decree. No procedure has been formulated proving a leeway for enforcement of the award. In *Richard Akama Nambane v ICG Maltauro Spa [2020] eKLR*, the court observed that the law is silent on how to enforce the compensation by the Director. Therefore, the party wishing to enforce the compensation must move to the ELRC under Section 87 of the Employment Act but within the limitation period to enforce the compensation.

Within the purview of the law, the ELRC has jurisdiction to invite such claims. The Work Injury Benefits Act concerns itself with the compensation of the employees alone, leaving out compensation for employers who may have suffered damages for the employee’s negligent actions. That is to say, no procedure in the WIBA addresses the liability of the employer. The Act is primarily focused on the form and procedure by which an injured employee can seek compensation from the Director.

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20 Ibid
21 Joash Shishi Cheto v Thepot Patrick Charles [2022] eKLR para 43
22 Ibid, Para 45
23 Supra para 10
An undeniable challenge is the workload of cases presented to the Director.\textsuperscript{25} With only 13 field stations nationwide for the director, it would be impossible to achieve the purpose and efficiently compensate the injured person as anticipated by the Act.\textsuperscript{26} With the immense number of work-related injuries occurring daily in different parts of the county, the director experiences an influx of work injury cases that he cannot efficiently and expeditiously address.\textsuperscript{27} This invites delays, which are best associated with the litigation system.\textsuperscript{28} A judge at the ELRC recently blamed the lack of clarity in the WIBA for delays in finalizing claims under the Act.\textsuperscript{29} The case involved an employee David who sued Sarova Whitesands at the Chief Magistrate’s Court in Mombasa but was adjourned severally due to transfers of the trial magistrates and the unavailability of the attorneys. The case was however affected by the promulgation of the 2010 Constitution which then required that the case be transferred to the Employment and Labour Relations Court.\textsuperscript{30} The Judge noted the uncertainty on the jurisdiction resulting from ever-changing law on work injury claims, in particular on the jurisdiction in which such claims are to be heard.\textsuperscript{31} The judge was keen to note the uncertainty on the jurisdiction resulting from the ever-changing law on work injury claims, in particular on the jurisdiction in which such claims are to be heard. According to him, it was disheartening that since the Work Injury Benefits Act of 2007 came into force, employers and employees still find themselves in a state of limbo on work injury dispute resolution, as different courts have kept giving a different interpretation to work injury law, and on employment law in general, particularly on the

\textsuperscript{25} Supra para 10
\textsuperscript{26} KIPPRA, An International Centre of Excellence in Public Policy and Research, An Overview of Workplace Safety and Health in Kenya
\textsuperscript{27} Ibid
\textsuperscript{28} Bowry&Co Advocates, Address Delays in The Justice System, 2015
\textsuperscript{30} Ibid
\textsuperscript{31} Ibid para15
jurisdiction of the courts.\textsuperscript{32} As it can be clearly seen, the Director’s office, which is supposed to be an avenue for alternative dispute resolution, is however, subject to long delays before cases that require fast intervention are resolved. For example, in the case mentioned above, judge James Rika made the observation that the claim was initiated on 13\textsuperscript{th} May 2007, in which a ruling was made in September 2018. This is such a long time, especially when the life of a person is involved.\textsuperscript{33}

Needless to say, the Director’s office, just like any other government office, can fall victim to the never-ending corruption disease that is rampant in the country.\textsuperscript{34} This is prone to occur, especially from the parties with more bargaining power.\textsuperscript{35}

Furthermore delays in the director’s office and courts can generally reduce the confidence people have in these systems.\textsuperscript{36} Injured employees and their families can be frustrated and disillusioned with the system leading to a lack of confidence in the government to provide adequate support.\textsuperscript{37} Alternative Dispute Resolution Mechanisms such as Arbitration and Mediation can promote the effective implementation of the Work Injury Benefit Act.\textsuperscript{38}

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Alternative Resolution Mechanisms That can Solve the Challenges Posited by the Work Injury Benefits Act

Alternative Dispute Resolution Mechanisms can be used importantly to provide a faster, better and suitable compensation for injured workers to access better medical care since injured workers or employees can no longer entirely rely on the director’s office or the courts through litigation due to procedural delays and backlog of cases. Furthermore, it can be used to minimize conflict between the employer and employee since these systems are not adversarial. Therefore, these mechanisms of ADR can be better suited to assist in this tedious journey of compensation.

The Constitution and ADR

The main role of ADR can be held to be a way of accessing justice out of the normal system ways. In that, it supplements the rigidity of the common law and statutes and allows justice to prevail where these two other systems of law cannot reach. The responsibility to ensure that justice is not only done but is also done without delay and without giving significance to unjustified procedural technicalities. Article 159 of the Constitution of Kenya 2010 promotes the importance of justice and its attainment, hence the aforementioned article becoming the source how ADR should be used to attain justice by disputing people regardless of the ADR mechanism they use.

Therefore, with Article 159 of the constitution it can buttress the argument that rigid and ineffective methods which suppress justice rather than alleviate it can

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40 Work Injury Benefits Act, 2007

41 Work Injury Benefits Act

42 Mary Anjao Otindo, Alternative Dispute Resolution Mechanisms and management of case backlog in the Family Division of the Judiciary of Kenya, 2016

43 Ibid

44 Art 159(2d), Constitution of Kenya 2010.

be replaced with ADR mechanism to allow proper dissemination of justice which is not subject to delays and unjustified procedural technicalities. Hence the importance and need of ADR in work injury disputes to alleviate the challenges faced by the director’s office and courts.\textsuperscript{46}

**Mediation**

Mediation can be defined as being a proceeding which involves a neutral individual who facilitates a mutually acceptable resolution of the dispute by and between the parties.\textsuperscript{47} Mediation as a system of ADR pertains to a system of confidentiality in that unlike litigation the contentious aspect of the case remains between the mediator and the parties.\textsuperscript{48} Furthermore its a non-coercive mechanism in that no one is forced to do anything, this leads to mediation being very participative and parties talking to each other directly or through the mediator.\textsuperscript{49} Mediation leads to the parties approaching the contentious issues in a way that leads to better comprehension which in turn leads to a high prospects of reaching a suitable and mutually acceptable resolution.\textsuperscript{50}

Relationships are important especially work relationships in that people who have worked together for a long time.\textsuperscript{51} It is disheartening when co-workers in this situation, an employer and employee, find themselves in a situation which may ruin this relationship.\textsuperscript{52} Litigation tends to ruin relationships as one party will win which might be the end of relationship however mediation tends to protect this relationship in that mediator fosters a peaceful environment which

\textsuperscript{46} Supra para 15
\textsuperscript{48} Ibid
\textsuperscript{49} Ibid
\textsuperscript{50} Judy Wamaitha Mugo, ‘An Anaysis of Mediation as a Tool in Conflict Resolution in Africa: A case Study of education Process in South Sudan Between December 2013 - March 2015’ (Masters in International Conflict Management, University of Nairobi 2016)
\textsuperscript{51} Ibid
\textsuperscript{52} Ibid
promotes working together by the two parties in finding a final resolution instead of pinning the two against each other furthering high chances of employer-employee relationship being preserved.\footnote{Athanasia Kompuri, ‘Dissertation on Advocacy Mediation’ (LLM in Transnational and European Commercial Law and Alternative Dispute Resolution, International Hellenic University 2013)}

Mediation just like any other mechanism has its own drawbacks and one is that there is power imbalance between parties and that the stronger party in this case the employer has an upper hand.\footnote{Jordi Agusti Panerda, Power Imbalances in Mediation- Dispute Resolution Journal [2005] V59} Additionally, it being non-coercive renders its decisions to be non-binding and would hence be difficult to enforce.\footnote{Ibid} Mediation also can be court annexed, which is court ordained that the parties try mediation before resorting to litigation, this would assist in reducing backlog, reaching a mutually agreeable position and faster compensation of the injured party and perhaps consequently even an early return to work if the injuries are not substantial.\footnote{Ibid}

**Arbitration**

Arbitration is defined as a process in which the disputing parties submit their dispute before an arbitrator who is tasked to reach a decision that becomes binding and is capable of being enforced in a court of law.\footnote{Farooq Khan, *Alternative Dispute Resolution*, A paper presented to the chartered institute of Arbitrators-Kenya branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.} Arbitration however much having an arbitrator who reaches a binding decision which can be held to be enforceable is similar to litigation, it differs on the aspect that arbitration is consensual unlike the court process in which one party institutes legal claims against another.\footnote{Ibid}
Arbitration is advantageous in that in most cases it is held to be fast compared to litigation in that parties to arbitration can set a timeline to finish on the case.\(^{59}\) Furthermore, on the aspect of timeline, arbitration can be really versatile in that parties have the ability to set the most suitable time to arbitrate and even look for the most suitable location, unlike litigation and other administrative hearings which are rigid.\(^{60}\)

Most importantly arbitration has been held to be more efficient when parties are willing to participate fully and the process remains fair which limits a further conflict when the decision is made.\(^{61}\) Arbitration is not a contemporary mechanism but one which has stood the test of time and continues to provide an easy and attainable access to justice without undermining its role but instead beckoning to its call and furthering its will.\(^{62}\)

Therefore it is important to facilitate arbitration in Work Injury disputes since it is enforceable like litigation hence no dissatisfaction of enforceability as in Mediation.\(^{63}\) However, like Mediation it will be fast, expeditious and time saving.\(^{64}\) Kenyan law favors arbitration as an established method of solving disputes.\(^{65}\) It provides that a domestic award shall be recognized as binding and upon application in writing to the high court, shall be enforced.\(^{66}\) However, if one is not satisfied with the decision of the arbitrator and the arbitral award they

\(^{59}\) Ibid


\(^{62}\) Ibid

\(^{63}\) Ibid

\(^{64}\) Ibid

\(^{65}\) Ibid

\(^{66}\) Kariuki Muigua, Settling disputes through Arbitration in Kenya (3rd edition, 2017) 194
still have a leeway to appeal to the high court to enforce their rights and access justice.\textsuperscript{67}

**Mediation-Arbitration (Med-Arb)**
Med-Arb seeks to combine mediation and arbitration in that the conflict resolution will start with Mediation and when no resolution is reached it will be converted to Arbitration.\textsuperscript{68} Parties can opt to have the same mediator as an arbitrator or look for another arbitrator, which will eventually lead to it being resolved through arbitration and the decision of the arbitrator becoming binding.\textsuperscript{69}

The use of Med-Arb and generally mediation and Arbitration is that it can be an easy way to reach an early settlement regarding the Work Injury dispute due to its fast and flexible capabilities.\textsuperscript{70} Furthermore Med-Arb is very effective in that the shortcomings of Mediation are corrected by Arbitration for instance the issue of enforceability\textsuperscript{71} Therefore, the formidable combination of these two ADR mechanisms can be used to reduce the challenges posed by the courts and the director’s office in the WIBA and aspects like access to many people are facilitated. Additionally, this along with ADR mechanisms are relatively cheaper compared to the court system, hence informal and poor workers are given a chance to air their grievances and access the justice that they so require.\textsuperscript{72}

**Recommendations**
Employers and employees who come into head-to-head regarding work injuries should consider using ADR as a first step in resolving disputes related to work injuries. As demonstrated ADR has proven itself in other circumstances to be quicker and less expensive than going to court or the director’s office which is

\textsuperscript{67} Ibid
\textsuperscript{68} Supra
\textsuperscript{69} Supra.
\textsuperscript{70} Ibid
\textsuperscript{71} Supra
\textsuperscript{72} Ibid
often plagued with delays and backlogs. An employer should give serious consideration to adopting an ADR-based worker’s compensation system. If employees are unionized, then such a system must be negotiated with the union. The system can potentially yield significant relationship building and improvement in employee morale. Additionally, it is less adversarial, allowing for more collaborative resolution to the dispute. Therefore it is pertinent to amend the Work Injury Benefits Act (WIBA) to allow Alternative Dispute Resolution Mechanisms (ADR) in order to foster easy access to justice and make article 159 of the constitution to reach fruition.

Massive training should be carried out most especially to the employers, employees and other alternative dispute resolution to facilitate more utilization of the mechanisms. The stakeholders will reap the many benefits that ADR portrays. The ADR actors can make ADR more natural. Those being trained should be advised clearly that ADR is not an alternative to seeking the aid of a director whenever an injury occurs but is an appropriate method of seeking justice in a quick and easy manner.

Additionally, the director should seek the help of ADR through the ADR practitioners to ensure that the process of compensation is both fair to the employer and the employee, but not the employee alone, as it has repeatedly been the case as portrayed by the Work Injury Benefits Act.

**Conclusion**
In conclusion, Alternative Dispute Resolution (ADR) can play an important role in the Implementation of the Work Benefit Injuries Act (WIBA). By providing for a voluntary, fair and legally binding process for resolving disputes to work injuries, ADR can help ensure that employees receive their compensation and support they are entitled to under the law. Additionally, the shortcomings of the current Work Injury Benefits Act such as backlogs and delays in the

73 Ibid
director’s office can be alleviated by ADR since they have proven to be fast, efficient and cheap especially to the informal worker. Therefore, it is of great importance to amend the current Work Injury Benefits Act to accommodate Alternative Dispute Resolution Mechanisms in order to promote access to justice as stipulated by article 159 of the constitution and ensure the rights and dignities of workers are duly reserved.
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Resolving Oil and Gas Disputes in an Integrating Africa: An Appraisal of the Role of Regional Arbitration Centres

By: Hon. Dr. Wilfred A Mutubwa *

Abstract
This paper will explore the nature of disputes in the realm of oil and gas in Africa. It will also assess the role of recent continental and sub-regional developments in regional integration and their role in oil and gas dispute resolution. Additionally, it will test the limits of intra-African trade and dispute resolution and the imperatives for the African regional courts and arbitration centres as it relates to oil and gas disputes. In conclusion, it will offer an analysis of the common reliefs in oil and gas arbitration and highlight the leading cases in oil and gas in international arbitration from an African context.

1. Introduction
The extractives sector cases account for 16 per cent of known investment disputes.¹ Africa, the world's second-largest and second most-populous continent, is endowed with significant oil and natural gas deposits that are critical to its economic development and sustainability ambitions.

There are eight regional economic communities in Africa: the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa and the Community of Sahel-Saharan States (COMESA), the Eastern African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States and Economic Community of Central

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Resolving Oil and Gas Disputes in an Integrating Africa: An Appraisal of the Role of Regional Arbitration Centres: Hon. Dr. Wilfred A. Mutubwa

African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).²

The significance of Africa in the oil and gas sector cannot be understated since it accounts for 7.8 percent of the global oil production.³ Additionally, Africa controls roughly 8.9 per cent of global oil exports.⁴ Africa plays host to four of the world’s top thirty oil-producing countries, namely: Nigeria, Angola, Algeria, and Egypt.⁵ Nigeria is the continent’s top oil producer, followed by Algeria and Angola.⁶ Africa also has significant natural gas reserves, accounting for 6.9 percent of the world’s proven gas reserves. Nigeria has by far the most proven gas reserves in the region, followed by Algeria, Senegal, Mozambique, and Egypt.⁷

2. Nature of Disputes in the Realm of Oil and Gas in Africa

2.1 State-Investor Disputes
These refer to the disputes between governments and international oil companies concerning oil extraction, development, and production agreements. The primary cause of such disputes is legislation that seeks to change or interfere with the value of the project as previously evaluated. The oil industry is very sensitive to the fiscal and legislative framework which affects the

⁴Ibid. p.32
⁵Ibid. p.20
⁶Ibid. p.18
commercial viability of previously evaluated projects. Due to such matters, investors emphasize the importance of the legislative framework. Tax regulations and their stability are critical in investment decision-making. The possibility and occurrence of state-investor disputes are increased by the large amounts of money or property involved in the dealings. Moreover, the acquisition and disposal of interests in these projects either through the disposal of subsidiaries or direct asset sales may also cause conflicts between states and investors.

African states contributed to 135 cases out of the 613 reported cases to the ICSID Convention and Additional Facility Rules. 45% of these cases concerned states` consent in the BITs. Out of these cases, fifty-six involved investor-state disputes over oil and gas with African states contributing to twelve cases. African states continue to experience more investor-state disputes over oil and gas.

2.2 State-State Disputes
State to state disputes over oil and gas are not frequent, but they occur. They primarily occur where the petroleum fields overlap international borders either offshore or onshore. The offshore disputes arise over who has sovereign power over the Exclusive Economic Zone. Similarly, state-to-state disputes may be caused by differences over the transport fees charged through the cross-border oil and gas pipelines. Further, terrorist attacks in one state may force the state to breach its agreements with another state or act in contrast to the terms of the agreement, thus leading to disputes. For instance, the threats registered by the Al Shabaab terrorists in the Turkana region of Kenya led to Uganda cutting their

8 Cristal Advocates, `Dispute Resolution in the Oils and Gas Industry: The Case of Uganda` (2019)
10 Ibid. (n1).
11 Ibid.
financial support that facilitated the pipeline oil transport through the northern parts of Kenya to Lamu port at the Kenyan coast.

2.3 Community-State Disputes
Whereas the exploration of natural resources in a state ought to be beneficial, African states have varied experiences. Disputes over oil and gas occur between states and communities within states due to cultural and environmental concerns. A good illustration was evidenced upon the launching of oil extraction in Kenya, which was operated by Tullow Oil and Total international oil companies had disagreements. Some of the local communities, who are pastoralists, raised claims over loss of grazing land rights.

The primary cause of conflict between communities and states over oils and gas is due to lack of transparency and trust, exacerbated by claims of corruption, in the exploitation of the resources. In most cases, the government compulsorily acquires land for the extraction of natural resources with a guarantee of compensating the displaced communities. However, some of these communities end up not being compensated or insufficiently compensated. As a result, and due to this violation of the communities` constitutional rights, conflicts arise between them and the state. Such conflicts lead to high-security threats, low productivity, and destruction of infrastructure.

Another cause of community-state conflicts is the widespread obscurity especially when it comes to the implementation of government policies. For example, it is a requirement to submit duly and well-conducted environmental assessment reports indicating how the side effects of the extraction of natural resources will be handled. Lack of transparency often leads to poor assessments and, thus, poor and incompetent reports. This means that the local communities stand to suffer adverse impacts of the extraction, such as air pollution and health risks. It is such disasters that spike bitterness among communities leading them to wage conflicts against the state.
2.4 Disputes over Sharing of Revenue between National and County (devolved) Governments

It is a common practice for disputes to arise between national and county (devolved) governments over revenue from oil and gas extraction and investment. According to the Kenya Civil Society Platform On Oil and Gas, improper revenue management causes conflicts since oil explorations mostly occur in areas prone to ethnic rivalry and competition, such as the Northern parts of Kenya.\(^\text{12}\) The revenue sharing system between national and county governments in Kenya depends on the formula aiming at equitable distribution as opposed to equal distribution of revenue.\(^\text{13}\) This is because certain factors such as poverty levels, and population size among others determine the amount of revenue a particular county requires. For a long time, most devolved governments have complained about insufficient revenue allocation by the national government, thus causing disputes.\(^\text{14}\) Although this has proved to be true on certain circumstances, the other side of the coin presents a different situation. It is understood that Kenya lacks a detailed procedure on how the county governments ought to spend the oil and gas revenue allocated to them.

3. Recent Continental and Regional Developments

3.1 Application of Alternative Dispute Resolution Mechanisms (ADR)

There are various alternative dispute resolution mechanisms including but not limited to arbitration, conciliation, mediation, negotiation, expert determination, and inquiry. These modes are recognized and engraved under the Charter of the United Nations as peaceful means of dispute resolution.\(^\text{15}\) ADR helps in bridging the gap between traditional forms of dispute resolution and the formal means of dispute resolution. This is essential owing to the fact

\(^{12}\) Kenya Civil Society Platform on Oil and Gas, “Settling the Agenda for the Development of Kenya’s Oil and Gas Resources: The Perspectives of Civil Society” (2014)


\(^{14}\) Ibid.

\(^{15}\) The United Nations Charter, Article 33.
that African countries never had formal means of dispute resolution before colonization. However, they had traditional means of dispute resolution, which form the greater part of the ADR. Further, ADR helps in building a stable justice system that ensures the prevention of violence and rebellion. It is to this end that Africa as a continent is embracing the use of ADR in conflict resolution, especially in commercial conflicts.\(^{16}\)

### 3.2 The Emergence of the Gas frontier in East Africa

Since the 1960s, Mozambique and Tanzania have been known for gas, however, most investors were primarily interested in oil and thus ignored these regions. However, in the early 2000s companies started exploring the maritime borders of Tanzania and Mozambique after obtaining exploration blocks along the offshore Rovuma Basin. Later in that decade, the interest in oil and gas in these regions improved significantly due to the discovery of large amounts of natural gas enough to support Liquefied National Gas (LNG) Projects.\(^{17}\)

These new developments have incensed the interest for further developments with plans of establishing LNG trains in Mozambique by 2022 and liquefaction plants in the same region come 2024. Similarly, the general exploration of entire Africa has improved immensely leading to major discoveries in South Africa in 2019, the offshores of Senegal, Mauritania, etc.\(^{18}\)

### 3.3 Establishing Cooperation on Regional Public Goods

A new development has been the Africa Continental Free Trade Area (AfCFTA) seen as the most recent attempt at creating a single market in Africa. Forty-six countries (84% of the continent) have deposited instruments of ratification as at


\(^{18}\) Ibid.
March 2023 to the AfCFTA.¹⁹ AfCFTA the largest number of multilateral integration since the WTO. The Africa Economic Outlook 2019 focuses on developing regional public goods through fostering cooperation. It seeks to concentrate on the areas of peace and security, hard infrastructure such as roads, railways, ports, and corridors, and soft infrastructures such as logistics markets for mining and energy.²⁰

Specifically, under mining, since most African states are moving towards a mineral-based industrialization era, there arises the need for coordination in the exploitation of minerals. This new law mandates the African Minerals Development Centre to assist in the development of a regional approach to track financial flows in extraction firms and in coordinating the fiscal regimes.²¹

3.4 The Establishment of the Department of Economic Development, Trade, Industry and Mining under the African Union

The African Union sought to redefine the scope and objectives of integration as registered in the African Integration Report 2021 the Department of Economic, Trade, Industry and Mining is to “... coordinate the development of continental policy, lead strategic partnerships for continental programs, and monitor, review, and evaluate progress in the implementation of continental policies in the areas of economic integration, monetary affairs, trade, industry, mining, oil, and gas, private sector development, investment, productive transformation, economic and trade agreements, and sustainable development.” ²²

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²¹ Ibid.
²² African Union, 2021 African Integration Report. `Putting Free Movement of Persons at the centre of Continental Integration`` (14 March 2022) Available at
3.5 The Variation in Economic Outlook
Sub-Saharan Africa experienced an economic recovery in the 2nd half of 2021 with a positive progression from 3.7 percent in 2020 to 4.5 percent in 2021. Although this provided hopes of further improvement, these hopes were disabled by the Russia-Ukraine war, making Africa unable to respond properly. The war caused a surge in oil prices which impacted the fiscal balances of the importing countries.23

Due to the challenges in sustaining the global shocks caused by the Covid-19 pandemic and the Russia-Ukraine war, the International Monetary Fund (IMF) recommends the establishment of a decisive policy action that will improve economic diversification, bring out the potential of private sectors, and remedy the problems caused by climate change. In an attempt to achieve this end, the IMF has developed the Integrated Policy Framework to assist states in coming up with relevant policy responses to global shocks as the Russia-Ukraine effect on oil and gas production in Africa. This policy toolkit focuses on the interacting role of monetary, macro prudential, exchange rate, and capital flow management regulations while focusing on the African states whose exchange rates are flexible.

3.6 The Rise in Commercial Arbitration
In order to improve its presence and raise knowledge of the International Chamber of Commerce (ICC's) dispute settlement system in the region, the ICC Court of Arbitration established an Africa Commission in 2018.24 In May 2021, the ICC also established a new position for Regional Director for Africa, who

would work closely with the ICC Africa Commission to develop ICC activities and raise awareness of ICC dispute resolution services in Sub-Saharan Africa. Given the ICC's initiatives in Africa, the number of African parties resolving their issues through ICC arbitration may increase, implying an increase in African energy conflicts. However, parties to energy contracts are not solely opting for ICC arbitration. Global energy and resource disputes constituted 26% of the caseload at the London Court of International Arbitration (LCIA) in 2020.

4. Limits of the intra-African Trade and Dispute Resolution

Africa as a continent has made significant steps towards the prevention of conflicts and dispute resolution. There are several regional courts, arbitration centers and dispute resolution systems that advocate for the stability of African countries and promoting safe and healthy investments. Most recognizable bodies include the East African Court of Justice, ECOWAS, COMESA, etc. Despite the efforts and track record, certain limits pose hurdles towards dispute resolution and the promotion of healthy trade relations in Africa. This part discusses some of the noticeable limits of the intra-African trade and dispute resolution.

4.1 Limitations of the African Continental Free Trade Area (AfCFTA)

The AfCFTA has a jurisdiction limited to state parties. Similarly, a dispute is defined under Article 1 of the Protocol as “… a disagreement between State Parties regarding the interpretation and/or application of the (AfCFTA)

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27 AfCFTA, Article 20
Agreement in relation to their rights and obligations.” The Protocol further limits the application of the AfCFTA to disputes between State Parties concerning their rights and duties as to the extent of the AfCFTA Agreement. An interpretation of this provision is taken to mean that private entities do not have the *locus standi* to invoke the jurisdiction of the AfCFTA Dispute Settlement System (DSM) procedures in case of a cross-border commercial dispute. Although the Economic Community of West African States, Common Market for Eastern and Southern Africa, and the East African Court of Justice have a system of rules governing cross-border disputes among private entities, the AfCFTA not managed to address the abovementioned challenge.28

In the same regard, Emilia Onyema wonders whether African states can espouse claims of their citizens suppose these citizens suffer a loss due to the measures of the dispute resolution system.29 It is worth noting that states may always raise diplomatic protection for their citizens and the World Trade Organisation (WTO) DSM does not prohibit this. Can African states use the DSM engraved in the AfCFTA to bring claims for their citizens? Whereas this is possible, most of such disputes fall under the category of commercial disputes, which necessitate the establishment of a system of pan-African Conflict of Laws.30

### 4.2 Implementation Shortcomings

Most African states face a lot of challenges in implementing policies. For instance, scholars argue that FTA implementation disputes arise especially in transnational disputes, which are expensive and marred with procedural technicalities. Such challenges are highly likely to cause uncertainty for investments and trading relations.31 It is to this end that Eurallyya suggests that

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29 Ibid.
30 Ibid.
31 2016 UNCTAD Report
it is imperative for the AfFTA to employ adequate modes of dispute prevention and resolution such as the use of ADR, without necessarily duplicating the modes under the WTO.\textsuperscript{32} She states that such mechanisms should be expeditious, efficient, quick to respond to the disputants, cost affordable and easy to use.\textsuperscript{33}

4.3 Inadequate Representation of Africa in International Investment Arbitration

The 2017 Africa-Special Focus ICSID Caseload provides that Africa is only represented by an African state’s Attorney General and limited witnesses.\textsuperscript{34} This presents various challenges such as the making of assumptions and inclinations among the arbitrators. Similarly, the competence and performance of African representatives are affected by discomfort in the new environment, language barrier, and unfamiliar attitudes of strange counsels.\textsuperscript{35} Similarly, African countries have found themselves bound by inexplicable contracts concluded with foreigners. Kidane attributes the challenge to African public officials signing the contracts to the limited understand the technical complexities involved in the contractual terms.\textsuperscript{36} This presents a danger of the African Officials being declared incompetent and negligent by Western arbitrators in case of disputes arising out of the contracts.\textsuperscript{37} While this is not always true, and is debatable, in the modern world, it, at the very least, presents a valid concern.

5. The Imperatives for the African Courts and Administration Centres

5.1 Establishment of Pan-African Conflict of Laws
Conflict of laws facilitates the evaluation of the relationship of a country’s legal system with other countries legal systems since it has municipal and

\textsuperscript{32} Ibid. (n24).
\textsuperscript{33} Ibid.
\textsuperscript{34} ICSID, `The ICSID Caseload Statistics: Special Focus Africa` (2017)
\textsuperscript{35} Won Kidane, `The Culture of Investment Arbitration: An African Perspective` (2019)
\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid.
international constituents. The exclusion of Africa from critical discussions on such matters has contributed to the stagnation of the development of private international law. Factors such as global transportation, technological advancement, investment and, international trade promote the development of conflict of laws. The isolation of Africa from these factors has huddled the development of a Pan-African conflict of laws.

Despite the promulgation of the AfCFTA, Africa still lacks a multilateral treaty that deals specifically with matters of conflict of laws. However, it has a good number of bilateral treaties regulating the enforcement of foreign courts’ pronouncements. This does not however dilute the fact that conflict of laws has significant effects on certain African REC treaties.

The rise of intra-African commercial disputes such as the Republic of Mauritius v Polytol Paints and Adhesives Manufacturers Co. Ltd calls for the development of the pan-African conflict of laws.

5.2 Preference to Arbitration in Dispute Resolution

As investments in Africa continue to rise, it is understood that conflicts will arise thus the need for a stronger framework for dispute resolution. A recent report indicates an improved preference for arbitration over litigation and other modes of dispute resolution. The report by Herbert states that investments continue to improve despite the impacts of the Covid-19 pandemic and that there are high chances for the use of arbitration in future in Africa. For a long time, states and

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39 Ibid.
40 Ibid.
investor companies have preferred negotiation and commercial settlements over arbitration during conflicts thus utilizing the established avenues. However, the increase in foreign investment in the continent has elevated the formal means of dispute resolution, specifically arbitration.

Similarly, Laurence Franc-Menget states that: “Even where litigation or arbitration takes place outside Africa, onshore litigation may still be required when seeking to enforce an international judgment or arbitral award against assets held in African jurisdiction, or when dealing with local regulators.”

Arbitration and other alternative dispute resolution mechanisms are obtaining wide recognition due to the challenges faced with litigation such as delays and technicalities. Although all the 54 countries in Africa use arbitration, South Africa, Ghana, Ethiopia and Tanzania have embraced it more and established more reforms to increase its efficiency.

5.3 Enforcement of Intra-African Cross Border Arbitral Awards
There needs to be a reconsideration of the enforcement of intra-African cross border awards. 38 countries in Africa are members of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, 1958. This Convention facilitates the enforcement of awards given in another Convention state or one Convention state. However, African states have no equivalent body for the enforcement of judgments by foreign courts. Therefore, should an African state obtain an arbitral award it will be difficult to enforce it in another African state? Could it be a time to embrace the enforcement value of national courts’ pronouncements over cross-border arbitral awards?

rise/amp&ved=2ahUKEwjxNGtt574AhXNwQlHHcFrm0ECAQQAQ&usg=AOvVaw0PUIgOjGwt1HZ2olTe09Vj Accessed on 7 June 2022.

42 Ibid.
43 Ibid.
44 New York Convention 1958, Articles I and II respectively
5.4 State versus State Dispute Settlement

Whereas the AfCFTA has tried to address the challenges experienced in this area, it is understood that a more detailed system would have sufficed. The EU has room for domestic courts to refer cases to the Court of Justice of the European Union for appeal, while AfCFTA lacks this. Further, the EU allows private entities to seek enforcement of their rights under it while the AfCFTA lacks this direct effect principle. Other scholars have suggested that suppose the AfCFTA had a direct effect on national legal systems, it would have made obvious the need for major reforms on dispute settlement in investment matters.\(^ {45} \) Further, they contend that suppose the AfCFTA had a system like the EU, it would have dealt with any apprehension of protection of investors. They argue that the investor would have had an opportunity to file a suit in a domestic court of the host state, which would have in turn referred the matter to the AfCFTA system for a preliminary ruling.\(^ {46} \)

6. Local Content Requirement as a Tool for Economic Leveraging

Kenya and Africa, as a whole, are critical contributors to the global oil and gas market. As a continent, Africa has oil reserves that have enabled it to contribute and control about 8.9% of the total global oil exports.\(^ {47} \) Although Africa has these rich reservoirs, during the exploitation, little to no value is added to the countries' economies, and Kenya is no exception. It follows that mechanisms and frameworks must be established to ensure value addition to economies that rely on the extractive industry to foster their growth. One of the key ways of realizing this objective is through the implementation of the principle of local content requirement.

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\(^ {45} \) Alex Ansong, `International Economic Law in Africa: Is the African Continent Free Trade Area: A Viable Project? ` Available at https://srn.com/abstract=3285290

\(^ {46} \) R v. Secretary of State for Transport ECJ [1990]2 Lloyds Rep 351, [1990]3 CMLR 1, C-213/89

Kenya’s legal regime on implementing local content requirements is characterized by multiple legislative instruments. As it stands, the leading provision sharing of benefits from the extractive industry lies in Energy Act. This act provides for and defines what comprises local content. Section 2 of this Act stipulates that Local Content Requirement (LCRs) refers to the added value brought to the economy from extractive industry through systematic development of national capacity and capabilities and investments in developing and procuring locally available workforce, services, and supplies, for the sharing of accruing benefits. A similar definition was adopted in the Petroleum Act.

Furthermore, this act establishes the Energy and Petroleum Regulation Authority (EPRA) which is tasked with the role of ensuring the enforcement of local content requirements. These requirements are outlined under section 206 of this Act. In essence, this Act places a duty on any person who wants to carry out any activities in the extractive industry that they must furnish the EPRA with a local content plan. This is to establish whether consideration was given to the services that are within the relevant counties and goods manufactured in the country meeting the Kenya Bureau of Standards or, in the absence of KEBS then, any other internationally acceptable standards. The implication is that if there is any construction to be conducted on-site, the materials such as steel pipes, ballast, cement, and even trucks must be procured from the Kenyan market as opposed to importation.

Additionally, priority must be given to qualified and skilled Kenyans when it comes to employment within the value chain, and training is conducted on the job for better capacity building. Although this concept is frowned upon in international economics and trade because it is seen as a barrier to trade as they

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48 Energy Act No 1 of 2019, Section 2.
49 See Petroleum Act No 2 of 2019, Section 2.
50 Energy Act 2019, Section 10(z) (ee).
51 Energy Act 2019, Section 206(3).
52 Ibid n52 Section 206(3)(c).
limit competition which is responsible for fostering research and development and improvement of services in a free market, this paper contends that LCRs are a necessary evil. It is worth noting that the economies of developing countries like Kenya cannot compete favorably and, as such, must be protected from competition for them to grow to their desired potential.

There are daunting similarities between the Energy and Petroleum Act on LRCs. However, the Petroleum Act requires that a LCR plan must include a working plan that must address issues including employment, legal, financial, consultation, transport, hospitality, inspection, and security services, among others. This makes this Act more specific than the Energy Act. To operationalize the provisions of this Act, the Petroleum (Local Content) Regulations 2019 was passed, giving powers to EPRA to maintain a database with the details of qualified suppliers, services providers, and skilled personnel to be considered for opportunities arising within the extractive industries. To this end, it is arguably evident that there is an element of duplicity and multiplicity of laws on LRCs in Kenya.

Recent developments in this area have further seen Kenya propose a Local Content Bill. This Bill was proposed before Parliament in 2018. Interestingly, the Bill adopts a similar definition of what local content means as captured in the Energy and Petroleum Act. However, it proffers a better definition of who an operator is since the definition under the petroleum act is limiting. The petroleum act defines an operator as a “designated entity that is responsible for managing the day-to-day operation of oil and gas exploration, development and

54 The Petroleum Act 2019, Section 50(3).
production. Evidently, this is a very specific and limited definition of who an operator is as opposed to the definition under the proposed Bill, which refers to an operator as a “person, firm, or entity licensed by the Government to undertake exploration, development and extraction activity with respect to a natural resource in the extractive industry.” Arguably, this provision is more encompassing when compared to the petroleum Act. This is one of the positives in the Bill, among others, that, if adopted, will see the economy thrive by leveraging on international investments in the extractive industry. Unfortunately, this legislation remains to be a Bill five years later since it was proposed leaning Kenya without a comprehensive framework for LCRs.

Comparatively, Nigeria remains the perfect example of why LCRs are beneficial. As a country whose economy almost entirely depends on oil and gas, which accounts for nearly 90% of the total revenue, it was established that these two industries only contribute to a measly 30% of the GDP of Nigeria. This is mostly because this industry was flooded with foreign content in the production and distribution of oil and gas, necessitating the enactment of Local Content Policies (LCPs) to arrest the situation. In 2010, Nigeria passed the Nigerian Oil and Gas Industry Content Development (NOGICD) Act 2010. This Act created the Nigerian Content Development and Monitoring Board (NCDMB), which was tasked with the primary role of ensuring the success of Nigeria’s Local Content Policy. Nearly ten years after the creation of this body,

56 Petroleum Act 2019, Section 2.
57 Local Content Bill 2018, Section 2.
59 Ibid, n59, p82.
Nigeria’s local content has risen to 54% in an industry that was dominated by 99% foreign content.  

The lack of a clear regulatory framework in Kenya has continued to cause a myriad of challenges in the oil and gas industry, with the recent setback being suffered in the Tullow Oil project. Despite Tullow Oil making a discovery of oil in South Lokichar in 2012, it has been over ten (10) years, and Kenya is yet to reap the profits. Natural resources at all times must benefit the communities where they lie. When resources do not benefit the local communities and local economies, it opens an endless cycle of challenges that impede the success of any extraction project, and this was seen in the Tullow Oil project, where the project stalled because of endless riots from the local community. These conflicts resulted from dissatisfaction among the locals. This dissatisfaction resulted from the fact that the community felt that they were short changed by excluding them from tenders, employment opportunities, and vehicle hire contracts. A similar situation was recorded in Kwale County, where titanium mining stalled by conflicts because of disputes around land ownership and inequality in the distribution of the resources.

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Admittedly from the above discussion, local content policies are often enforced by governments to ensure that locally manufactured goods and domestically supplied services are used by investors for them to operate in an economy. In developing countries like most African states, this requirement aims to stimulate job markets, increase the size of the skilled labour force and develop competitiveness among local suppliers.

7. A Critical Analysis of the Common Reliefs in Oil and Gas Arbitration

Investment treaties are agreements between nations that govern how each signatory state treats investments made by individuals or companies that are nationals of the other signatory state or states. They can be standalone treaties or part of wider free-trade accords. They intend to stimulate cross-border investment by safeguarding international investments from political risk. They are categorized into two kinds: bilateral investment treaties (BITs), which are entered between two governments, and multilateral investment treaties (MITs), which are negotiated and agreed upon between more than two states (MITs). The common reliefs in oil and gas arbitration are based on these.

The aim of some investment treaties making provisions obligating an investor to exhaust local remedies is to protect the sovereignty of the Host State. The principle of local exhaustion of remedies was originally underpinned in diplomatic protection, it was a compulsory condition that a home state of the investor could/would espouse a claim of its investor against the host state only after the exhaustion of local remedies. This has changed over time with the formulation of the International Treaty of Arbitration. Some International Investment Agreements (IIAs) and contracts state the domestic courts as the

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exclusive forums for settling disputes. Such do not create pre-conditions to commencing international arbitration; they are exclusive forum choice clauses. Some treaties contain fork-in-the-road clauses that declare that once an investor selects a particular dispute resolution procedure, that choice precludes the investor from selecting any other dispute resolution procedure theoretically accessible under the treaty. It is expressed in the Latin maxim *una via electa non datur recursus ad alteram*, which means that once one path is selected, there is no turning back. If a fork-in-the-road clause applies and the claimant seeks redress in a local court, the claimant will forfeit their ability to arbitrate in the same dispute.

### 7.1 Common Law Remedies

Common law remedies for breach of contracts are applicable in oil and gas arbitration. The remedy most claimed is Compensatory damages. Other remedies include specific performance and non-compensatory damages such as restitutatory damages, nominal damages, exemplary damages, and liquidated damages. Parties usually choose to stipulate the circumstances for recouping damages, as well as the categories and amounts of damages recoverable. The applicable legal rules can be a national law or a convention, principles, or sets of rules – such as the Convention on Contracts for the International Sale of Goods (CISG), UNIDROIT Principles, that have been developed to reflect

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67 Christoph Schreuer, ‘Travelling the BIT Route’ [2004] The Journal of World Investment & Trade vii, 240
70 See Chapter 3 on Damages principles under the Convention on Contracts for the International Sale of Goods.
internationally accepted rules or principles or to achieve a compromise between various legal systems. Beyond national legislation, arbitral tribunals may take a transnational approach, resorting to general principles applicable to damages in international arbitration, such as a generally recognized responsibility to mitigate. However, such principles are not consistently identified or used.\textsuperscript{71}

An investment tribunal may decline jurisdiction to consider a breach of contract action where the counterparty to the contract is a state-owned corporation or a state agency exercising regulatory authority rather than the state itself.\textsuperscript{72}

\subsection{7.1.1 Specific Performance}
When you enter into an agreement, you expect the promisor to honour their promise. Most contractual remedies operate to make put the disappointed promise in a position they would have been in had the contract been performed.\textsuperscript{73} Specific performance is a remedy defined as where a party to a contract is ordered to meet their contractual obligation.\textsuperscript{74} Usually, this remedy is given where the subject matter of the contract is unique\textsuperscript{75} and where damages may not be deemed appropriate.\textsuperscript{76} The appropriateness of damages is about establishing if the damages payable are adequate to the aggrieved party.\textsuperscript{77}

\subsection{7.1.2 Non-Compensatory Damages}
Generally, damages are compensatory. Impliedly, damages are for ensuring that a party is compensated for the losses they have suffered. However, there

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\textsuperscript{71}See, Chapter 5 on principles of reducing damages
\textsuperscript{74}Alan Schwartz, ‘The Case for Specific Performance’ (1979) 89 The Yale Law Journal, p274.
\textsuperscript{75}Adderley v Dixon [1824] 57 ER 239.
\textsuperscript{76}Chris Turner, Un locking Contract Law (Routledge 2010), p406.
\textsuperscript{77}Ibid n77, p406.
are exceptions to this common law rule; that is, there are instances where non-compensatory damages may be issued. Non-compensatory damages include restitutory, nominal, exemplary, and liquidated damages.

7.1.3 Nominal Damages
Nominal damages as a common law remedy that is granted where a wrong has been committed, but then there has been no loss inflicted on the aggrieved party. Often, if a breach has been made, but no loss has been suffered, then the practice has always been that no damages are paid.\(^7\) If, for instance, a party entered into a contract for the upstream, midstream, or upstream services of oil to be delivered at a particular date, but the seller fails to meet this, and immediately the contracting party gets a second seller who delivers without him suffering any damages, the court may award nominal damages for the breach characterized by the failed delivery. This position was so held in the matter in the locus classicus between *Staniforth v Lyall*.\(^7\) Where despite there being any actual losses, a nominal sum was awarded to the aggrieved party.

7.1.4 Restitutory Damages
This is a common law that entitles a party, the claimant, to reimbursement of all the benefits he had advanced to the party who has breached the contract who is the defendant in this case.\(^8\) Usually, the premise for his damages is to prevent unjust enrichment by the party occasioning the breach. For instance, if a contract is between two parties for the purchase, extraction, processing, or distribution of petroleum and gas and one of the parties has advanced consideration to the other, this remedy allows the party to recover these sums in case of a breach on the party who was paid.

7.1.5 Liquidated Damages
Sometimes when parties enter into an oil and gas agreement they may include not only a clause on dispute resolution but the sums payable when the party

\(^7\) Ibid n77, p393.
\(^7\) (1830) 7 Bing 169.
\(^8\) Ibid n77, p396.
breaches the contract.\textsuperscript{81} This figure is usually formed during the contract negotiation phase and is indicative of a genuine assessment of the breach that is likely to be suffered. However, these sums are not cast in stone and must pass the commensuration test. It follows that there sums that are deemed to be higher than the loss suffered and without any basis are considered to be void by courts of laws.\textsuperscript{82}

8. A Highlight of the Leading Cases in Oil and Gas in International Arbitration from an African Perspective

The oil and gas industry is fundamentally divided into three segments; upstream, midstream, and upstream. They are a representative of the four major activities necessary for the oil and gas industry which include producing, transporting, refining, and selling at retail.\textsuperscript{83} ‘Upstream’ refers to exploring oil and gas reservoirs, drilling wells, and producing hydrocarbons, also known as exploration and production. This is where exploration and development take place. It is the industry's largest segment.\textsuperscript{84} The downstream section includes the refining, processing, distribution, and marketing of oil and gas products.\textsuperscript{85} The transportation of oil and gas between the initial production and the end-user of the hydrocarbons is referred to as midstream.\textsuperscript{86} These three categories are governed by different laws, practices, usages and are subject to different administrative and environmental standards.\textsuperscript{87}

\textsuperscript{82} Ibid n82, p403.
\textsuperscript{84} See Diagram by the American Petroleum Institute, available at www.americanpetroleuminstitute.com/oil-and-natural-gas-overview/wells-to-consumer-interactive-diagram
\textsuperscript{85} Ibid. at footnote 12 above.
\textsuperscript{86} Ibid. at footnote 12 above.
\textsuperscript{87} Claude Duval and others, \textit{International Petroleum Exploration And Exploitation Agreements} (2nd edn, Barrows 2009).
In the Nigerian setting, Dr. Dayo Adaralegbe88 outlines the various interests of various parties and how the occurrence of dispute is inevitable in the petroleum industry. He contends that the Sovereign State is principally interested in:

- revenue from the exploitation activities in terms of tax, royalties,
- bonuses and other government takes
- work program that increases oil production and increase revenue
- local content development
- Technological transfer

Host communities on the other hand are fundamentally concerned in, compensation where it has to be relocated from the land because of exploitation, a right to first, the second and third generation of human rights and the protection against environmental degradation, oil pollution and gas flaring.89 The foreign investor is solely interested in a legal system that gives recognition to its property rights to exploit. The causal agents of disputes include economic change, infrastructural needs, technical assumptions, political expectations and attitudinal change, economic crises, foreign investors caught up with domestic disputes, government change, and economically or politically unviable projects. Africa-related arbitrations are on an upward trajectory in the past decade. Within the precinct of the International Chamber of Commerce (ICC), Africa-related ICC arbitrations are increasing significantly. Remarkably in 2017, the

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Resolving Oil and Gas Disputes in an Integrating Africa: An Appraisal of the Role of Regional Arbitration Centres: Hon. Dr. Wilfred A. Mutubwa

ICC recorded an all-time high of 87 cases with 153 parties emanating from Sub-Saharan Africa. Furthermore, there has been an increase in disputes under the London Court of International Arbitration (LCIA) rules from a mere two related Africa cases in 2002 to 8 percent of LCIA’s new cases in 2016. The African continent is deeply disadvantaged since many of its countries lack modern arbitration laws. 42 out of Africa’s 54 States are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention). African countries are presently a party

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92 About half of African countries have adopted modern arbitration legislation based on a model law: 10 countries in Africa have arbitration legislation based on the UNCITRAL Model Law (www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html) and in Central and West Africa the 17 member states of the Organization for the Harmonization of Business Law in Africa (OHADA) have adopted the Uniform Act on Arbitration, which was revised in 2017, together with a new set of rules for the Common Court of Justice and Arbitration (see Armand Terrien, The New OHADA Arbitration and Mediation Framework: A Glass Half Full? (2018), available at http://arbitrationblog.kluwerarbitration.com/2018/02/18/new-ohada-arbitration-mediation-framework-glass-half-full/). However, other countries have fairly dated arbitration legislation. Examples are South Africa, Botswana, Namibia, Malawi, Lesotho and Swaziland which all retain arbitration statutes based on the now-repealed English Arbitration Act 1950. South Africa is expected to adopt a revised arbitration law soon, but the timing of that is not clear (see https://globalarbitrationreview.com/jurisdiction/1000205/south-africa).

to more than five hundred bilateral investment treaties (BITs) of which 17 include the protection for the investments of foreign investors and offer arbitration for the resolution of disputes between warring foreign investors and host governments under the International Center for Settlement of Disputes (ICSID) and other arbitral rules. In the realm of Africa-related, ICSID cases involve energy issues, and a great percentage of cases involving energy issues are African countries related.

8.1 Different Illustrations

8.1.1 Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria

P&ID, an engineering and project management firm founded in 2006 by two Irish nationals to carry out an energy project in Nigeria. P&ID and Nigeria signed a 20-year natural gas supply and processing agreement in January 2010.

7.1.1.1 Background and Context

This is a legal dispute that arose between Nigeria and Process & Industrial Developments Limited (P&ID). The main source of contention was the repudiation of the Gas Supply and Processing Agreement. The subject matter of the contract was the supply of natural gas to P&ID which was establishing a processing plant in Nigeria. In exchange, the claimant(P&ID) would return about 85% of the gas to the Federal Government of Nigeria as dry gas which is also known as lean gas. To ensure the success of this project and the agreement, the government was tasked with the construction of a pipeline that would be

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94 A myriad of investment treaties provide for arbitration under the ICSID Arbitration Rules, and some provide for arbitration under other rules, most often the UNCITRAL, ICC or Stockholm Chamber of Commerce (SCC) rules.


96 [2019] EWHC 2541
used to supply the claimant with wet gas but this was not met for three years since the agreement was entered into. P&ID viewed this as a repudiation of the contract.

Nigeria supplied P&ID with agreed-upon amounts of natural gas, which P&ID processed for use in Nigeria's national electric grid. In exchange, P&ID took valuable by products from the refining process for its own use. The agreement was "governed by and construed in accordance with the laws of the Federal Republic of Nigeria," disputes arising under the agreement were subject to arbitration under the rules of the Nigerian Arbitration and Conciliation Act, and the arbitration venue was London, England, unless the parties agreed otherwise.

P & ID launched arbitration proceedings in London in August 2012, alleging that Nigeria failed to produce the agreed-upon quantity of natural gas to P&ID as well as to construct the requisite pipeline infrastructure. In July 2014, the arbitral tribunal first declared that it had jurisdiction over the dispute, and then, in July 2015, it determined that Nigeria had breached the agreement.

Nigeria sought relief in English courts, requesting that the arbitral tribunal's liability determination be overturned, but the High Court of Justice in London denied Nigeria's application in February 2016 on the grounds that Nigeria had filed it more than four months after the deadline and that an extension was not warranted. Soon after, Nigeria requested a set-aside order in its courts, and the Federal High Court of Nigeria granted an order "setting aside and/or remitting for further consideration all or part of the arbitration Award" in May 2016. The set-aside ruling issued by the Nigerian court provided no reasons or explanation for its judgment.

Nonetheless, arbitration proceedings in London continued. After concluding that the Nigerian court lacked jurisdiction to overturn the responsibility judgment, the tribunal awarded P&ID roughly $6.6 billion in damages for lost
earnings, plus interest of 7%. The arbitral award, with interest, is now worth more than $10 billion.

As at the time of this award, the amount awarded was about over 20% of Nigeria’s foreign exchange reserves as of December 2020 and 10% of the Total Public Debt Stock for the third quarter of 2020. These figures are indicative of how expensive and deleterious the breaches of oil and gas supply and processing agreements have become. This is because if Nigeria was to pay these damages it would dent the economic landscape of the country.

P&ID initially moved to enforce the award in England, and the English High Court of Justice ruled in August 2019 that the award was enforceable. In the meantime, Nigeria had launched a criminal investigation into P&ID’s procurement of the natural gas agreement and had applied to the High Court of Justice in December 2019 to extend the deadline for challenging the award based on what it described as new evidence of fraud in the arbitration and underlying contract negotiations. The request was granted by the English court because Nigeria had "developed a strong prima facie case" of P&ID’s fraud and bribery in obtaining the agreement and during the arbitration processes.

The English court has yet to overturn the arbitral award, and a trial on these matters is due to commence in January 2023. A careful examination of the actions by Nigeria to institute fraud allegations against the claimant makes the discovery that these efforts come as a realization of the fact that this award may be enforced against Nigeria; therefore, these allegations act as a “knee jerk” for Nigeria.

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8.1.1.2 Relevance of Fraud and Public Policy Concerns in the Nigeria v P&ID Case

Many are times when arbitral awards have been set aside for violating public policy. The English Arbitration Act 1996 provides that an award may be challenged in the award as procured through fraud or against public policy.\(^98\) These grounds are considered serious irregularities capable of invalidating an award. It is noteworthy that in bringing the claim before the courts, Nigeria had delayed which became a challenge since the English Arbitration Act enhances the speed in the finality of arbitration awards.

Although there has been debate on the intention of the Government of Nigeria in the timing of exposing this fraud, it has set the stage for addressing one of the challenges that face countries during procurement. The details of this fraud are a series of fraudulent practices by senior government officials and public servants leading to the creation of the agreement. It is important to remember that whenever fraud has been used to induce parties into a contractual agreement, the same must be tried before a court prior to the commencement of the arbitration since this is a vitiating factor that may void a contract. It follows that arbitration will automatically fail since the contract has been voided.\(^99\) This statement begs the question of why Nigeria did not take a proactive role in investigating these allegations. Admittedly, it can be inferred that the threat of the US $10 billion award is the motivation behind the government's attempts to uncover the alleged fraud.

\(^{98}\) See Section 68(2)(g) of the Arbitration Act, 1996.

\(^{99}\) *Re Cheney Bros.* 218 A.D 652-653

8.1.2.1 Background of Parties and Facts

The claimant in this dispute was Cortec Mining Kenya Limited (CMK). This is a private company constituted in Kenya. CMK’s shareholders have as majority shareholders Cortec(PTY) Limited and Stirling Capital Limited which are leading British holding Companies. CMK began to invest in a mining project at Mrima Hill in Kenya in 2007 and obtained a Special Prospecting License (SPL 256), which was renewed three times. In mining activities, the first step is to search the identified area for the resources that you are looking for; they could include valuable minerals such as gold or resources such as oil and gas. However, you cannot conduct this preliminary activity without a valid prospecting license. Subsequently, in 2013, the claimant was granted a Special Mining License 351(SML 3510 based on the Special Prospecting Licence.

After the conclusion of the 2013 election, the newly elected and formed government, in a wave of investigating government contracts, suspended several mining licenses, including the Special Mining License that had been granted to the claimant. According to the CMK, this revocation amounted to a breach of the agreement.

8.1.2.2 Commencement of the Arbitration Proceedings

In 2015, a request for arbitration was made to the tribunal per the agreement. The claim arose out of the Government's allegedly unlawful revocation of the claimant's mining license following the discovery of new rare earth deposits by the claimant.

100 ICSID Case No. ARB/15/29. The claimants have since applied for annulment of the award.
The investor-state arbitral tribunal established under a Bilateral Investment Treaty (BIT) held it lacked jurisdiction to hear a dispute concerning a mining project which the tribunal found did not comply with domestic environmental law. The area contains one of "the world's largest untapped niobium and rare earth resources," according to the claimants. The area is also home to abundant biodiversity and sacred sites for indigenous people, and it is protected as a forest reserve, a nature reserve, and a national monument under Kenyan legislation. The case's facts are intertwined with Kenyan election politics. The parties fought bitterly on the facts, and their examination accounted for a large chunk of the award.

The claimants claimed that their investment was nationalized as a result of a "resource nationalism" strategy implemented during a government change. It was the contention of the respondent, among other things, that there was no protected investment in the first place because the mining license was obtained in violation of domestic law, and as such, it was void ab initio. The tribunal determined that the claimants bear the burden of demonstrating jurisdiction under the BIT and the ICSID Convention, including relevant facts that warrant jurisdiction. Furthermore, the tribunal ruled that in order for an investment to be protected on an international level, it must "be in substantial compliance with the significant legal requirement of the host state" and be made in good faith. Since the claimants were successful in demonstrating that they operated in good faith, the award did not hinge on this question. The issue of compliance with domestic law, on the other hand, was fundamental to the tribunal's ruling. This case highlights the need to exhaust local remedies.

The tribunal held that, under Kenyan law and the terms of the prospecting license, several conditions were to be satisfied before investors could obtain a valid mining license, including requirements arising out of the special protected status of Mrima Hill as a forest reserve, a nature reserve, and a national monument. The award is noteworthy because it established that international investment treaties only guarantee investments made in accordance with local law, even where there is no explicit legality requirement in the applicable BIT.
In this regard, the judgment draws on and expands on a considerable body of arbitral precedent addressing legal compliance issues in the context of investor-state dispute settlement.

8.1.3 Nigeria Niger Delta Oil Spill Cases
The Niger Delta region is located on the west coast of Africa,\textsuperscript{101} in South-South Nigeria, at the mouth of the Gulf of Guinea. It has a population of 31 million\textsuperscript{102} people and accounts for 7.5 percent of Nigeria's total land area.\textsuperscript{103} To date, 1,182 exploration wells have been sunk in the delta basin, with approximately 400 oil and gas fields of various sizes identified.\textsuperscript{104} This region encompasses over 800 oil-producing villages, a vast network of over 900 active oil wells, and several petroleum-related infrastructures.\textsuperscript{105}

According to an Amnesty International report, Eni has reported 820 spills in the Niger Delta since 2014, resulting in the loss of 26,286 barrels (4.1 million litres). Shell has reported 1,010 spills since 2011, with 110,535 barrels or 17.5 million litres lost. That's around seven Olympic-sized swimming pools. These are enormous figures, but the truth may be considerably worse.\textsuperscript{106} Not long ago, shell admitted liability for two operational spills in Bodo.\textsuperscript{107}

\begin{flushleft}
\textsuperscript{102}E. M Young, Food and Development (Routledge 2012).
\textsuperscript{104}Obaje N, Geology and Mineral Resources of Nigeria (Springer 2009).
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In a landmark ruling in 2021, the Hague Court of Appeal in the case of *Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell*.\(^{108}\) Dealt with an action brought by a group of Nigerians, with the backing of the Dutch NGO Milieudefensie, concerning three distinct oil leaks from Shell pipelines and wellheads near the Oruma, Goi, and Ikot Ada Udo villages in the Niger Delta. The claimants held Shell Nigeria and its parent company, Royal Dutch Shell, accountable for harm to their farmlands and fishing areas, claiming that the corporations were negligent in maintaining the pipelines, mitigating spills, and cleaning the contaminated environment thereafter. The Court of Appeal ruled in a groundbreaking decision that Shell Nigeria was strictly liable for the damage caused by two of the incidents (the Oruma and Goi cases), Shell will pay an unspecified amount in damages to the farmers, who claimed the leaks destroyed their livelihoods. Additionally, the corporation was forced to put leak detection equipment in its pipelines.

### 8.2 Lessons Learnt from the Illustrated Cases

These disputes have brought to light issues plaguing the Bilateral Investment Treaties in Africa. Therefore, it is imperative that these concerns be addressed. This is an examination of the possible lessons that Africa can learn when it comes to resolving oil and gas disputes.

#### 8.2.1 Need for Early Intervention in the Creation of Oil and Gas Agreements

First, there is a need to advocate for early intervention in the public procurement process. Although Nigeria’s allegation comes to the forefront as a litigation strategy,\(^{109}\) it epitomizes the challenges that cripple the negotiation stages of BITs. It is, therefore, crucial that during these infantile stages, checks must be included to prevent fraud which, like in the Nigerian disputes, has since stalled

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\(^{108}\)*Friends of the Earth Netherlands (Milieudefensie) v Royal Dutch Shell, District Court The Hague, Judgment of 26 May 2021.*

the enforcement of the arbitral award. The relevance of these safeguards is that they will bring Africa closer to ending the endemic corruption that has grave socioeconomic implications\textsuperscript{110} on sovereign states, including those facing adverse arbitration awards like Nigeria\textsuperscript{111}.

Similarly, in the Kenyan scenario, it is clear that there should be safeguards before a BIT is signed. In this case, Kenya was able to get a reprieve because the claimant did not provide an Environmental Impact Assessment Report. This was one of the grounds that the government used to revoke the special mining license that was given to Cortec Limited. The Environmental (Impact Assessment and Audit) Regulations, 2003 stipulates that:

“No licensing authority under any law in force in Kenya shall issue a licence for any project for which an environmental impact assessment is required under the Act unless the applicant produces to the licensing authority a licence of environmental impact assessment issued by the Authority [NEMA] under these Regulations.”\textsuperscript{112}

The preparation of an EIA report is essential in any project that will have adverse effects on the environment. Its relevance is that it evaluates all the possible significant effects that a project may cause so that they be mitigated in advance.\textsuperscript{113}


\textsuperscript{112} Environmental (Impact Assessment and Audit) Regulations, 2003, Section 4(2).

The government believed this was an illegal mining activity since the licence procured did not satisfy the legal requirements. Evidently, this was more of a procedural process than a mishap that proper checks and safeguards would have unearthed.\textsuperscript{114} This is particularly so through institutional oversight by the National Environmental Management Authority (NEMA). The tribunal agreed with the Government of Kenya that licences obtained did not fully comply with the relevant Kenyan laws as such, Cortec could not seek protection under the investment treaty. \textsuperscript{115} The result of these findings meant that Kenya was allowed to recover amounts paid to Cortec.

8.2.2 Advocating for an African Approach to Dispute Settlement

Disputes involving African states as one of the parties present unique challenges and are ever so often sensitive. Having these disputes resolved in foreign countries runs the risk of excluding public interest considerations of the home countries which, must contend with hefty awards from agreements that were procured fraudulently, as we have seen in the Nigerian case or agreements that were formed without following the due process of the law as was seen in the Kenyan case.

When these cases are filed in foreign courts or before western dominated tribunals, it presents them with an opportunity to either champion the economic growth of developing African countries or stifle their economic growth. Ohio argues that arbitral awards that have African parties must provide some sort of ‘justice’ to the millions who suffer the impact of agreements borne of corruption between government officials and investors.\textsuperscript{116} The award made in favour of PID against Nigeria, if honoured, would have had serious ramifications for the


\textsuperscript{115} ICSID Case No. ARB/15/29.

economic status of the country.\textsuperscript{117} International arbitration remains most preferred not only in oil and Gas disputes but disputes on natural resources generally.\textsuperscript{118} This is mainly because international arbitration tribunals remain attractive to most investors, including Africans.\textsuperscript{119}

The tribunal in \textit{Churchill Mining V Indonesia Award} stated that a tribunal should:

\begin{quote}
“consider that it is not bound by previous decisions. At the same time, in its judgment, it must pay due consideration to earlier decisions of international tribunals. Specifically, it believes that subject to compelling grounds to the contrary, it has a duty to adopt principles established in a series of consistent cases. It further believes that subject always to the text of the BITs and the circumstances of each particular case, it has a duty to contribute to the harmonious development of international investment law, with a view to meeting the legitimate expectations of the community of States and investors towards legal certainty and the rule of law.”\textsuperscript{120}
\end{quote}

Introducing judicial activism in the resolution of oil and gas disputes may claw back the gains that have been made in ensuring there is legal certainty when it comes to settling of such disputes. Judicial activism allows a court to be guided by its own independent individual and political observations in place of subsisting laws.\textsuperscript{121} The implication is that there will be a variance in the outcome of matters, including similar matters, since observations vary.

Generally, certainty is achievable through the application of consistent progressive laws. Arbitration should not go this way because this will discourage Foreign Direct Investment (FDI), which African countries need for their economies to grow.

Admittedly, there is a need for an African touch when resolving these disputes where African states or investors are parties. However, a balance must be struck in a manner that ensures that there is the promotion of FDI while at the same time ensuring that African parties get justice during the resolution of oil and gas disputes.

8.2.3 Need for Environmental Protection Mechanism

Although oil and gas agreements are about better economic returns and development, particularly for developing countries, it is prudent that they are viewed from different lenses because the effects are not purely financial. Lessons must be learnt from the cases in the Niger delta that have been discussed in this Chapter. Oil and gas activities come with the immense responsibility of ensuring environmental protection and protecting the source of and livelihoods of the community where the upstream, mid-stream, and downstream activities are conducted.\textsuperscript{122} It is worth noting that most of these effects are difficult to reverse, especially where the exploration and exploitation entail the construction of drills, pipelines, and excavation activity.

In Niger Delta, were witnessed cases of oil spillage that damaged environmental resources such as water bodies, affecting fisheries, which are a source of livelihood and water for personal and domestic uses. Studies have shown that coastal communities remain on the fringes of the promised socio-economic benefits of oil development and are mostly at risk of experiencing adverse

impacts due to the reduced access to the ocean,\textsuperscript{123} where oil and gas are being extracted from the seabed. Evidently, the oil sector has negative effects on fisheries and coastal communities; it is crucial to remember that these adverse impacts vary depending on location, ecosystems, species, and specific activities and groups.

The perception that oil wealth can translate to broad socioeconomic development continues to overshadow the call for better Environmental Sustainable Governance (ESG). These expectations are usually higher among communities located near oil development projects, and who believe that they will benefit from infrastructure development, revenues, jobs, compensation payments, and other “trickle-down” effects to improve their economic well-being.\textsuperscript{124}

One way to ensure environmental conservation is the mandatory requirement of the EIA. For example, Kenya has adopted rules that mandate parties to provide environmental impact assessment reports highlighting the possible environmental effects and how they should be mitigated.\textsuperscript{125} Additionally, affected parties may bring suits before a court of law to enforce their environmental rights and seek damages where relevant, as was the case in Nigeria, where the victims partnered with Dutch NGO Milieudefensie to bring an action against Shell at the Hague.\textsuperscript{126} This case brings to the fore an interesting issue regarding the power imbalance that exists between the victims and perpetrators. This is because most of these corporations contracted for oil and

\textsuperscript{124} Ibid n125, p1.
\textsuperscript{125} Environmental (Impact Assessment and Audit) Regulations, 2003, Section 4(2).
\textsuperscript{126} See Footnote 92.
gas exploitations have grown massively, and their influence is global. The status they enjoy as private entities has elevated them to shapers of global affairs, including politics, democracy, governance, human rights, and the price of basic commodities. This power and influence also influence states during the negotiations of agreements and resolution of disputes, and that is why this chapter calls for an African approach and perspective in the resolution of oil and gas disputes through arbitration through the use of African.

9. Conclusion
This Chapter has critically examined the relevance of regional institutions in resolving oil and gas disputes. To achieve this objective, this study has conducted an appraisal of the existing regulatory regime for oil and gas, including the institutional framework formed through the creation of trade blocks. Some of the treaties discussed include the Africa Free Continental Trade Area agreement, which bears numerous benefits and bolsters potential trade opportunities among African countries. Although AfCTA has positives, it limits the parties that can bring disputes for resolution.

It is largely a state centric mechanism which means that private entities lack the *locus standi* to bring matters before the established DSU. This approach fails to acknowledge the fact that oil and disputes are multifaceted with state, non-state, private and public actors.

Additionally, this chapter has appraised some of the cases that have been resolved through arbitration and highlighted lessons that Africa must learn to leverage the benefits that are borne from oil wealth.

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The Alternative Dispute Resolution (ADR) Framework for Tax Dispute Resolution in Kenya

By: Hon. Dr. Kariuki Muigua*

Background
Since the promulgation of the Constitution of Kenya, 2010 incorporating Article 159 which enjoins the Courts to promote use of Alternative Dispute Resolution (ADR), the application of ADR in resolving disputes in Kenya has gone from general usage as a voluntary private arrangement of parties to incorporate use in resolving specialized disputes as part of administrative and quasi-judicial arrangement by public institution. The best example of the incorporation of ADR as a mechanism of resolving disputes in the administrative structure of a public entity is Kenya Revenue Authority (KRA). In June 2015, KRA developed its pioneering Alternative Dispute Resolution (ADR) Framework to guide stakeholders on using ADR in tax dispute resolution in Kenya.¹ In June 2020, the National Treasury enacted the Tax Procedures (Settlement of Disputes Out of Court or Tribunal) Regulations, 2020 to buttress the KRA ADR Framework and guide the use of ADR in the settlement of tax disputes out of the Courts or Tax Appeals Tribunal.²

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The phrase alternative dispute resolution refers to all dispute resolution mechanisms and processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others. It has, however, been argued that the term “alternative dispute resolution” is a misnomer as it may be understood to imply that these mechanisms are second-best to litigation which is not true. Article 33 of the Charter of the United Nations outlines these conflict management mechanisms and is considered the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties whether States or individuals. It provides that the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

This article discusses the legal framework for use of ADR in tax dispute resolution in Kenya with South Africa as a case study. It starts with a review of the constitutional basis for use of ADR in tax disputes in Kenya and the relevant provisions of the Civil Procedure Code relevant to use of ADR in resolving commercial disputes (including tax disputes) out of Court. The next section explores the methods of resolving tax disputes in Kenya as outlined by the Tax Procedures Act, 2015, the Tax Appeals Tribunal Act, 2013, the Tax Procedures (Settlement of Disputes Out of Court or Tribunal) Regulations, 2020 and the Revised KRA Alternative Dispute Resolution (ADR) Framework. This is followed by a review of the legal framework for Alternative Dispute Resolution of Tax Disputes to serve as a case study for the critique of the Kenyan Tax ADR framework. Finally, the author undertakes a critique of the framework for ADR of tax disputes in Kenya incorporating assessment of the successes, challenges and limitation.

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2.0 The Constitution and Alternative Dispute Resolution of Tax Disputes

Alternative Dispute Resolution (ADR) is now recognized in the Kenyan legal framework including under the Constitution which has elevated status of ADR from being merely a convenient private arrangement for resolving disputes between parties to an access to justice mechanism with applicability to a wide array of disputes including tax dispute resolution.

2.1 Promotion of Alternative Dispute Resolution

Article 159(2) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted,...”⁵ In essence, article 159 of the Constitution makes promotion of ADR a key principle of exercise of judicial authority in Kenya. In turn, courts and tribunals are called upon to promote the use alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.⁶

Further, the scope for the application of ADR has also been extensively widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These are the key provisions that form the constitutional basis for the application of ADR in dispute resolution in Kenya.⁷ The import of these provisions is that ADR can apply to all disputes and enjoys broad applicability

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now more than ever. It is also a clear manifestation of the acceptance of ADR as a means of conflict resolution in all disputes.

2.2 Public Finance and No Taxation without Legislation
The principles of public finance under the constitution include “openness and accountability” and the need to “promote an equitable society, and in particular ensure “the burden of taxation shall be shared fairly.” In turn, the Constitution gives the National Government power to impose taxes and charges which include income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. In addition, parliament may enact laws authorizing the national government to impose any other tax or duty. On its part, the county may impose property rates, entertainment taxes and any other tax that is authorize by an Act of Parliament. Important for tax dispute resolution, Article 210(1) of the Constitution on imposition of tax provides that “no tax or licensing fee may be imposed, waived or varied except as provided by legislation.” This means that any resolution or settlement of tax disputes which has the effect of imposing, waiving or varying taxes must be pursuant to provision of legislation to be valid.

2.3 Fair Administrative Action and Access to Justice
In addition to the provisions of the Constitution on authority and principles of public finance, the right to fair administrative action and access to justice are also relevant to tax dispute resolution given that some aspects of it are administrative in nature such as objection decision and the decision by KRA officials to accept request to refer disputes to ADR or request for settlement out of court or tribunal. In that regard, taxpayers enjoy the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

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8 Article 201 (a) and (b), Constitution of Kenya, 2010.
Given that most of tax administrative decisions affect the right or fundamental freedom of a person including right to property, taxpayers have the right to be given written reasons for the action.\textsuperscript{14}

Further, the right to fair administrative action is the basis for review of KRA decisions by Court or impartial tribunal.\textsuperscript{15} The question that begs is, can the Court refer for settlement an application for review of administrative action of KRA referred to it by a taxpayer to an ADR Facilitator who is a KRA employee given the requirement of “independent and impartial tribunal”? Further, the State is enjoined to ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.\textsuperscript{16} This raises the question, whether requiring where taxpayer opts for an Independent ADR facilitator who is not an employee of KRA that they pay for them may be considered an impediment to access to justice. In any case, the Tax Procedures (Settlement Out of Court or Tribunal) Regulations, 2020 have to be considered from the perspective that they are offering an alternative to Court-Annexed Mediation which allows parties access to an Independent Mediator.

3.0 The Civil Procedure Act and Alternative Dispute Resolution of Tax Disputes

There are numerous provisions under the Civil Procedure Act, Cap. 21, Laws of Kenya, on the use of Alternative Dispute Resolution (ADR) in conflict management and are relevant to the resolution of tax disputes. In July 2009, Parliament passed a raft of proposals for amendment to the Civil Procedure Act to introduce ADR. Essentially, these were proposed amendments to sections 1 and 81 of the Civil Procedure Act which have so far been enacted into law.\textsuperscript{17} For starters, the amendment introduced section 1A (1) of the Civil Procedure Act which outlined the overriding objective of the Act as to facilitate the just,

\textsuperscript{14} Article 47(2), Constitution of Kenya, 2010.
\textsuperscript{17} Section 1A (1) and section 81 (2) (ff) of Civil Procedure Act, Revised Edition 2010(2008), Government Printer, Nairobi.
expeditious, proportionate and affordable resolution of civil disputes governed by the Act.

The Civil Procedure Act enjoins the Judiciary to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective above. In effect, this implies that the court in its interpretation of laws and issuance of orders will ensure that the civil procedure shall, as far as possible, not be used to inflict injustice or delay the proceedings and thus minimize the litigation costs for the parties.¹⁸ This provision also serves as a basis for the court to employ rules of procedure that provide for use of Alternative Dispute Resolution mechanisms, to ensure that they serve the ends of the overriding objective.

Section 14 of the Tax Appeals Tribunal Act, exempts the provisions of Cap. 21. In particular, the Act provides that the provisions of the Civil Procedure Act (Cap. 21) shall not apply to the proceedings of the Tribunal.¹⁹ On the other hand, section 32 of the Act clearly states that the High Court shall hear appeals from the Tribunal in accordance with rules set out by the Chief Justice.²⁰ However, the Tax Procedures Act does not exempt the Civil Procedure Act and tax appeals to High Court are similar to other Civil Disputes that are referred to High Court and therefore subject to Civil Procedure. Therefore, the provisions of Civil Procedure Act and Civil Procedure Rules on ADR are applicable to tax disputes.

3.1 Court annexed arbitration
Court-annexed arbitration can arise as a result of the application of the Arbitration Act (as Amended in 2009) and also under supervision of the court under the Civil Procedure Act. Under the Civil Procedure Act, the courts involvement in the arbitral process is specifically provided for in Section 59 and

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¹⁸ Section 1A (2) of Civil Procedure Act, op. cit.
Order 46 of the Civil Procedure Rules, 2010. Section 59 of the Act provides for references of issues to arbitration, which references are to be governed in a manner provided for by the rules. Order 46 rule 1 provides that; “Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.”

Under Order 46 Rule 2, the arbitrator is to be appointed in a manner that the parties have agreed upon. However, where no arbitrator or umpire (under rule 4) has been appointed the court under rule 5 may, on application by the party who gave the notice to the other to appoint, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration and in such case the court shall proceed with the suit. Where an award has been made pursuant to arbitration under the Rules, rule 10 requires that that the persons who made it shall sign it, date it and cause it to be filed in court within 14 days together with any depositions and documents which have been taken and proved before them.

A court has the power to modify or correct an award under rule 14 if it is imperfect or contains an obvious error, if a part of the award is upon a matter not referred to arbitration or if it contains a clerical mistake or error from an accidental slip or omission. The court also has power to remit an award for reconsideration by the arbitrator under rule 15. Rule 18 provides that the court shall, upon due notice to the other parties, enter judgment according to the award and upon such that judgment a decree shall follow thereof. No appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with the award.

Order 46 Rule 20 of the Civil Procedure Rules provides that; “Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the
attainment of the overriding objective envisaged under sections 1A and 1B of the Act.” Order 46 Rule 20 read together with Sections 1A and 1B of the Civil Procedure Act therefore obligates the court to employ ADR mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Under Order 46 rule 20 (2) it is provided that a court may adopt any ADR mechanism for the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be adeptly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism and that will lead to the attainment of the overriding objective under sections 1A and 1B of the Act.

3.2 Mediation and other ADR Mechanisms
The clamor to introduce court-annexed mediation led to the enactment of section 81 (2) (ff) of the Civil Procedure Act, as amended by the Statute Law (Miscellaneous Amendment) Act.21 Section 81 (2) (ff) provides for the selection of mediators and the hearing of matters referred to mediation under the Act. Parties who have presented their cases to court now are able to have their matter referred to mediation by the court for resolution.

The Statute Law (Miscellaneous Amendments) Act amended sections 2 and 59 of the Civil Procedure Act to provide for mediation of disputes. Section 2 of the Civil Procedure Act has been amended to define mediation as an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings.22 Section 59 of the Civil Procedure Act has also been amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process. This includes the establishment of a Mediation Accreditation Committee appointed by the Chief Justice to determine and apply the criteria

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22 Section 2 of the Civil Procedure Act.
The Alternative Dispute Resolution (ADR) Framework for Tax Dispute Resolution in Kenya: Hon. Dr. Kariuki Muigua

for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.\(^{23}\)

The law now requires the court either at the request of the parties, where it deems appropriate to do so or where the law provides so, to refer a dispute presented before it to mediation. Where a dispute is referred to mediation, the parties are enjoined to select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee. Such reference should, however, be conducted in accordance with the mediation rules. Section 59B (4) provides that an agreement between the parties to a dispute as a result of mediation be recorded in writing and registered with the court and is enforceable as if it were a judgment of that court. No appeal lies against such agreement.

Under Section 59C, a suit may be referred to any other method of dispute resolution where the parties agree or where the court considers the case suitable for referral. Under Section 59C (2), any such other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order. Any settlement arising from a suit referred to any such other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court and no appeal shall lie in respect of such judgment. Further, all agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court. Pursuant to Order 46 rule 20 (3) it is only after a court-mandated mediation fails that the court shall set the matter down for hearing and determination.

Clearly, these provisions of the Civil Procedure Act are not, in my view, really introducing mediation per se, but merely setting up a legal process where a

\(^{23}\) Section 59A of the Civil Procedure Act.
court can coerce parties to mediate and the outcome of the mediation taken back to court for ratification. These amendments have introduced a mediation process which is formal and annexed to the procedures governing the conduct of cases in the High Court. Informal mediation which may not require the use of writing is not provided for. Hence, it can be said that the codification of mediation rules in the Civil Procedure Act merely reflect the concept of mediation as viewed from the Western perspective and not in the traditional, political and informal perspective where it could lead to a resolution of the conflict.

4.0 The Methods of Tax Dispute Resolution in Kenya
The tax law in Kenya envisages four approaches and levels of resolving tax disputes, namely, the administrative decision, quasi-judicial process involving Tax Appeals Tribunal (TAT), formal judicial process involving High Court as court of first instance or appeal from the Tribunal and appeal to Court of Appeal and alternative dispute resolution on agreement of parties at administrative level or as an out of tribunal/court dispute settlement procedure. The relevant laws are the Tax Procedures Act,\(^{24}\) Tax Appeals Tribunal Act\(^{25}\) and the relevant Tax Laws in Kenya. Parties can opt for Alternative Dispute Resolution of tax disputes at any level of the dispute under KRA Alternative Dispute Resolution (ADR) Framework.\(^{26}\)

4.1 Tax Objection and Objection Decision
The Tax Procedures Act requires that a taxpayer who wishes to dispute a tax decision at first instance lodges an objection with Commissioner against the tax decision within 30 days of notification under section 51 before proceeding to take any steps envisaged under any other written law. Any such notice of


objection must state the precise grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments. Further, the taxpayer must confirm payment of the entire amount of tax due under the assessment that is not in dispute. If the Commissioner concludes that these conditions have not been met, she is to immediately notify the taxpayer in writing that the objection has not been validly lodged. The Commissioner has sixty (60) days to make an objection decision from the date the taxpayer lodged the notice of the objection failing which the objection is considered to be allowed.27

The taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection. The Commissioner has discretion to allow an application for the extension of time to file a notice of objection if the taxpayer was prevented from lodging the notice of objection within the prescribed period because of an absence from Kenya, sickness or other reasonable cause and the taxpayer did not unreasonably delay in lodging the notice of objection. Once a notice of objection has been validly lodged within time, the Commissioner is bound to consider the objection and decide either to allow the objection in whole or in part, or disallow it. The Commissioner's decision is referred to as an "objection decision" and includes a statement of findings on the material facts and the reasons for the decision. In any case, the Commissioner is required to notify in writing the taxpayer of the objection decision and take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.28

4.2 Appeal to the Tax Appeals Tribunal
Section 52 of the Tax Procedures Act gives a person who is dissatisfied with an appealable decision the discretion to appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013. As per the Tax Appeals Tribunal Act, whether or not a decision is appealable to the tax

27 Section 51 of the Tax Procedures Act, 2015.
28 Section 51 of the Tax Procedures Act, 2015.
tribunal depends on the relevant tax law on case to case basis. In turn, a person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may upon giving notice in writing to the Commissioner, appeal to the Tribunal. However, a notice of appeal to the Tribunal relating to an assessment is only valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice. Further, the person appealing is required to pay a non-refundable fee of twenty thousand shillings to the tribunal.

As a matter of fact, while the proceedings of the Tribunal are of a judicial nature, the Civil Procedure rules have been specifically excluded. The provisions of the Civil Procedure Act (Cap. 21) are expressly excluded from application to the proceedings of the Tribunal meaning aspects such as Court-Annexed Mediation are not allowable. However, the Act allows parties to an appeal before the Tribunal to apply, in writing, to the Tribunal to settle the dispute out of the Tribunal. In such a case, the time taken to resolve or conclude the settlement out of the Tribunal is to be excluded when calculating the period contemplated for resolution of Appeals under the Act. In particular, the Tribunal is bound to hear and determine an appeal within ninety days from the date the appeal is filed with the Tribunal.

4.3 Appeal to the High Court
If a party to proceedings before the Tribunal is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, they are entitled within thirty days of being notified of the decision or within such further period as the High Court may allow, to appeal the decision to the High Court in accordance

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29 Section 12 of the Tax Appeals Tribunal Act, 2013.
30 Proviso to Section 12 of the Tax Appeals Tribunal Act, 2013.
31 Section 14 of the Tax Appeals Tribunal Act, 2013.
32 Section 13(8) of the Tax Appeals Tribunal Act.
33 Section 13(7) of the Tax Appeals Tribunal Act.
34 Section 53 of the Tax Procedures Act, 2015.
with the provisions of the Tax Appeals Tribunal Act, 2013.\textsuperscript{35} The High Court is to hear such appeals in accordance with rules to be issued by the Chief Justice.

Essentially, appeal to the High Court marks the formal start of tax litigation in Kenya and tax cases usually take three forms, namely, appeals from decisions of the Tax Appeals Tribunal (TAT), judicial review cases challenging abuse of process or other administrative excesses by the Kenya Revenue Authority (KRA) and constitution petitions by aggrieved tax payer(s) alleging infringement of constitutional rights.\textsuperscript{36} In an appeal by a taxpayer to the Tribunal, High Court (or Court of Appeal) in relation to an appealable decision, the taxpayer is only permitted to rely on the grounds stated in the objection to which the decision relates unless the Tribunal or Court allows the person to add new grounds.\textsuperscript{37}

**4.4 Appeals to Court of Appeal**

In event any party to tax litigation proceedings before the High Court is dissatisfied with the decision of the High Court in relation to an appealable decision, they may in thirty (30) days of being notified of the decision or within such further period as the Court of Appeal may allow, appeal the decision to the Court of Appeal.\textsuperscript{38} Both KRA and tax payers have resorted to appeals to Court of Appeal to challenge several decisions of the High Court. The Tax Procedures Act is clear that any appeal to the decision of the Tax Tribunal to the High Court or to decision of the High Court to the Court of Appeal shall be on a question of law only.\textsuperscript{39}

\textsuperscript{35} Section 32 of the Tax Appeals Tribunal Act.

\textsuperscript{36} Taxbaddy, Tax Litigation in Kenya, Available at: https://www.taxbaddy.com/applications/academy/litigation/litigation_intro_ke.php (accessed on 25/01/2022).

\textsuperscript{37} Section 56(3) of the Tax Procedure Act, 2015.

\textsuperscript{38} Section 54 of the Tax Procedures Act, 2015.

\textsuperscript{39} Section 56(2) of the Tax Procedures Act, 2015.
5.0 Alternative Dispute Resolution of Tax Disputes out of Court or Tribunal

The law provides that where a Court or the Tribunal permits the parties to settle a dispute out of Court or the Tribunal, as the case may be, the parties are to make the settlement within ninety days from the date the Court or the Tribunal permits the settlement. In that regard, if the parties fail to settle the dispute within that period, the dispute is to be referred back to the Court or the Tribunal that permitted the settlement. This provision of the Tax Procedures Act in allowing for settlement of tax disputes vide Alternative Dispute Resolution along with Article 159 of the Constitution are the basis for use of ADR in tax disputes resolution in Kenya.\(^\text{40}\) The provision is activated by the Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020 and KRA Alternative Dispute Resolution (ADR) Framework both of which provide the procedures for parties to refer disputes to Alternative Dispute Resolution before or in lieu of referring them to the Tribunal or appealing to the Court and for settlement out of court or tribunal.

5.1 Settlement of Tax Disputes Out of Court or Tribunal Regulations, 2020

The Cabinet Secretary for the National Treasury and Planning on 17th June 2020, pursuant to section 112 of Tax Procedures Act, 2015 (the Act), enacted The Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020 (which were gazetted on 9th July 2020) to make provision for Alternative Dispute Resolution after tax appeal has been lodged either with the Tax Appeals Tribunal (TAT) or Court of Law whether High Court or Court of Appeal.\(^\text{41}\) The regulations apply where a tax dispute has been permitted to be settled out of court or tribunal in accordance with section 55 of the Act and section 28 of the Tax Appeals Tribunal providing for out of Court and out of Tribunal settlement. The regulations provide that a party to a tax dispute may apply to the court or tribunal to settle the tax dispute out of court or tribunal as the case may be.

\(^{40}\) Section 55 of the Tax Procedure Act, 2015.

However, the parties to a tax dispute have to agree voluntarily to settle the dispute out of court or tribunal and the party seeking to settle the dispute out of court or tribunal has to obtain the consent of the other party as proof before applying to the court or tribunal. In any case, the parties must be committed to the settlement process.\(^{42}\) Even where parties agree, there are tax disputes that cannot be settled out of court or tribunal. These include disputes whose settlement would be contrary to the Constitution, the tax law or any other written law; tax dispute involving the interpretation of the law or where there is evidence that the taxpayer has committed fraud in relation to tax.\(^{43}\)

Further, if the parties to the tax dispute have previously fail to settle the dispute out of court or tribunal, the matter cannot be referred to out of court settlement again.\(^{44}\) In essence, this provision appears to limit the discretion of the Court or Tribunal to allow referral of disputes that had previously failed to reach settlement under ADR process. This is key given that the parties to a tax dispute are required to conclude the settlement process within ninety days from the date the court or tribunal grants permission to settle the dispute out of court or tribunal as stipulated under the Tax Procedures Act.\(^{45}\) Thus, if the parties do not reach a settlement agreement within the stipulated 90 days, the tax dispute shall be referred back to the court or tribunal and it is not possible for parties to agree to extend the time for settlement except with the permission of the court or the tribunal to extend the time.\(^{46}\)

Once the court or tribunal has permitted the parties to a tax dispute to settle the dispute out of court or tribunal, a facilitator is to be nominated, with the consent of the other party to the dispute. In this regard, the Commissioner may

\(^{42}\) Regulation 3, Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

\(^{43}\) Regulation 4, Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

\(^{44}\) Ibid.

\(^{45}\) Section 55 of the Tax Procedures Act, 2015.

\(^{46}\) Regulation 3(5), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
recommend a facilitator from amongst the staff of the Authority or the taxpayer may propose one from a list of mediators accredited by an institution recognized in Kenya.\textsuperscript{47} Clearly, this means a taxpayer is not bound to choose a Court Accredited Mediator as is the case in the Court Mandated Mediation. The nomination of a facilitator has to be done within fourteen days after the court or tribunal has granted the parties to a tax dispute permission to settle the dispute. The facilitator is to be notified in writing of the nomination by the Commissioner.\textsuperscript{48}

In the interest of impartiality and neutrality, a facilitator must not have been involved in any way in the matter which is the subject to the tax dispute or be a practicing tax agent or represent or have represented the taxpayer in any matter or have any interest in the tax dispute.\textsuperscript{49} Further, the facilitator has to disclose in writing to the parties to the tax dispute any conflict of interest which may arise before the commencement of the proceedings for the settlement of the tax dispute or which may arise during the proceedings.\textsuperscript{50} In that regard, upon the disclosure of a conflict of interest by a facilitator, the facilitator is required to immediately recuse himself or herself from dealing with the tax dispute and another facilitator shall be nominated.\textsuperscript{51} This is needlessly too stringent and may lead to undue delays in settlement of tax disputes. The best option would have been to allow both parties to decide whether to continue with the facilitator or press for recusal.

In facilitating the resolution of a tax dispute, the Facilitator is bound to hold such number of meetings as may be appropriate, guide the parties to the tax dispute

\textsuperscript{47} Regulation 5(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
\textsuperscript{48} Ibid.
\textsuperscript{49} Regulation 5(5), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
\textsuperscript{50} Regulation 5(7), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
\textsuperscript{51} Regulation 5(8), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
in the settlement of the dispute, promote and protect the integrity, confidentiality, fairness and efficiency of the process; act independently and avoid circumstances that may result in a conflict of interest; and employ the procedures necessary for the expeditious resolution of the dispute.\textsuperscript{52} At the same time, the facilitator has to convene the first meeting between the parties to the tax dispute within fourteen days of being notified of nomination.\textsuperscript{53} At the first meeting, the parties identify the issues for settlement; agree on a schedule of meetings; decide on the service of documentary material relevant to the tax dispute; agree on the conduct of the meetings; and agree on any other issues necessary to facilitate the settlement of the tax dispute.\textsuperscript{54}

Once the settlement meetings commence, the parties to the tax dispute or the parties’ appointed representatives are forbidden from communicating with the facilitator in the absence of the other party and any communication with the facilitator shall only be in relation to the tax dispute.\textsuperscript{55} During meetings convened by the facilitator, the parties or their appointed representatives are required to maintain confidentiality and uphold decorum; uphold integrity and fairness; make full disclosure of material facts and documents relevant to the tax dispute; and strictly adhere to the agreed timelines.\textsuperscript{56} If a party to a tax dispute is unable to meet any timelines agreed upon at a meeting convened by the facilitator, that party has to notify the facilitator and the other party in writing of the inability and specify the reasons for the inability.\textsuperscript{57} In event of failure by

\textsuperscript{52} Regulation 5(6), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
\textsuperscript{53} Regulation 5(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
\textsuperscript{54} Regulation 6(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
\textsuperscript{55} Regulation 6(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
\textsuperscript{56} Regulation 6(3), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
\textsuperscript{57} Regulation 6(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
a party or their representative without justifiable cause to attend a meeting convened by the facilitator, the facilitator may appoint another date for the meeting or terminate the process.\(^{58}\)

The regulations provide for the reasons for termination of settlement proceedings which include where a party to the tax dispute opts to terminate the proceedings and notifies the other party, the court or tribunal in writing of the intention to terminate the proceedings or where both parties to the tax dispute mutually agree to terminate the proceedings and notify the court or tribunal in writing. Further, the settlement proceedings may terminate where a party fails to attend three consecutive meetings convened by the facilitator without any justifiable cause or where the ninety days’ timeline required to resolve the dispute has lapsed and an extension of time by the court or the tribunal has not been granted.\(^{59}\) Upon the termination of settlement proceedings, the facilitator is to send a notice of termination in writing to the parties and the matter stands referred back to the court or the tribunal.\(^{60}\)

The settlement agreement constitutes the decision between the parties and has to be dated and signed by the parties or their appointed representatives and witnessed by the facilitator. It forms the basis for preparation of tax dispute resolution consent for filing before the court or tribunal and is binding to both parties.\(^{61}\) Such agreement is considered to be the full and final settlement of the dispute save where the parties have expressly specified otherwise in the Agreement. The agreement is also confidential and entered into on a “without

\(^{58}\) Regulation 6(5), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

\(^{59}\) Regulation 7(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

\(^{60}\) Regulation 7(2), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.

\(^{61}\) Regulation 8(1), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
prejudice” basis and does not form the basis for judicial precedent.\textsuperscript{62} If the parties fail to reach a settlement agreement, the tax dispute shall be referred back to the court or tribunal, as the case may be, for determination.\textsuperscript{63}

In case a tax dispute is settled wholly or partially a consent agreement between the parties to a tax dispute setting down the terms of the settlement agreement shall be filed with the court or tribunal, as the case may be.\textsuperscript{64} Such consent agreement between parties to a tax dispute shall be recorded by the court or tribunal as an order of the court or tribunal.\textsuperscript{65} Where a party to a tax dispute violates the terms of a settlement agreement between the parties, the other party may apply to the court or the tribunal for enforcement of the agreement.\textsuperscript{66} Each party is to bear its own costs for the settlement of the tax dispute out of court or the tribunal and pay any expert witness they call.\textsuperscript{67} Where a taxpayer nominated a facilitator, they shall bear any cost that may be payable to the facilitator.\textsuperscript{68} The Commissioner provides a venue for the meetings but where the other party prefers a different venue, that party shall bear the costs of that different venue.\textsuperscript{69}

\begin{thebibliography}{99}
\bibitem{2023} Regulation 8(3), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
\bibitem{2023} Regulation 8(4), Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020.
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\end{thebibliography}
5.2 KRA Alternative Dispute Resolution (ADR) Framework

The KRA Alternative Dispute Resolution (ADR) Framework “for the general guidance of the Stakeholders who wish to engage in Alternative Dispute Resolution (ADR) to resolve their tax disputes.”\(^{70}\) In essence, this means that the ADR Framework is not binding on the parties except until the parties agree to refer to their dispute to ADR. Even then, the ADR Framework serves as a guidance allowing the ADR Facilitator the discretion to do what is necessary to resolve the dispute. Indeed, KRA has attempted to Tax Procedures (Alternative Dispute Resolution) Regulations 2019 which have been described as seeking to “to anchor the existing ADR Framework in law” and to govern the alternative tax dispute resolution (ADR) process.\(^ {71}\) Eventually, the Cabinet Secretary for National Treasury on 17\(^{th}\) June 2020 enacted the revised regulations as Tax Procedures (Settlement of Tax Disputes out of Court or Tribunal) Regulations, 2020 which appear to be limited to settlement of tax disputes already instituted in court or tribunal.

The KRA ADR Framework was launched in June 2015 and revised in June 2019 to provide an internal process for KRA to amicably resolve and settle tax disputes outside the judicial process. The ADR Framework aimed at complementing the judicial and quasi-judicial mechanisms for resolving tax disputes in the tax laws “by introducing ADR as an additional and/or alternative means of resolving tax disputes.”\(^{72}\) The ADR framework has in the first five (5) years of its existence provided a useful “reference point for the alternative tax dispute resolution process.”\(^ {73}\) Importantly, the ADR Framework helped to achieve alternative dispute resolution of tax disputes as envisaged


\(^{72}\) KRA ADR Framework, p. 7.


However, with the enactment of the Tax Procedures (Settlement of Tax Disputes out of Court or Tribunal) Regulations, 2020, the place of the KRA ADR Framework is now exclusively guiding alternative dispute resolution (ADR) under the KRA Internal Dispute Resolution Mechanism (IDRM) before or in lieu of referral to the tribunal or the court. The Framework acknowledges that it seeks to provide flexibility and eliminate “the limitations imposed by judicial and quasi-judicial processes and the complexity of technical procedures and high costs of litigation.” The ADR envisaged under the framework is a voluntary, participatory and facilitated discussion of a tax dispute between a taxpayer and the commissioner.74

Further, the KRA ADR Framework clarifies that it is in the form of facilitated mediation and not arbitration as envisaged by the Arbitration Act (Cap 49 of Laws of Kenya). This is because the Facilitator of the ADR has no power to impose any decision regarding the outcome of the tax dispute. Under the Framework, “the parties are facilitated to find a solution to the dispute.”75 This form of ADR is favoured over litigation because it gives parties autonomy to achieve settlement of their tax disputes on their terms. The approach taken in the Framework has benefited from benchmarking against the experiences of many Tax Dispute Resolution Frameworks from the World.76

According to KRA, ADR is preferable for resolving tax disputes in that it shifts focus from enforcement to trust and facilitation, avoids inordinate delays before conclusion of cases before courts and tribunals, is cost-effective and confidential especially where tax litigation has the possibility of having adverse impact on

74 KRA ADR Framework, p. 7.
75 KRA ADR Framework, p. 7.
76 KRA ADR Framework, p. 7.
the business relations of the tax payer or may attract negative publicity for KRA. In addition, ADR is without prejudice in that if it does not succeed the discussions under its framework cannot be used against any party without express agreement. ADR also helps to preserve relationships between KRA and tax payers and also ensures higher compliance levels as parties are more likely to abide by the negotiated outcome. It also removes the specter of uncertainty associated with tax litigation over the outcome of a tax case for both KRA & the taxpayer. Alternative Dispute Resolution (ADR) of tax disputes is also encouraged in compliance with the constitution principle promoting negotiated settlement of appropriate disputes. 

The ADR Framework expressly states that it does not negate the legal right of either party to appeal to the Tax Appeals Tribunal or the Court of Law. Thus, an aggrieved party must file appeal within the time stipulated under the law under the tax Procedures Act. This creates a dilemma in that while parties are pursuing ADR under the framework, the time is ticking and the party has a duty to comply with the stipulated timelines for filling appeal. The end result most tax payers would rather file their Tax Appeal and then seek out of court or tribunal settlement that take the risk of pursuing ADR within the framework even as the clock ticks against them.

The Commissioner is entitled to give taxpayer opportunity to engage ADR before issuing objection decision in case of a decision to amend assessment partially or decline to amend an assessment. In that regard, the timelines of the ADR are restricted to the time remaining in the time imposed by the Tax Procedures Act (of 60 days for Commissioner to make Objection Decision) and 30 days for Commissioner to make a review decision under the East African Community Customs Management Act (EACCMA) 2004.

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The parties may engage a tax agent or legal advisor to assist in the implementation of the framework. On the other hand, an ADR Facilitator provides guidance to the discussion and need not be an expert in tax or law. They convene and chair the ADR meetings, attest the signing of ADR agreements and generally guide the parties towards arriving at amicable agreement. ADR Facilitators although they are usually KRA employees are expected to maintain independence and must not have been involved in the tax audit or investigation. In event of conflict of interest, they are expected to make full disclosure and parties may request appointment of a new facilitator where necessary in such event.\(^78\)

The facilitators are bound to keep the process as simple and flexible as possible and as far as possible make it easy for each party to participate freely in the ADR discussions and adhere to the timelines. At the same time, they must remain neutral and maintain confidentiality of the process.\(^79\) The duty of the Facilitators is to seek fair, equitable and legal resolution of the tax dispute, promote and protect integrity, fairness and efficiency of the process. Facilitators must also act independently, impartially and avoid conflict of interest and bring the dispute to expeditious resolution.\(^80\)

In addition, the ADR Framework addresses issues of procedure during discussions. In this regard, it provides for adjournments, documentation of the dispute in ADR, management and procedure of ADR sittings, termination of ADR discussions and the signing of ADR Agreement and the prerequisites for validity of such agreement. The Framework also provides for reservation of rights by providing that discussions be held on without prejudice basis. Finally, the ADR Framework lays down the suitability test of tax disputes for ADR which limits the scope of the disputes that may be referred to the process to purely factual disputes.

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78 KRA ADR Framework, p. 12.
6.0 Alternative Dispute Resolution (ADR) of Tax Disputes in South Africa

The South Africa Revenue Service (SARS) has established an Internal Administrative Appeal (IAA) mechanism which allows anyone does not agree with the decision of tax officer and has approached the officer’s immediate supervisor to clarify the decision in question and resolve any uncertainties but the matter remains unresolved to institute a formal internal administrative appeal. In such cases, the client(s) not satisfied with any decision taken by officers in terms of the relevant tax law, have a right to appeal that decision to the relevant appeal committee. Once the appeal is lodged in the prescribed form to the office that communicated the decision. The Appeal has to be made within thirty (30) days from the date the client became aware of the decision or received reasons for the decision. An extension of twenty (20) days may be granted, if such extension is applied before the expiry of the 30-days period but if that is exceeded, the IAA process cannot be followed and the applicant’s only recourse will then lie in litigation.\(^8\)

In the event of successful appeal, the Appeal Committee has to provide a decision and reasons for the decision in writing within forty-five (45) days from the date of acknowledgement of receipt of the Appeal. If the taxpayer is unhappy with the decision of any appeal committee, their recourse is to lodge an application for Alternative Dispute Resolution (ADR) with that relevant appeal committee which made the decision. In that case, the committee will add its comments thereto and forward the application to the ADR Unit for attention. The ADR process is used as recourse against the final decision made under the IAA process and may be initiated by either the aggrieved person or SARS but the final decision on whether a matter is suitable for ADR vests with SARS.

To apply for ADR, a properly completed prescribed form together with the relevant supporting documents, must be submitted to the chairperson of the

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The appeal committee who informed the client of the decision within 30 days of the date of the letter. The Commissioner may agree to extend the period for submission of the application for ADR. The Commissioner is required within 20 days to decide and inform the applicant whether the matter is appropriate for ADR or not and that it may be resolved by way of the procedures contemplated in the rules. The SAR Alternative Dispute Resolution (ADR) External Policy provides the standard approach to be followed by stakeholders when a dispute is referred to Alternative Dispute Resolution (ADR), as provided for in Section 77I of the Customs and Excise Act (Act No. 91 of 1964).82

ADR can also be used as an alternative to judicial tax proceedings in South Africa. In that regard, the Commissioner must within ten days after receipt of a notice in terms of Section 96(1) of the Act inform the person delivering such notice that he is of the opinion that the matter is appropriate for ADR. Within ten days after the date of the above notice by the Commissioner such person must deliver a duly completed prescribed form for Application for ADR to the Commissioner should he or she agree to the ADR process. If the party does not complete the application for ADR within ten days after the date of the notice by the Commissioner, the matter may not be dealt with through ADR.83

The ADR must be concluded within 90 days, or such further period as SARS may agree to. The period within which the ADR proceedings are conducted commences either 20 days after date of notice by the Commissioner of suitability of the matter for resolution by ADR or on receipt of an application for ADR by the Commissioner after communication a matter suitable for ADR as alternative to judicial proceedings. The period ends on the date of termination of proceedings in the manner provided for in the terms governing the ADR

procedures. SARS is entitled to appoint a facilitator, who may be an appropriately qualified officer of SARS within 15 days and the Commissioner must inform the aggrieved person of the appointment of the facilitator. The role of the facilitator is to seek a fair, equitable and legal resolution of the dispute between an aggrieved person and SARS.

The procedure to be adopted, the time place and date and requirements as to the furnishing of submissions and documentation, are determined by the facilitator after consultation with the aggrieved person and the officer(s) or appeal committee of SARS. The aggrieved person must be personally present during the ADR proceedings but may however be accompanied by any representative of their choice. But the facilitator may, in exceptional circumstances, allow the aggrieved person to be represented in their absence by a duly authorized representative of their choice. With agreement of the facilitator, the parties may to lead or bring witnesses in the ADR process. The facilitator may also require either party to produce a witness to give evidence. At the conclusion of the meeting, either at the instance of the facilitator or by mutual agreement, the facilitator must record all issues which were resolved and issues upon which no agreement or settlement could be reached and the facilitator must deliver a report to the parties within ten days of the conclusion of the ADR process.84

The ADR proceedings are envisaged to be without prejudice and not one of record, and any representation made or document tendered in the course of the proceedings may not be tendered in any subsequent proceedings as evidence by any other party, unless: it is used with the knowledge and consent of the party who made the representation or tendered the document during the proceedings or the representation/document is already known to, or in possession of, that party or where it was obtained by that party otherwise than in terms of the ADR proceedings. Further, no person may subpoena any person involved in the ADR process (including the facilitator), in whatever capacity, to

84 Clause 5:10 of the SARS Alternative Dispute Resolution (ADR) External Policy.
compel disclosure of any representation made or document tendered in the course of the proceedings.\textsuperscript{85}

A dispute may either be resolved by agreement whereby either SARS or the aggrieved person accepts, either in whole or in part, the other party’s interpretation of the facts or the law applicable to those facts or both. However, such agreement must be reduced to writing and signed by both parties. If the parties fail to resolve the dispute, the parties may attempt to settle the matter as set out in the Act. In any case, once a dispute is resolved either by agreement or settlement SARS must give effect to that agreement or settlement within a period of 60 days after conclusion. If the dispute is not resolved by either agreement or settlement or the proceedings are terminated, SARS must inform the aggrieved person within 10 days inform the aggrieved party of their right to institute judicial proceedings. Any agreement or settlement reached through the ADR process has no binding effect in respect of any other matters relating to that aggrieved person not actually covered by the agreement or settlement or any other person.\textsuperscript{86}

The Tax Law gives SARS the power to settle a dispute which is to the benefit of the State. A dispute may be settled at any time as the settlement provisions are not limited for use only during the ADR process. However, the ADR is noted as a process to resolve disputes one ideal situation where the settlement provisions may be applied in an attempt to settle the matter. The settlement provisions in the South African law may only be applied if the circumstances of the matter comply with these regulations. The settlement procedures provide guidelines as to the circumstances when it would be appropriate and when it would be inappropriate to settle.\textsuperscript{87}

\textsuperscript{85} Clause 5:11 of the SARS Alternative Dispute Resolution (ADR) External Policy on “Reservation of Rights.”
\textsuperscript{86} Clause 5:12 of the SARS Alternative Dispute Resolution (ADR) External Policy on “Agreement or Settlement.”
\textsuperscript{87} Clause 5:12.1 of the SARS Alternative Dispute Resolution (ADR) External Policy on “Settlements.”
Circumstances where it is inappropriate to settle include where, if in the opinion of SARS: the action of the aggrieved person constitute intentional tax evasion or fraud or where the settlement would be contrary to the law or a clearly established practice of the Commissioner on the matter, and no exceptional circumstances exist to justify a departure from the law or practice. Further, it is not appropriate to settle where it is in the public interest to have judicial clarification of the issue or pursuit of the matter through the courts will significantly promote compliance of the tax laws or the person concerned has not complied with the provisions of any Act administered by SARS and SARS is of the opinion that the non-compliance is of a serious nature.  

On the other hand, where it is to the best advantage of the State, SARS may settle a dispute, in whole or in part, on a basis that is fair and equitable to both the person concerned and SARS. SARS is enjoined when contemplating the settling of a matter, to have regard to a number of factors including: whether that settlement would be in the interest of good management of the tax system, overall fairness and the best use of SARS’ resources; the cost of litigation in comparison to the possible benefits, whether there are any complex factual or quantum issues in contention or evidentiary difficulties which are sufficient to make the case problematic in outcome or unsuitable for resolution through the ADR process or the courts. Settlement is also to be embraced where the settlement of the dispute will promote compliance of the tax laws by the person concerned or a group of taxpayers or a section of the public in a cost-effective way.  

The tax law provides for reporting requirements in terms of which SARS must report on an annual basis to the Minister of Finance and the Commissioner on settlements reached. This report must be in such format as does not disclose the identity of the person concerned and contain details of the number of disputes  

88 Clause 5:12.2 of the SARS Alternative Dispute Resolution (ADR) External Policy on “Circumstances where Inappropriate to Settle.”  
89 Clause 5:12.3 of the SARS Alternative Dispute Resolution (ADR) External Policy on “Circumstances where Appropriate to Settle.”
settled or part settled, the amounts of revenue foregone and estimated amount of savings in costs of litigation, which must be reflected in respect of main classes of taxpayers.\textsuperscript{90} In the end, ADR as contemplated in South African law is “a form of dispute resolution other than litigation, or adjudication through the courts.” It is less formal, less cumbersome and less adversarial and a more cost-effective and speedier process of resolving a dispute with SARS.

7.0 Critique of the Alternative Dispute Resolution (ADR) of Tax Disputes in Kenya

The adverse impact of resolving disputes through litigation including high cost, delays, loss of trust and relationship is what has driven Kenya to incorporate alternative dispute resolution (ADR) as one of the mechanism of resolving tax disputes in the country. There is no question that the application of ADR Framework has enabled KRA to register numerous successes which would not have been possible using the judicial and quasi-judicial processes stipulated under the law. Kenya Revenue Authority (KRA) reported collecting over KShs 21 billion through the Alternative Disputes Resolution (ADR) mechanism by resolving 393 cases vide ADR in the period between July 2020 to March 2021. That was 109% growth in number of cases and 389% growth in revenue when compared to a similar period last financial year 2019/2020.\textsuperscript{91}

One of the positive aspects of the KRA ADR Scheme is that many taxpayers have embraced it as evidenced by the increasing number of ADR applications being received by KRA. For instance, in the above period, KRA recorded a 56% growth in the number of ADR applications from 425 received in the financial year 2019/2020 to 661 despite the current Covid-19 pandemic related challenges. As a matter of fact, resolution of disputes through ADR remained unhampered as

\textsuperscript{90} Clause 5:13 of the SARS Alternative Dispute Resolution (ADR) External Policy on “Reporting Requirements.”

meetings were conducted virtually. This has further reduced the time within which the meetings are held. ADR of tax disputes is now preferred because it ensures that disputes are resolved in an expeditious and timeous manner with resolution of cases under ADR being achieved in a much shorter time span. Indeed, the speed of tax ADR in Kenya has improved tremendously and average time taken to resolve ADR cases stood at 42 days in the current financial year 2020/2021, more than half the stipulated 90 days.92

The ADR of tax disputes in Kenya is also acknowledged in that unlike other dispute resolution mechanisms, it is more pocket friendly as it does not require payment of any filing fees. It is also a mediation process in which a taxpayer can opt to represent himself without the need for an Advocate or a tax representative hence saving costs. The ADR process has also proved effective in preserving the relationship between the taxpayer and the Authority. The mediator ensures that parties are not antagonized and maintain cordial relationships. The process provides a win-win outcome for the parties which leaves both parties happy with the outcome and prevents further escalation of disputes.93 The ADR mechanism also allows reservation of rights meaning the record of the ADR discussions cannot be used in a court of law without agreement of parties. In addition, given the relaxed procedures, a taxpayer can be allowed to present documents for verification under the ADR process which would otherwise be rejected in a Tribunal or Court hearing in strict adherence to the law governing admission of evidence.94

7.1 Challenges of Use of Alternative Dispute Resolution in Tax Disputes in Kenya
The KRA Alternative Dispute Resolution (ADR) Framework and the Tax Procedures (Settlement Out of the Tribunal or Court) Regulations as they are

92 Ibid.
94 KRA ADR Framework.
The Alternative Dispute Resolution (ADR) Framework for Tax Dispute Resolution in Kenya: Hon. Dr. Kariuki Muigua

...currently framed have created challenges that bedevil ADR of Tax Disputes in Kenya. These include lack of independence of the ADR mechanism from KRA, time constraints, lack of clarity on the circumstances to settle or not to settle, need for tribunal or court permission to pursue out of court settlement, conflict of interest challenges because of the use of KRA employees as ADR facilitators and potential conflict between the ADR mechanism for out of court or tribunal settlement as envisaged under the tax laws and regulations and the existing court annexed ADR mechanisms.

7.1.1 The Overreaching Role of KRA in the ADR Mechanism
The role of KRA as envisaged under the KRA ADR Framework and the Settlement Out of Court or Tribunal Regulations is overreaching in that not only does KRA decide whether a matter is fit for ADR resolution but also appoints and pays the ADR Facilitator who is its employee. The decision to appoint the ADR Facilitator is communicated both to the facilitator and the taxpayer by the Commissioner. It would have been better to create an independent Dispute Resolution Unit which is not directly answerable to KRA. However, the Kenyan system is similar to what exists in South Africa where the Facilitators are staff of South Africa Revenue Authority (SARS). Further, thus far no significant complaints have arisen as to adverse effect of use of KRA paid facilitators but in the interest of fairness, in future the role of KRA as investigator, prosecutor and facilitator of ADR may need to be revisited in the interest of enhancing integrity of the ADR process.

7.1.2 Time Constraints of the ADR Process
There is no clarity as to the time allocated for ADR Process under the KRA Alternative Dispute Resolution (ADR) Mechanism as when the process commences depends on when the application for ADR but the time allocated for it is restricted to the time remaining within the 60 days the Commissioner is required to issue the Objection Decision when KRA issues and communicates their decision. This puts pressure on the parties, especially the taxpayer, to choose between ADR and pursuing quasi-judicial process and judicial process and opting for ADR or waiting to opt for out of court settlement after the matter
has been lodged with the tribunal or court. In any case, the time to lodge an appeal does not freeze against the party who has lodged an ADR process meaning they have to choose between filling an appeal and pursuing ADR only or pursuing ADR and filling an appeal at the same time. There is need to amend the law clearly stipulate the time for ADR to the scenario of parties wasting resources to first file a needless appeal and then opt for out of court or tribunal settlement just to overcome the limitations imposed by the rules as they currently are.

7.1.3 Lack of clarity on circumstances to settle or not to settle
There are no clear provisions in the regulations and the ADR Framework on the circumstances when to settle or when not to settle tax dispute as stipulated under the relevant tax law and the Alternative Dispute Resolution External Policy of South Africa. The assumption is that any matter that is suitable for ADR is suitable for settlement. In South Africa, it is clear that SARS has power to settle any tax dispute where doing so to the benefit of the State and such settlement may be entered at any time and not necessarily under the ADR process as part of out of court or tribunal settlement. The danger of the current arrangement is that KRA officials involved in a dispute may have to go through motions for lack of clarity on whether to settle or while waiting for bureaucratic decision to come from the top on whether to settle.

7.1.4 Need for Permission of Court for Out of Court Settlement
The ADR mechanism for settlement of tax disputes out of court or tribunal has been complicated further by the requirement that the Court or the Tribunal gives permission for the parties to commence the process. This removes the element of spontaneity of the agreement of parties to engage in ADR after filling of the Appeal as now a formal application has to be made to commence the process. The Court permission is required in addition to the administrative constraints that require that the taxpayer obtains the permission or at least mutual agreement of KRA to opt for out of Court or Tribunal Settlement. It is proposed that the regulations be amended to allow parties upon agreement to
merely give notice to the Court or Tribunal for adjournment to pursue settlement without need for formal permission which calls for application.

7.1.5 Aligning the Law on ADR and Out of Court or Tribunal Settlement

There is no clarity in the tax law, in particular section 55 of the Tax Procedures Act and section 28 of the Tax Appeals Tribunal Act render clarity on the ADR procedure before referral to Appeal. There is thus need to reform the law to clearly accommodate ADR and settlement before the tax dispute is referred to the Tribunal or Court. Further, there is no clarity how the ADR process and especially the out of court or tribunal settlement integrates with the existing Court Mandated ADR which has been provided and which runs parallel to proposed ADR for tax disputes. This is necessary to extricate the out of court or tribunal settlement process from KRA control in the interest of the perception of independence and impartiality of the ADR facilitators.

8.0 Conclusion

The use of ADR in resolution of tax disputes has inspired other sectors into embracing ADR as the mode of resolution of disputes. For instance, Cabinet Secretary for ICT and Youth recently enacted the Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021 which include provision for mediation, negation and conciliation of data protection disputes in Kenya. Last year, the Office of the Data Commissioner with the help of the UNDP has also engaged a consultant for the development of Alternative Dispute Resolution Framework similar to the KRA Alternative Dispute Resolution (ADR) Framework. This points to the need to ensure the KRA ADR Framework is perfected to avoid other public entities taking up ADR from inheriting the inefficiencies and challenges inherent in it even as they seek to

adopt the positive aspects of it. In particular, there is need to revise the law anchoring the KRA ADR Framework to sufficiently accommodate ADR in the tax dispute resolution timeline. The KRA ADR Framework should also be revised to reconcile it fully with the provisions of the Tax Procedures (Settlement of Tax Disputes Out of Court or Tribunal) Regulations, 2020. There is also need to expand the place and role of Independent ADR Practitioners in alternative dispute resolution of tax disputes in Kenya.
Published in January 2023, the Journal of Conflict Management and Sustainable Development Volume 10 Issue 1 has continued to grow as a key academic resource in the fields of Conflict Management, Sustainable Development and related fields of knowledge. It focuses on emerging and pertinent areas and challenges in these fields and proposes necessary legal, institutional and policy reforms towards addressing these issues.

It is edited by the ADR Practitioner of the Year 2022, Dr. Kariuki Muigua, Ph.D, who was also awarded: The African Arbitrator of the Year 2022; The Chartered Institute of Arbitrators (CIArb) (Kenya Branch) ADR Lifetime Achievement Award 2021; The ADR Publisher of the Year 2021 and The Law Society of Kenya (LSK) ADR Practitioner of the Year Award 2021.

His book, Settling Disputes through Arbitration in Kenya, 4th Edition; Glenwood publishers 2022, was awarded the Publication of the Year Award 2022. He is a member of the National Environment Tribunal which was awarded the best performing Tribunal in Kenya for handling the most cases.

The first article ‘Entrenching Biodiversity Impact Assessment in Kenya as a Tool for Enhancing Sustainable Development Agenda’ by Dr. Kariuki Muigua argues that in the most sensitive ecological areas, impact assessments should include biodiversity impact assessment as the most effective tool in safeguarding the biological diversity that may be found within these areas and also enhancing their conservation. The author argues that the ordinary Environmental Impact Assessment may not successfully reflect the real effect of the particular project, policy or programme on the biological diversity.

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Dr. Kenneth Wyne Mutuma in his article ‘Role of Technology in Climate Change Disputes Resolution’ examines the efficacy of climate change dispute resolution mechanisms within the Kenyan and International framework. The article analyzes climate change and its implications and suggests requisite reforms that are required based on the gaps that have been identified.


Aaron Okoth Onyango in his paper, ‘Putting Children First: Prioritising Minors in the Application of ADR in Criminal Cases in Kenya’ highlights how the child’s best interest requirement can be leveraged in advancing a pro alternative dispute resolution approach in criminal offences. Using landmark criminal cases as a case study, the paper underwrites the new opportunities available in the application of Alternative Dispute Resolution in the dispensing of criminal cases in Kenya’s courts.

‘Exploring Heritage Impact Assessment in Kenya’ by Dr. Kariuki Muigua critically discusses the concept of Heritage Impact Assessment (HIA) in Kenya and conceptualizes HIA and its role in the Sustainable Development Agenda. The paper further highlights the legal framework on HIA at both the global and national level. It discusses the extent to which HIA has been embraced in Kenya and challenges thereof. Finally, the paper suggests recommendations towards embracing heritage impact assessment for Sustainable Development in Kenya.

Michael Sang in his paper ‘Clarifying the Roles of the Director of Public Prosecutions and the Director of Criminal Investigations in Kenya: A Proposal for Legal Reform’ critically discusses the distinguishing unique roles between the Office of the Director of Public Prosecution and the Directorate of Criminal Investigations while referring to legislative mechanisms and judicial precedents. The paper
analyses legislative proposals to address the prevalent conflict between the two offices.

*The Duty to Treat Versus the Right to Refuse Unsafe Work of Healthcare Workers in Kenya: Implications for Public Health Emergencies*’ by Dr. Naomi N. Njuguna explores the nature of the duty to treat, its origins and justifications and whether indeed there is a duty to treat among healthcare workers in Kenya. The paper proposes a system of reporting unsafe working conditions that will balance the rights of the healthcare workers and the rights of patients with a view to enhancing the realisation of the right to health in times of a health crisis.

Michael Otieno Okello in his paper ‘Effectuating the Doctrine of Eminent Domain: Sustainable Principles for Compulsory Land Acquisition in Kenya’ critically analyzes the doctrine of eminent domain, the controversies that enshroud its prospects and the effect of sustainable principles on right to property.


Md. Harun-Or-Rashid in his paper, ‘Evaluation of a Conflict in a learning Environment: Does it always Fetch a Negative Outcome?’ evaluates each stage of an institutional conflict that began as an interpersonal conflict, turned into an external conflict, and was finally settled by exterior intervention followed by a constructive outcome. The paper provides some background information and stimulates some thought about the life sketch of a conflict occurred in an academic setting and its resolution mechanisms.

Designating A Seat of Arbitration Away from The Domicile of the Parties PASL Wind Solutions Limited V Ge Power Conversion India 

By: Hon. Dr. Wilfred Mutubwa *

Facts in Issue

A dispute arose between PASL and GE Power pertaining to the supply and warranties of certain converters. Both parties are incorporated in India. When the disputes arose between the parties, PASL issued a request for arbitration to the International Chamber of Commerce as per the settlement agreement which provided that all disputes, controversies or differences shall be referred to and finally resolved by arbitration in Zurich, Switzerland in the English language.

GE suggested Mumbai as a more convenient venue for the Arbitration and raised a preliminary objection with respect to the seat of arbitration to which PASL put in Grounds of Opposition. The Arbitrator made the determination and ruled in favor of PASL that the seat is Zurich. However, the Arbitrator did agree with the suggestion of GE and held that though the seat will be Zurich, all hearings would be held in Mumbai.

After the final award was delivered, GE succeeded in its claim and sought to enforce the amounts granted against PASL in the award but PASL failed to oblige. Consequently, GE initiated enforcement proceedings under Sections 47 and 49 of the Arbitration Act before the High Court of Gujarat, in who’s jurisdiction the assets of PASL were located.

PASL resisted the enforcement of arbitral award and filed an Application at the High Court in Gujarat on the grounds that the seat of arbitration had actually been Mumbai, where all the hearings of the arbitral proceedings had taken place. The High Court in Gujarat ruled against PASL and upheld the

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Designating A Seat of Arbitration Away from The Domicile of the Parties PASL Wind Solutions Limited V Ge Power Conversion India: Hon. Dr. Wilfred Mutubwa

enforcement of the arbitral award. Consequently, PASL appealed to the Indian Supreme Court.

**Issue**

1. Can two Indian parties designate a seat of Arbitration outside of India?

2. Was the award therefore a foreign award or an award from an International Commercial Arbitration.

**Analysis**

PASL contented that two Indian parties cannot designate a seat of arbitration outside India on the following basis—

- That by designating a foreign seat, parties would be able to opt out of substantive law of India, which is contrary to the public policy.
- That foreign awards as contemplated under Part II of the Arbitration Act can arise only from international commercial arbitrations.
- That since there was no foreign element involved and the dispute between the two parties arose out a contract to be performed solely in India, by applying the closest connection test, the seat of the arbitration would necessarily be Mumbai and not Zurich.

The Supreme Court in its judgment ruled that the parties by their express consent designated Zurich as the seat of arbitration and Mumbai as the venue. PASL could therefore not rely on applying closest connection test as followed in *Enercon (India) Ltd. v. Enercon Gmbh*. The Court determined that the closest connection test could only apply if it is unclear that the seat has been designated either by the parties or by Tribunal.

The court also clarified on the distinction between international commercial Arbitration and foreign awards, stating that they were not the same. It provided that an award made in a State other than the State where the enforcement is
sought is a foreign award however, the nationality, domicile, residence of parties is irrelevant to determine whether an award is a foreign award or not. What would be relevant to determine whether an award is an ICA or not is the nationality domicile, residence of parties.

Conclusion
The supreme court’s judgement in this matter was in favor of party autonomy. The principal contention of the appellant was that the parties between whom the dispute arose, being Indian parties could not have resorted to a foreign seated arbitration and thereby impliedly exclude the remedy available under ordinary Indian law. The Supreme Court held that merely because the arbitrators are situated in a foreign country that by itself cannot be a reason to nullify the arbitration agreement that parties willingly entered into.
Towards Enhanced Access to Justice: Leveraging the Role of Kenyan Law Schools in Promoting ADR

By: Murithi Antony*

Abstract
Access to justice is a fundamental right, yet it is a concept that remains elusive to many individuals around the world. Whereas the legal system is designed to provide a forum to resolve disputes, it often fails to meet the needs of those who lack the resources or expertise to navigate its complexities. Although ADR was designed to offer a solution to these problems, it has fallen short of anticipated results. It is upon this conceptualization that this article begins by discussing the idea of access to justice, and challenges facing it in Kenya. This article examines the efficacy of ADR, its inadequacies and explores how Kenyan law schools can contribute to its development as a means to improve access to justice, particularly for marginalized communities. This paper concludes with a call to action for Kenyan law schools to take a more proactive role in promoting ADR and ensuring that access to justice is available to all.

1. Introduction
‘Access to justice’ though a commonly used notion in law, is a term difficult to define precisely for it embodies a multitude of concepts. According to the United Nations, access to justice means that "all individuals and communities, particularly the poor and vulnerable, have equal access to justice and that justice is delivered without discrimination or delay."1 Other scholars argue that access to justice is a system by which people may vindicate their rights and/or resolve

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their disputes under the general backings of the state. This is because, axiomatically, human conflicts and disputes are inevitable in any given society. Defined, disputes refer to issues or interests that are finite and divisible, and can therefore be negotiated. Resolving these disputes in a fair way is then what access to justice entails. This includes procedural access; that is a fair hearing, and substantive justice; which is getting a fair remedy. Equally, access to justice requires that people in need of help find effective solutions available from justice systems which are accessible, friendly, affordable to ordinary people, which dispense justice fairly, speedily and devoid of discrimination. The components of access to justice were authoritatively stated in the case of Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd, where Justice Majanja succinctly expressed himself thus:-

“Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial

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system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

Access to justice is cardinal to the success and well-being of any democracy. That access to justice is a fundamental human right that has been recognized by international legal instruments, including the Charter of the United Nations and the Universal Declaration of Human Rights, is axiomatic. The Kenyan Constitution emphasizes the importance of ensuring access to justice for all individuals. It specifically states that any fees associated with accessing the justice system must be reasonable and not serve as a barrier to entry. This underlines the government's obligation to make sure that the legal system is accessible to everyone, regardless of their financial situation, and that justice is not only available to those who can afford it.

2. Barriers facing access to justice in Kenya.
Despite being a constitutional right, access to justice in Kenya has been a long-standing issue as many citizens continue to face numerous barriers in their quest for legal remedies. These barriers include, among others; inadequate legal aid services & representation, lack of limited awareness of legal rights, etc.

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9 For example, UNDP states that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.
11 Ibid.
12 Ibid; See also, Kituo Cha Sheria & Another v. Attorney General & Another [2017] eKLR.
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overburdened court system, high cost of litigation and long delays in court proceedings.\(^{14}\)

To start with, Legal aid services and representation play a crucial role in ensuring access to justice, particularly for economically disadvantaged individuals.\(^ {15}\) Inadequate provision of these services can have a significant impact, leaving those who cannot afford legal representation without the support they need.\(^ {16}\) The importance of legal representation cannot be overstated, as it is a key factor in securing fair outcomes for those navigating the legal system. In the words of Lord Denning:

\[\text{“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favor or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: “you can ask any questions you like; ” whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”}^{17}\]

The constitution of Kenya\(^ {18}\) explicitly recognizes and protects the right to legal representation as part of the right to a fair trial.\(^ {19}\) In a criminal trial, for example,

\[\text{14 See, Dag Hammarskjold Foundation, Rule of Law and Equal access to Justice’, op. cit. p. 1.}\]
\[\text{15 Stephen B. Bright, ‘Legal Representation for the Poor: Can Society Afford This Much Injustice?’ available at https://core.ac.uk/download/pdf/72831245.pdf accessed on 17th April 2023.}\]
\[\text{17 Pett v. Greyhound Racing Association Ltd [1968] 2 W.L.R. 1471.}\]
\[\text{18 2010}\]
\[\text{19 Article 50, Constitution of Kenya 2010.}\]
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the defense and the prosecution must argue their cases at equal footing. This has however not been achieved owing to the high cost of securing legal representation, and insufficient legal aid services.

Secondly, lack of legal awareness in Kenya has had a significant impact on access to justice. Despite ongoing efforts by various stakeholders to raise public awareness of the Bill of Rights, many Kenyans still do not have sufficient knowledge of their rights. This knowledge gap poses a significant barrier to accessing justice in the country, for many citizens engage in actions and transactions without sufficient awareness of laws and procedures, leading to potential violations and significant financial losses.

Additionally, the court process is designed to be adversarial, which can often result in high costs and inefficiencies. The system tends to prioritize legal technicalities, making it slow and cumbersome. This can make it challenging

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for those seeking justice to navigate, as the process can be both time-consuming and expensive. The combination of these constraints creates significant obstacles to achieving access to justice as a fundamental human right, highlighting the need for more sustainable and innovative approaches to conflict resolution. This is the reason why alternative dispute resolution (ADR) was developed.

3. Breaking down the barriers: ADR as the solution

Alternative Dispute Resolution (ADR) refers to a set of processes designed to resolve disputes without resorting to court. These mechanisms are meant to provide a solution to the afore discussed problems that are inevitable in litigation including procedural technicalities, and at the same time reduce the case backlog thus enhancing access to justice. ADR is recognized internationally and disputing parties are encouraged to resolve their legal issues outside the traditional court system. Precisely, the United Nations Charter under article 33 states as follows; “The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall,

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28 Ibid.
first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” This is reiterated in the Constitution of Kenya 2010 which provides that Alternative form of Dispute Resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted. ADR has also been described as modern version of ancient set of practices, especially due to their informality.

ADR mechanisms have emerged as a highly effective approach to resolving disputes across various domains. In the realm of family matters, mediation, in particular, has proven to be a valuable tool in resolving issues and promoting the best interests of children, while ensuring fairness for both parents. Through mediation, a win-win situation can be achieved, where the concerns of both disputing parents are addressed without any prejudice. Arbitration has also provided a more efficient platform for resolving complex disputes in an efficient and private manner, even in cases involving multiple countries with different legal systems. Equally, ADR has played a pivotal role in mitigating the expenses associated with litigation while also alleviating the overwhelming

32 Ibid.
33 The Constitution of Kenya 2010, Article 159 (2) (c), Government Printer, Nairobi.
38 For example, various international contracts and agreements provide for arbitration as the form of resolving disputes in case they arise.
backlog of cases in court, thus facilitating faster access to justice.\(^39\) However, ADR has also faced its own set of challenges, which will be discussed in the next section of this article.

4. Challenges facing ADR as a method of dispute resolution

Despite being a promising avenue for attaining justice, ADR has encountered various obstacles and limitations. ADR has been haunted by the demons it sought to exorcise from litigation, in that the issues it aimed to resolve have resurfaced within its mechanisms.\(^40\) For example, whereas ADR is designed to resolve disputes without resorting to courts, some ADR mechanisms cannot function independently of the court system.\(^41\) Court annexed mediation, for instance, is supervised by the courts,\(^42\) while arbitration may involve the court appointing an arbitrator, and the court may also intervene in arbitral proceedings as provided by law.\(^43\)


\(^{43}\) Article 5, UNCITRAL Model Law on International Commercial Arbitration, United Nations document A/40/17, Annex I, which provides that in matters governed by it, no courts shall intervene except where so provided by the Law; See also, Arbitration Act, Section 10 which provides that “Except as provided in this Act, no Court Shall intervene in matters governed by this Act.”
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Equally, arbitration which is an ADR mechanism resemble litigation in many ways, and is most times faced with similar challenges that dominate litigation. Arbitral proceedings and legal proceedings in courts of law share an adversarial nature, with instances where the former may even be more adversarial than the latter. Another reason for promoting ADR mechanisms is the inefficiency and slowness of litigation, which occasion prejudice to either party. While ADR is generally faster and more efficient, it can also be slow if parties fail to agree on preliminary issues or encounter other obstacles. In such cases, parties may resort to court intervention, which can lead to additional delays in accessing justice, thus defeating its intended purpose.

Another major challenge that Alternative Dispute Resolution (ADR) faces is the low level of awareness regarding its existence. This is evident in Kenya where disputes are predominantly brought before the court system for resolution, with

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48 Parties to ADR especially in arbitral proceedings when they fail to agree on some issues may seek for court intervention, which delays the whole process defeating its objectives.

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other viable alternatives being overlooked.\textsuperscript{51} A significant number of people, especially those outside the legal profession, remain oblivious to the existence of alternative dispute resolution methods. This trend can be attributed to the limited number of institutions that provide professional courses on ADR, which has resulted in a shortage of ADR experts compared to litigators.\textsuperscript{52} As a consequence, ADR is not widely acknowledged as the preferred mode of dispute resolution, mainly due to the dominance of litigation in the legal sector.\textsuperscript{53}

It is worth considering whether ADR has successfully addressed the challenges associated with traditional litigation, as it was intended to do.\textsuperscript{54} Despite its potential benefits, ADR may not always provide a comprehensive solution to the difficulties and complexities of legal disputes.\textsuperscript{55} Kenyan law schools have the potential to leverage their power and solve most obstacles facing ADR and access to justice as shall be argued in the next part.\textsuperscript{56}

\textsuperscript{51} See, Chepkemoi R, ‘Effectiveness of Alternative Dispute Resolution Mechanisms (ADR) in case backlog management in Kenyan judicial system’ (LLM thesis, University of Nairobi, 2019)


\textsuperscript{53} Ibid.


\textsuperscript{55} Ng’ang’a Njiri, Kenneth, Alternative Dispute Resolution and Access to Justice: The Kenyan Perspective (July 22, 2020). Available at SSRN: <http://dx.doi.org/10.2139/ssrn.3658004> accessed on 16\textsuperscript{th} June 2023.

5. The place of Kenyan Law Schools in advancing ADR goals: A pathway to improved access to justice

That Law schools can greatly help in addressing the challenges facing Alternative Dispute Resolution (ADR) and advancing its objectives to improve access to justice, is indisputable.\(^5^7\) This can be achieved by adoption various strategies, such as purposefully providing pro bono legal services, collaborating with other departments, offering courses on ADR, and organizing seminars and workshops among others.\(^5^8\) The next part of this paper highlights, albeit briefly, how each of this strategy can be implemented.

5.1. Offering Pro bono services

Law schools have the potential of curing the problem of inadequate legal aid services.\(^5^9\) As earlier stated, Legal aid services play a crucial role in promoting justice, especially for those who cannot afford the services of a lawyer. In Kenya, the Legal Aid Act of 2016\(^6^0\) recognizes universities as institutions that can provide legal aid services to the public. This inclusion provides an opportunity for universities to contribute to the provision of legal aid services and promote access to justice for all. The Act defines the term “Legal Aid” to include the provision of legal advice and representation while Assistance includes dispute resolution, drafting of relevant documents for legal proceedings, and facilitating out-of-court settlements.\(^6^1\) This can be achieved through providing pro bono legal aid services,\(^6^2\) establishing and operating legal aid clinics and Young

\(^5^7\) Ibid.
\(^5^9\) Ibid.
\(^6^0\) No. 6 of 2016.
\(^6^1\) Ibid.
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Arbiters societies. These initiatives provide students with opportunities to apply what they have learned in class to real-life situations, as well as to raise legal awareness and provide services in non-complex matters. Such activities are focused on alternative dispute resolution (ADR) and are instrumental in promoting access to justice.

Kenyan universities are increasingly promoting legal awareness services and pro bono work, as demonstrated by the successful legal awareness program held by the University of Embu School of Law in February for coffee farmers. Students from various universities, including Kenyatta University, Strathmore University, and Catholic University, have also engaged in providing pro bono services. By promoting this culture of legal awareness and pro bono work, universities are contributing to the growth of alternative dispute resolution mechanisms and enhancing access to justice.

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63 Such clubs, clinics and societies promote the use of ADR and give students an opportunity to practice what they have learnt in class to a real-life scenario.
64 For example; organizing prison visit programs, participating in legal awareness weeks.
65 The Clinic was organized by the School of Law and brought together members of Academic Staff and students from the School of Law who sensitized the farmers on the issues of Inheritance and Will, Shares transmissions, Land disputes among other areas. The Clinic was dubbed “Bottom-up Justice.” Available at <https://law.embuni.ac.ke/?_ga=2.93418461.117546719.1686836720-372797606.1610043439&_gl=1*_ad04n*_ga*MzcyNzk3NjA2LjE2MTAwNDM0Mzk.*_ga_RSJNFFJTH*MTY4Njg5Mzk0My4xNC4xLjE2ODY4OTM5OTIuMC4wLjA.*_ga_GVRJ341594*MTY4Njg5Mzk0My4yLjEuMTY4Njg5Mzk5Mi4wLjAuMA.>
66 For instance, See, Strathmore University, Law Students hold a Legal Clinic at Nairobi West Prison,’ retrieved from <https://strathmore.edu/news/law-clinic-students-hold-a-legal-clinic-at-nairobi-west-prison/>
5.2. Collaborating with other departments/schools, and offering courses on ADR

One of the key limitations facing Alternative Dispute Resolution as earlier highlighted is lawyer dominance. Most ADR practitioners are lawyers, making it difficult to achieve the goals of inclusion. Whereas lawyers are believed to have the required legal knowledge to solve legal issues, it is important to include other professions which will improve access to justice given that every area of specialization can have expert practitioners from the said field. Law schools can work closely with other schools/departments, for example business school to offer joint courses on ADR in business disputes, as well as medical schools to promote ADR in medical disputes.

Notably, certain Alternative Dispute Resolution (ADR) mechanisms, such as Arbitration, place a premium on the expertise of the arbitrator. In such cases, the arbitrator is expected to have a comprehensive understanding of the subject matter in dispute. For example, if the issue at hand involves accounting, the parties involved may prefer an arbitrator who is also an accountant. This ensures that the arbitration process is not only fair but is also informed by relevant and specialized knowledge. It also increases trust and confidence in the system therefore expediting access to justice. In contrast, if an arbitrator

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68 Ibid.
69 ADR practice is open for professionals from all fields who meet the specified requirements; however, individuals outside the legal profession often overlook the possibility of specializing in ADR as a viable career option. Law schools can play a crucial role in addressing this issue by fostering collaboration with other disciplines.
lacks familiarity with the subject matter at the heart of a dispute, it can lead to controversial decisions that ultimately impede access to justice.72

5.3. Hosting Seminars and workshops
Law schools can play a significant role in promoting the utilization of Alternative Dispute Resolution (ADR) by organizing seminars and workshops focused on ADR. Such events can help raise awareness among students about the various ADR mechanisms available and the career opportunities in this field.73 For instance, the University of Nairobi collaborated with the Chartered Institute of Arbitrators to host a Student ADR Conference, which brought together students from various universities in Kenya.74 The conference featured expert speeches by ADR practitioners and provided students with an opportunity to share their ideas as panelists. By organizing such activities, law schools can encourage the use of ADR and, in turn, improve access to justice.75

6. Conclusion
Access to justice is a fundamental human right that is recognized by both the Kenyan constitution and international human rights instruments. However, in Kenya, this right is far from being achieved due to various challenges. Alternative Dispute Resolution (ADR) was introduced to address these challenges, but it has also been faced with similar hurdles that it sought to eliminate. In light of this, law schools have an essential role to play in promoting ADR and other mechanisms that can improve access to justice. By doing so, we

72 Ibid.
74 This Conference was organized by Chartered Institute of Arbitrators, Kenya Branch, and was held on 10th February at University of Nairobi.
can overcome the obstacles to achieving this fundamental right and ensure that justice is accessible.
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The Constitution of Kenya 2010


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Josephat Mwenda Mboyo v. The Attorney General and 2 Others [2012] eKLR,


David Macharia vs Republic [2011] eKLR.
The Promise of Justice: Towards The Effective Resolution of Family Disputes

By: Florence Mithamo*

Abstract

The fact that the family is the fundamental unit of society\(^1\) underscores both the significance and the delicate nature of this unit. Therefore, when handling issues originating from the unit, extreme discretion and seclusion are required due to the sensitive and delicate nature of the family. Because of its non-adversarial nature and ability to protect family ties from the strain of conflict, alternative dispute resolution and alternative justice systems are becoming more widely accepted\(^2\). Per the paramount principle, child-inclusive mediation aims to give the child’s interests top priority as children are the most vulnerable when disputes between parents emerge\(^3\). Any society's future depends on its children, who should therefore be protected and given the best care possible. The increasing understanding of alternative justice systems and dispute settlement procedures has undoubtedly made it easier to handle family difficulties while still providing for the children's demands to be heard while keeping things private. Issues resolved through these means enhance quick access to justice at a lower cost than through courts. With mediation being utilised mostly for child custody and visitation disputes, the current laws for children, which will be examined, are still resistant to adopting these new processes. The existence of alternative dispute resolution and justice systems, such as councils of elders and mediation, in pre-colonial Kenya, has been acknowledged in several sources\(^4\), however, this postulation merely helps to emphasise where these systems stand in "modern" Kenya. This paper aims to demonstrate how

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alternative justice systems can be modified to be more child-friendly in matters involving the child. As well as shed light on the existing gaps in Kenya's legal provisions.

Keywords: ADR, Child participation, Child Inclusive Mediation, TDRM, access to justice

Introduction
It is amusing how when the white people first came to Africa, they assumed we had no effective "legal" system. That we existed and lived devoid of any guidelines and that we need saving for we were too barbaric to survive. While the reality on the ground was different, our African forebears had a way of life, a method of resolving interpersonal problems, a feeling of religion, and spiritual inclinations, among other things, that shaped their existence. I do not intend to talk about Africa as a whole but rather I narrow my focus on pre-colonial Kenya with specificity on how our African predecessors resolved conflicts, particularly family disputes. These forms of conflict resolution are what we refer to as Traditional Dispute Resolution Mechanisms (TDRMs). This paper seeks to delve into how TDRMs can be invoked in Child Inclusive Mediation in a manner that is child friendly.

Traditional Dispute Resolution Mechanisms.
Kenya is a diverse country with various communities each having its cultural inclinations it is natural to assert that there were different forms of TDRMs each

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6 Ibid.
specific and "perfectly" tailored to deal with the issues of the community in alignment with their principles and values9.

Due to the aforementioned fact, I will use a community that I am intimately acquainted with to help me make my point in my paper more clearly. I will use the Agikuyu community which is majorly popularized in the central part of Kenya10. The Agikuyu for one had a social structure that comprised three classes, the mbari, muhirigi, and the Kiama11. The Kiama was considered the supreme authority in the community where when matters defeated the mbari and the muhirigi they gave their decision12. The Kiama was made up of a council of elders who were deemed by society to be knowledgeable about community values13. Their decisions were binding because they conducted their proceedings in the open where anyone present would take part14. Most of their decisions were based on traditional values and beliefs that were deemed to be beneficial to the family15. The beauty of this was that the values of the community were maintained while strengthening social bonds16. This was the case for most pre-colonial communities, their verdicts were founded on strengthening societal bonds hence they were less punitive compared to what is the reality of our criminal justice system17.

12 Ibid.
13 Ibid.
16 Ibid.
In every family among the Agikuyu, the father would settle any disputes arising therein\textsuperscript{18}. The state of affairs would change if the father and the mother were involved in a dispute as it would not be fair for the presiding decision maker to also be a party to the dispute\textsuperscript{19}. Since one is inevitably skewed and will rule in favour of their interests, the other party will be disgruntled. As a result, such a turn of events would necessitate the kiama’s (the council of elders) involvement to resolve their issues\textsuperscript{20}. Most of the time, the parties will settle their issues. Children were hardly ever involved in such affairs; in fact, they were not seen as mature and reasonable enough to do so\textsuperscript{21}. After all, they were “thina cia ado agima” which translates to "big people problems" and in that regard what then will a child have to offer?

Although they were unaware of it at the time, the Agikuyu community relied mostly on negotiation, mediation, and Med-Arb as their main forms of dispute resolution\textsuperscript{22}. However the Third party approach was among the most preferred method that was frequently used to settle family conflicts\textsuperscript{23}. It entailed requesting the assistance of the extended family, clan, or council of elders to settle a dispute\textsuperscript{24}. The disputing parties would communicate with one another through a third party which also helped to ease the tension between them\textsuperscript{25}.

\footnotesize
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\item[\textsuperscript{25}] Ibid.
\end{itemize}
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Current position of ADR in the country

In our "modern" Kenya many people are resorting to having their disputes solved out of court through Alternative Dispute Resolution (ADR) means since they are faster, cheaper, and improve their access to justice\textsuperscript{26}. The numbers are said to have increased in past years and are set to soar higher in the coming years.\textsuperscript{27} Bearing the sensitive nature of family disputes in mind it is wiser to have them settled under ADR preferably by mediation\textsuperscript{28}, conciliation and reconciliation which result in a win-win situation for both parties as compared to the harsh court process with the case being balanced on a balance of probabilities resulting in a winner and a loser situation. Therefore, severing the remaining emotional family ties between the parties.

In any parental dispute, the children are the most vulnerable parties and it is then only fair to involve them in such dire matters that will greatly impact their lives\textsuperscript{29}. With immense changes in our societal attitude, children are more and more involved in post-separation disputes\textsuperscript{30}. This new change is called promoting "the voice of the child" it involves considering the child's input in the post-determination of separation and divorce proceedings after all it majorly affects them. Nevertheless, it results in attempts to strike a balance between children's rights as persons on one hand and their vulnerability and need for protection given their age and developmental stage, on the other hand\textsuperscript{31}.

\textsuperscript{26} Racheal Chepkoech Biomndo Ngetich, ‘Effectiveness of alternative dispute resolution mechanism (ADR) in case backlog management in Kenyan Judicial System: Focus on Milimani High Court Commercial Division’ (LLM Thesis, University of Nairobi 2019).
\textsuperscript{28} Kariuki Muigua, ‘Entrenching family mediation in the law in Kenya’ (2018) 1, 3.
\textsuperscript{29} Patrick T Davies, Lucia Q Parry, Sonnette Bascoe, Meredith J Martin, Edward Mark Cummings, ‘Children’s Vulnerability to Interparental Conflict: The protective role of sibling relationship quality’ (2018) 90(6) CD 1.
\textsuperscript{30} Megan Gollop, A.B. Smith, Nicola Taylor, ‘Children’s involvement in custody and access arrangements after parental separation’ (2000) 1.
\textsuperscript{31} Rachel Birnbaum, Family, Children and Youth Section Department of Justice Canada, ‘The voice of the child in separation/ Divorce mediation and other Alternative Dispute Resolution Processes: A literature Review’ (June 2009) v.
Consequently, in most cases, it pans out by promoting the best interests of the child (paramountcy principle) which in any case should be the goal in any family dispute\textsuperscript{32}.

Being that ADR in family matters is mostly used in child custody matters and visitation disputes most parties opt for mediation as compared to other methods\textsuperscript{33}. The aspect of self-determination of the parties is key with the mediator taking up the neutral, objective, and non-authoritative role creating an environment favorable for both parties to reach an amicable agreement\textsuperscript{34}. There are various types of mediation each with various conflict approach mechanisms, they include; facilitative, evaluative, and transformative mediation\textsuperscript{35}. Relevant to this paper are facilitative and evaluative mediation. Each of which can be uniquely engineered to deal with the best interests of the child in each child case.

**Facilitative mediation in family disputes.**

Facilitative mediation involves the mediator creating a neutral, safe, and supportive environment\textsuperscript{36}. Accordingly, the mediator's role is to facilitate such an opportunity. Espousers of facilitative mediation propound that disputants, with the assistance of their legal counsel, are capable of understanding their situations better than third parties and therefore "can develop better solutions than any the mediator might create"\textsuperscript{37}.

\footnotesize
\begin{itemize}
\item \textsuperscript{32} Shazia Choudhry, Helen Fenwick, ‘Taking the rights of parents and children seriously: confronting the welfare principle under the Human Rights Act’ (2005) 25 OJLS 453.
\item \textsuperscript{33} Kirsikka Salminen, ‘Mediation and the Best Interests of the Child from the Child law perspective’ (2018) 211, 216.
\item \textsuperscript{34} Ibid.
\item \textsuperscript{35} Kirsikka Salminen, ‘Mediation and the Best Interests of the Child from the child law perspective’ (2018) 211.
\item \textsuperscript{37} Murray Levin, the propriety of evaluative mediation: concerns about the nature and quality of an evaluative opinion’ (2001) 16:2 OSJDR 267.
\end{itemize}
One way for a facilitative mediator to enable the paramountcy principle is by helping the parents identify the information they need to make informed decisions\(^{38}\). The mediator's in-depth knowledge may enable him or her to pose pertinent questions, frame disagreements in a positive and meaningful way, and address the possibility that mediation is not the best method for resolving the family's needs\(^{39}\).

**Evaluative mediation in family disputes.**
The focus of evaluative mediation is on the parties' legal rights rather than satisfying their interests\(^{40}\). For that reason, the evaluative mediator gives advice, makes assessments, renders opinions on issues, and predicts outcomes—including expressing an opinion about how a judge or jury would likely decide the case\(^{41}\). Since the mediator typically has a strong background in law, s/he is knowledgeable about the child's right to be heard as well as other rights granted in connection with the mediation. Thereby supporting the child's best interests\(^{42}\).

**Various perspectives on Child Participation**
According to research children face an array of psychological effects from seeing their parents' divorce\(^{43}\). These effects range from anxiety, distress, disbelief, and depression\(^{44}\). Some of these effects can last a lifetime and permanently sever their family ties for a lifetime\(^{45}\). Some research has shown that involving the

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39 Ibid.
41 Ibid.
43 Brian D’ Onofrio, Robert Emery, ‘Parental divorce or separation and children’s mental health’ (2019) 18 WP 100.
45 Amy Morin, *The psychological effects of divorce on children* (21 February 2021)
child in the proceedings lessens the likelihood of the aforementioned effects as they are directly and actively involved in the process\textsuperscript{46}. This shows the serious and sensitive nature of family disputes and how if not approached appropriately we may end up having “broken” families and “broken” children which transcend into a “broken” society\textsuperscript{47}.

On the flip side, there has been a different assertion about involving children in the proceedings. One Martin Guggenheim avers that while there are important reasons to advance children as right-holders, there are certain costs involved with rights. He moves on to say that rights are relational\textsuperscript{48}. That is where there is a right there is a duty therefore if children have a right then someone else has a duty, putting into consideration that children’s legal rights are always in the hands of adults has brought about concerns that involving children could undermine parental authority and even cause further negative intrusion into children’s lives and family relationships\textsuperscript{49}.

According to Roger Hart's ladder of children's participation, there are eight rungs of child participation divided into the degree of participation and non-participation\textsuperscript{50}. Children get increasingly involved as one climbs the social ladder. At the very bottom of the child, participation is “assigned but informed”

\textsuperscript{46}Ibid.
where the child does what the adult says as the rungs get higher the child’s level of participation increases as well\(^{51}\). The eighth rung involves the highest level of child participation called "child-initiated shared decisions with adults" which involves the child setting the agenda and inviting the adults to participate\(^{52}\). From Hart's hypothesis, it is reasonable to conclude that indeed the "voice of the child" is not promoted from early on but rather it is dependent on the adults by first seeking their thoughts on the same. Consequently leaving the child less empowered to make major life-changing decisions\(^{53}\).

**Child Inclusive Mediation**

Child-inclusive mediation (CIM) refers to the inclusion of the child in the mediation process\(^{54}\). It can happen in several ways, such as when one mediator conducts separate interviews with the child and parents and then gives the parents input\(^{55}\). The alternative method involves having a child specialist interview the child individually and provide the parents with the findings\(^{56}\). The purpose of child-inclusive mediation is to give the child a voice during post-divorce negotiations as opposed to subjecting them to counselling to help them adjust to the change\(^{57}\).

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53 Ibid.


56 Ibid.

57Ibid.
Even though it is not officially recognised in Kenya, other nations like Canada have adopted this type of mediation\(^{58}\). Countries like the United Kingdom only permit child-inclusive mediation with the agreement of both parents\(^{59}\). Many of whom are in support of child-inclusive mediation base their assertions on Article 12 of the United Nations Convention on the Rights of the child which Kenya is a signatory. Article 12 stipulates that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child\(^{60}\).
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial weight in accordance with the age and maturity of the child. Appropriate body, in a manner consistent with the procedural rules of national law\(^{61}\).

The effects of these provisions are that children are accorded rights as individuals to hold and express their views in matters affecting them\(^{62}\). In this case divorce and separation proceedings. The provision indicates that "... A child capable of forming his or her views..." This, therefore, begs the question of at what age is this child capable of forming views regarding the subject matter that affects them and consequently being accorded those rights. Various sources have tried clarifying this by stating that the child can form views from the youngest age, even when he or she may be unable to express them verbally\(^{63}\).

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\(^{58}\) York Family Resolution Centre, Child Inclusive Mediation  

\(^{59}\) National Family Mediation, what is Child Inclusive Mediation?  


\(^{63}\) UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, 6.
Consequently, there is no age limit on the right of the child to express their views. However, expressing views is a choice of the child, therefore, he or she is under no obligation after all children are different and they process things differently with some choosing silence. This is linked to the use of the word "freely" to indicate that there is no pressure on the child to exercise their right to being heard. And the child should not be subjected to manipulation or undue influence to express themselves with these views being accessed on a case-to-case basis\textsuperscript{64}.

**Current Legal Provisions**

First based on the supreme law of the land- Article 159 (2) (c) of the Constitution of Kenya recognises mediation as a form of ADR. Additionally, Article 45 (1) states that "The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the state." The terms "…. And shall enjoy the recognition and protection of the state." Depicts that the state shall put in various measures to ensure that the family as a unit enjoys its protection. This position was reiterated in Diana Waceke Wainana v Director of Immigration Services; Serge Louodom (Interested Party) where the court stated “….. That would seem to be a matter within Article 45 of the Constitution which recognizes and enjoins the state to protect, the family as a natural and fundamental unit of society\textsuperscript{65}.” Children who are members of the family are also covered by this protection. This protection comes in different ways one way is the formulation of procedural and substantive laws that offer protection to the members of the family. In this case children, therefore it is only reasonable to conclude that indeed the law has opened the door to invoke child-inclusive mediation even though not expressly in black and white.

It was a start of a new dawn when the president recently assented to the new Children's Act 2022 which repealed the Children's Act 2001 which for one had not adjusted to the changing times and arising needs. In context to the form of

\textsuperscript{64} UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, 7.

\textsuperscript{65} [2022] e KLR.
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dispute resolution mechanisms, the Children's Act 2022 has indeed tried to fill this gap although not entirely this will be the focus of the next few paragraphs. Dissecting the law provisions including but not limited to the Children's Act 2022 and highlighting some of these gaps and some recommendations that may help in filling these gaps.

For this paragraph, the Children's Act 2022 will be referred to as "The Act." It is worth considering section 129 (1) which provides that,

"Where two or more persons acting as joint guardians to a child, or where the surviving parent and a guardian acting jointly, fail to agree on any matter concerning the welfare of the child, any of them may apply to the Court for directions in that regard, and the Court may make such orders regarding the matters in difference as the Court may deem proper.”\(^6\)

The words “where the surviving parent and a guardian acting jointly, fail to agree on any matter concerning the welfare of the child….” Deducing from these words, a child's rights are subordinate to those of a guardian or surviving parent. For one, this inhibits the child's participation in a matter that affects their welfare. The repercussions of this section simply serve to further muffle the child's voice. Which extensively infringes on the right of freedom of expression of the child. As provided under Article 7 of the African Charter on the rights and welfare of the child provides that, "Every child who is capable of communicating his or her views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws."\(^7\) As prescribed by the Constitution which is the grund norm that accrues the freedom of expression to every person with limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom\(^8\) together with the limitations stipulated under article 33 (2).

\(^6\) Children’s Act 2022), s 129 (1).
\(^8\) Constitution of Kenya 2010, art 24 (1).
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Given this, the right of a child to express themselves applies unless there are limitations that fall under the three-part criteria outlined in Article 24 (1). In light of the foregoing, it is very unlikely that a child’s speech whereby they express their opinions on a matter that affects them will fall under the legal ambit of speech that is subject to limitation. Because of this, it only stands to reason to conclude that a child should have the freedom to express themselves unless the person restricting this right provides a reasonable justification for doing so. Which in our case rarely happens in reference to children’s rights.

This section implies that upon disagreement by the parties, they first have to approach the court for directions regarding the matter. One major flaw with this section is that it does not recognize the time sensitiveness of the matter and it does not prescribe the timeline in which the court is expected to make such orders regarding the matter. And knowing how the wheels of justice in this country turn slowly one’s situation may end up getting worse. Second is that this provision solely puts the power of determining the directions to be given to the parties on the courts therefore there is no room for ADR and specifically TDRMs.

Another perspective worth considering is whether children may assist the parents or guardians in determining what is best for them. In the case of Fletcher v Fletcher, the court held that in determining the best interests of the child one of the factors that must be taken into account is the child’s wishes. Within our jurisdiction, The Constitution under Article 53 (2) stipulates that the “child’s best interests are of paramount importance in every matter concerning the child.” Can it then be interpreted that the child holds a position in helping the parents or guardians to ascertain what is best for them in the determination of a matter affecting them to some certain extent? The Children Act, 2022 defines “best interest of the child” to mean “the principles that prime the child’s right to survival, protection, participation, and development above other considerations and includes the

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69 Fletcher v Fletcher [1844] 67 ER 564.
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rights contemplated under Article 53 (1) of the Constitution and section 8 of this Act.”71 Relevant to this paper Section 8 of “The Act” provides for “In any matters affecting a child, the child shall be accorded an opportunity to express their opinion, and that opinion shall be taken into account in appropriate cases, having regard to the child’s age and degree of maturity.”72 Additionally, “The Act” heads on to state that actions taken should have regard to "safeguard and promote the rights and welfare of the child”73

As a consequence, these provisions enable child-inclusive mediation but it is subjected to a limitation of taking into account the child's age and degree of maturity. This position has been held by many courts74. This legal effect is rather offensive to any child who can express themselves but does not fit in the degree of maturity and age requirement. Nonetheless, a more liberal approach could be considered, where a child psychologist or other impartial third party could be utilised to assist the other parties in understanding the child's perspective on the situation. Ultimately, promoting and safeguarding children's rights and welfare. Some experts have postulated that giving a child room for taking part in decision-making empowers them while still enabling them to have a closer connection to the community. Furthermore, studies show that children who are more involved in decision-making manage stress and anxiety better than their peers who do not participate in decision making75. Given these findings, it is naturally conceivable to conclude that, encouraging children to take part in decision-making in matters affecting them benefits them holistically as members of society and finally that every effort should be taken to ensure that the child's views are heard however young they may be.

71 Children’s Act 2022, s 2.
72 Children’s Act 2022, s 8(3).
73 Children’s Act 2022, s 2(a).
74 Mc call v Mc call [1966] 280 Ala. 205.
Another law provision worth considering in “The act” is section 38 which provides for the functions of the secretary. Particularly section 38 (m) which states “promote family reconciliation and mediate in disputes involving children, parents, guardians or persons who have parental responsibility in the manner provided under this Act76.”

The effect of this provision is that the secretary may ".....mediate in disputes involving children, parents, guardians or persons who have parental responsibility in the manner provided under this act." This raises the question of whether the secretary has the necessary training and skills to handle such delicate situations. And if not, it stands to reason that the mediation process will not be as effective as when it is led by a skilled mediator who has the knowledge and experience to successfully navigate through the delicate nature of matters relating to "children, parents, and guardians." Skills such as knowing how and when to rephrase, establishing a rapport, and knowing when to talk and listen are not skills that anyone can develop right off the bat. They take time and continuous practice to hone them. And while Section 37 makes an effort to be precise about the required qualifications, such as "at least ten years' experience in social work, education, administration and management, public administration, human resource or finance management."

These requirements are far too general. For instance, how well would a person with financial management expertise be able to handle and mediate conflicts with children? Of fact, the secretary has other duties outlined in section 38 that may call for financial management expertise, but these skills will not be useful when resolving disputes affecting children. In light of the fact that parents attend parenting programs to learn how to raise and interact with their children, how much more training does the secretary then require? Considering the dire nature of child-related matters, the best implementations ought to be put in place.

76 Children’s Act 2022, s 38 (m).
**Other jurisdictions**

Comparatively participation of a child in matters affecting them is mandatory in South Africa\(^{77}\). The South African Children's Act more specifically provides for mediation for the resolution of various child-centred disputes\(^{78}\). One of these instances that provide for mediation as mandatory is where there is a dispute between the child’s unmarried biological parents about whether the father has fulfilled the requirements provided by law to obtain full parental responsibilities and rights\(^{79}\). And in other instances, the court has the discretion to order mediation for the parties\(^{80}\). Such provisions under South African law indicate how ADR forms especially mediation are highly encouraged in family matters bearing in mind the sensitive nature of these matters\(^{81}\). However, the High Court operates as an upper guardian of all minor children, and any decision made during mediation may be reviewed and approved by the court\(^{82}\). This ensures that the children’s rights are upheld including but not limited to the child’s participation.

Comparatively the Children’s Act of the South African Act under Section 33 (5) (b) provides that “in preparing a parenting plan as contemplated in subsection (2) the parties must

Seek…………………………………………..

(b) Mediation through a social worker or other suitably qualified person\(^{83}\)”

The effects of this Act expressly provide for mediation as the first resort when preparing a parenting plan. The parties must first attend mediation through a social worker or other suitably qualified person. And in most instances, s (he)

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\(^{79}\) Amanda Boniface, ‘Resolving disputes with regards to child participation in divorce mediation’ (2013) 1 Speculum Juris 131, 140.

\(^{80}\) Ibid.

\(^{81}\) Ibid.

\(^{82}\) Amanda Boniface, ‘Resolving disputes with regards to child participation in divorce mediation’ (2013) 1 Speculum Juris 131, 142.
can mediate over sensitive matters such as family disputes both in a formal or informal setting. If the mediation proceedings are unsuccessful the parties would have to prove that they indeed attended the mediation sessions before approaching the court on the matter.

The aforesaid provides information on how ADR, especially mediation, has been accepted in other jurisdictions. Kenya should take inspiration from these actions to better adopt child inclusive mediation.

**How to invoke TDRMs in Child Inclusive Mediation**

In many cases, parents (who are also parties of a dispute) end up using the traditional dispute resolution mechanisms especially the third-party approach which involves using a third party to communicate with the other person. The issue is not the frequency at which people use TDRMs after all Kenyans are cultural people who hold their culture in high regard but rather the issue is how do we make TDRMs more child friendly? To enable the thriving of the paramountcy principle, how do we encourage this form of mediation without making the parents feel disrespected, short changed.

It takes more than the judiciary for this goal to be achieved as other parties such as the local tribes' men and the population ought to know about the existence of this type of mediation. Supervision from well-trained mediators who are well-informed about children's rights may be a recommendation. But then again how can this be done without making the council of elders feel belittled by some white man's ideologies about how children should be treated?

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85 Amanda Boniface, ‘Resolving disputes with regards to child participation in divorce mediation’ (2013) 1 Speculum Juris 131, 142.
86 Ibid.
Recommendations.
Well one way is sensitizing the masses just as the adage goes "knowledge is power" and for this power to be manifested the people ought to be in the know\textsuperscript{88}. Programs that seek to educate the "mashinani" have to be put in place\textsuperscript{89}. With great emphasis on children’s rights and duties.

Codification of children's rights that apply to all communities other than the Constitution. However, this recommendation should be applied with caution to minimise its mechanical operation and rigidity over time\textsuperscript{90}. This drawback is unavoidable but can be minimized. One way to do this is by starting to codify the children’s rights that are universally accepted in a majority of the communities if not all. Such will be closely related to the people from the people without westernized ideas being forced on them. The High court will then take up an active supervisory role in its application to ensure that the children’s rights are upheld\textsuperscript{91}.

Conclusion
It follows from the aforementioned findings that child-inclusive mediation is a developing legal approach that has gained acceptance in many nations. Kenya is gradually moving in this direction. The good news is that by using traditional dispute resolution methods, she can accomplish this while still retaining some of her African culture. The good news is that she can achieve this by using Traditional Conflict Settlement Mechanisms and still maintain some of her African cultural identity. Since it constitutes the backbone of the country. Therefore, the culture of the Kenyan people must be promoted by the government, subject to the repugnancy clause.

\textsuperscript{88} William G Howell, Martin West, ‘Educating the public’ (2007) summer 41.
\textsuperscript{89} William G Howell, Martin West, ‘Educating the public’ (2007) summer 41, 43.
\textsuperscript{91} Constitution of Kenya, 2010, art 165 (3) (b).
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Commencement of The Arbitral Process and Significance of the Notice of Dispute

Envirocheck Limited -V- The Sisters of Notre Dame De Namur Registered Trustees, The Chairman Ciarb Kenya Branch & Eng. Henry Ngugah Odongo

By: Hon. Dr. Wilfred Mutubwa *

Introduction
This was a ruling delivered on 14th April, 2023 on the Applicant’s application challenging the appointment of the arbitrator seeking that the proceedings before the arbitrator be set aside and arbitral proceedings commence de novo. The Application was based on grounds that the 1st Respondent had not served a notice of the dispute before proceeding with the appointment of the arbitrator, that the 2nd Respondent was not the right appointing authority for the arbitrator and that the 3rd Respondent was not qualified as arbitrator in the matter as he was an electrical engineer while a quantity surveyor was more appropriate.

Background & Facts
The 2st Respondent had contracted the Applicant to construct an administration block and class rooms with the expected completion date of the project being 30th March, 2021. The Applicant failed to complete the project in due time but was granted additional time and paid an extra amount of Kshs. 10,000,000.

The Applicant did not complete the project in time and thus the 1st Respondent commenced court proceedings in Kakamega HCCC No 2 of 2022 - THE SISTERS OF NOTRE DAME DE NAMUR REGISTERED TRUSTEES -v-...

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Commencement of The Arbitral Process and Significance of the Notice of Dispute

**ENVIROCHECK KENYA LIMITED.** The court however referred the matter to arbitration directing the appointment of an arbitrator within 60 days.

The 1st Respondent proceeded to write to the Applicant and the 2nd Respondent for the purpose of appointment of an arbitrator. The 2nd respondent wrote to the applicant and the 1st Respondent notifying them of the appointment of the 3rd Respondent as arbitrator in their case.

**Issues for Determination**

i. Whether the arbitrator was improperly appointed for want of service of notice of dispute;

ii. Whether the 3rd Respondent was qualified to arbitrate the dispute;

iii. Is the application defective?

**Laws Relied Upon**

Section 12 of the *Arbitration Act* on qualification and procedure for appointment of arbitrators.

Section 14 of the *Arbitration Act* on the procedure for challenging the appointment of an arbitrator.

(1) Subject to subsection (3), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing an agreement under subsection (1), a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the composition of the arbitral tribunal or after becoming aware of any circumstances referred to in section 13(3), send a written statement of the reasons for the challenge to the arbitral tribunal, and unless the arbitrator who is being challenged withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
Commencement of The Arbitral Process and Significance of the Notice of Dispute
Envirocheck Limited - V - The Sisters of Notre Dame De Namur Registered Trustees, The Chairman Ciarb Kenya Branch & Eng. Henry Ngugah Odongo:
Hon. Dr. Wilfred Mutubwa

(3) If a challenge under agreed procedure or under subsection (2) is unsuccessful, the challenging party may, within 30 days after being notified of the decision to reject the challenge, apply to the High Court to determine the matter.

Parties’ Submissions
The Applicant submitted that the parties did not agree on the appointment of the 3rd Respondent as arbitrator and further that he was not qualified as he was not a quantity surveyor. Furthermore, they faulted the 2nd Respondent for not ensuring that the parties followed the arbitration agreement.

The 1st Respondent relied on Section 14(2) of the Arbitration Act in faulting the application submitting that the same did not follow the procedure laid out thereunder. They further submitted that there was no evidence to suggest that the 3rd Respondent was incompetent.

The 2nd Respondent reiterated that the application was premature as the applicant had not exhausted the mandatory procedure in Section 14 of the Arbitration Act. It furthermore submitted that it should not be faulted for the appointment since the Applicant did not participate in the appointment.

Analysis and Determination
The Court observed that under the arbitral clause in the in the Parties’ contract, they were at liberty to choose between the 2nd Respondent and the Chairperson of the Architectural Association of Kenya who would be the appointing authority in case of disagreement. The 1st Respondent did not breach the contract by designating the 2nd Respondent as the appointing authority.

The Court also found that it was immaterial to serve a notice of dispute since the suit in Kakamega High Court was already evidence of a dispute and that the Court had directed that an arbitrator be appointed within 60 days. The
Applicant had in fact participated in the said proceedings. The court further observed that failure to take part in the process of appointment could only be faulted on the Applicant since it was the one that had elected not to participate as all letters were served upon it and its advocates properly. Therefore, the arbitrator’s appointment was regular and lawful.

The Court also found the application to be fatally defective as it did not fit the requirements under **Section 14 of the Act**.

The also concluded that the contract did not specify the qualifications of the arbitrator to be appointed and therefore any challenge on the 3rd Respondent’s qualifications was an afterthought.

**Conclusion & Disposition**
The court found the application unmerited and dismissed the same with costs.
Addressing Construction Related Disputes in Kenya Taking into Consideration Environmental Factors

By: Shalom Bright Omondi* & Irene Makau Musengya**

Abstract
This paper will explore the issue of construction-related disputes in Kenya with a particular focus on the environmental harm caused by construction activities and the benefits of Alternative Dispute Resolutions in handling such disputes. The construction industry in Kenya has experienced rapid growth in recent years, driven by increasing demand for infrastructure development and urbanization. However, this growth has come at a cost, with many construction activities leading to environmental harm, including deforestation, soil erosion, and water pollution. The environmental harm caused by construction activities has led to a rise in disputes between construction companies and affected parties, including local communities, environmental groups, and government agencies. These disputes often centre around issues such as environmental impact assessments, waste management, and land use planning. Despite the existence of environmental laws and regulations in Kenya, enforcement has been a challenge, with many corporations failing to comply with environmental regulations. This has resulted in a high number of disputes and legal challenges, which can be costly and time-consuming for all parties involved. To address the issue of construction-related disputes in Kenya, there is a need for greater awareness and enforcement of environmental laws and regulations, as well as improved communication and consultation between construction companies, affected parties, and government agencies. Additionally, there is a need for greater investment in sustainable construction practices, including the use of environmentally friendly materials and techniques, to

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Addressing Construction Related Disputes in Kenya Taking into Consideration Environmental Factors: Shalom Bright Omondi & Irene Makau Musengya

minimize the environmental harm caused by construction activities. While highlighting the importance of ADR in Construction related disputes, this paper will also address lapses in the law and recommend the way forward on construction related disputes.

1.1 Introduction
The construction industry in Kenya is a vast and illustrious field. Kenya itself has a well-established construction industry that has businesses which are heavily employed in the construction of commercial and residential buildings, engineering structures and affiliated services. The Kenya construction market size was $17.3 billion in 2022 with an ever-projected AAGR growth of more than 5% expected to occur during 2024-2027. The importance of such an industry can then be clearly seen. According to the Kenya National Bureau of Statistics (KNBS), the construction and real estate sectors have been some of the main drivers of economic growth in Kenya, accounting for more than 7 percent of the GDP in 2015.

However, with all the progress being pushed in the construction industry, there has been a growing influx of disputes arising from construction field, mainly exasperated by environmental factors, mainly environmental harm. This ‘environmental harm’ has been the subject of debate and includes notable effects such as deforestation, soil erosion and noise pollution. These disputes often centre around issues such as environmental impact assessments, waste management, and land use planning. Despite the existence of environmental

laws and regulations in Kenya, enforcement has been a challenge, with many corporations failing to comply with environmental regulations.\(^5\)

The fact of the matter is, the environment plays a significant role in construction relate disputes as well as contractual agreements. However, in this paper we will put more focus into an in-depth analysis of other causational factors of construction related disputes under the context of environment. This paper will also identify and highlight what the law says on construction related disputes and the remedies thereunder in the future of the construction related industry.

2.1 Construction Industry

Construction in Kenya refers to the well-established industry that comprises businesses primarily involved in the construction of commercial and residential buildings, engineering structures, and affiliated trade services.\(^6\) The construction industry in Kenya is primarily driven by two key infrastructure sectors, namely transportation and building/housing.\(^7\) The Ministry of Transport and Infrastructure plays a crucial role in formulating policies and implementing actions related to roads, aviation, maritime, rail, housing, and urban development in the country.

2.1.1 Legal Framework

The establishment of the construction industry in Kenya is guided by the regulatory framework provided by various Acts under Kenya. While the Constitution does not specifically mention the construction industry, it lays the foundation for governance, economic development, and the protection of fundamental rights, indirectly influencing the construction sector.\(^8\)

\(^5\) Ibid

\(^6\) Construction Industry in Kenya (Kenya Construction Authority, 2021)  

\(^7\) Trade.gov, 'Kenya: Infrastructure' (accessed 25 May 2023)  

\(^8\) Constitution of Kenya (2010)
One of the key legislations governing the construction industry is the National Construction Authority Act, No. 41 of 2011. This Act established the National Construction Authority (NCA) with the mandate to regulate, streamline, and build capacity in the construction industry. The NCA plays a crucial role in ensuring quality assurance, promoting standardization, and maintaining an industry information system. It sets standards for construction projects, registers contractors, and provides certification and accreditation to industry professionals and entities involved in the construction sector.

The NCA's regulatory oversight extends to various aspects of the construction industry, including planning, design, construction, maintenance, and demolition of buildings and infrastructure. The Authority collaborates with other government agencies, professional bodies, and stakeholders to enforce compliance with building codes, regulations, and industry best practices. By establishing guidelines and standards, the NCA contributes to the development of a safe, efficient, and sustainable construction industry in Kenya.

Under the NCA, contractors involved in construction projects are required to register and meet certain qualifications or attributes. This registration process helps ensure that only competent and qualified contractors are engaged in construction activities, enhancing the overall quality and reliability of the industry. By promoting professionalism and accountability, the NCA aims to build trust and confidence in the construction sector.

The establishment of the construction industry under Kenya Acts and the Constitution is also supported by the involvement of various government ministries. The Ministry of Transport and Infrastructure plays a crucial role in driving infrastructure development, including transportation projects such as roads, aviation, maritime, and rail. This sector provides significant

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9 National Construction Authority Act No. 41 of 2011
10 Ibid
11 Ibid
opportunities for construction companies and professionals, contributing to the growth of the industry and the overall economy.

Additionally, the building and housing sector within the construction industry plays a vital role in meeting the demand for residential and commercial structures. The construction of new buildings and the renovation of existing ones contribute to urban development, addressing the housing needs of the population and supporting economic growth.

In recent years, the construction industry in Kenya has experienced steady growth and value addition. This growth is attributed to increased investments in infrastructure development, urbanization, and the demand for housing and commercial spaces. The construction industry's contribution to the economy is expected to continue expanding, creating employment opportunities and driving economic development.

The construction industry in Kenya is also embracing sustainable practices and aligning with the country's commitment to the 2030 Sustainable Development Goals (SDGs). There is a growing focus on environmental sustainability, energy efficiency, waste management, and the use of eco-friendly materials in construction projects. These efforts attempt to mitigate the environmental impact of the industry and promoting sustainable development in Kenya.

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13 Research and Markets, 'Construction Industry in Kenya - Key Market Trends and Opportunities to 2025' (2022)
14 Ibid
15 Capital Markets Authority of Kenya, 'Construction Industry in Kenya' (Year)
16 Ibid
2.1.2 Environmental Legislative Framework in Kenya Constitution

Article 42 of the Constitution of Kenya accords Kenyan citizens the right to a clean and healthy environment, including for the benefit of present and future generations, with the state being obligated as per the Constitution. Article 10 of the Constitution lays down the national values and principles of governance in Kenya such as sustainable development, that act as a guide or reference to the government when they are attempting to make laws or policy.

The creation of the Environment and Land Court through Article 162 of the Constitution also had the impact of having a court in Kenya with the power of the High Court to deal with environmental protection matters.

Environmental Management and Coordination Act

The Environmental Management and Coordination Act (EMCA) 1999, is established as a comprehensive framework law on environmental management and conservation. The EMCA establishes a variety of institutions such as National Environment Management Authority (NEMA), Public Complaints Committee, National Environment Tribunal, National Environment Action Plan Committees, and County Environment Committees. NEMA is the main body which exercises general supervision and coordination matters in regards to the environment. The Act itself provides for environmental protection through the following; Environmental Impact Assessment (EIA), Environmental audit and monitoring, Environmental restoration orders, conservation orders, and easements.

18 Article 10
19 Article 162
20 Environmental Management and Coordination Act (1999)
22 Ibid
The Climate Change Act
The Climate Change Act 2016 in Kenya aims to establish a regulatory framework that enhances the country's response to climate change. Its objective is to provide mechanisms and measures to improve resilience to climate change and promote low carbon development. The act adopts a mainstreaming approach, serving as a legal foundation for climate change activities through the National Climate Change Action Plan (NCCAP). Additionally, it establishes the National Climate Change Council and the Climate Fund.  

By enacting this legislation, Kenya aligns itself with other nations that have taken concrete steps to implement the commitments of the Paris Agreement on Climate Change. The Climate Change Act's primary purpose is to guide the development, management, implementation, and regulation of strategies that enhance climate change resilience and promote sustainable development in Kenya, with a focus on low carbon approaches.

The Energy Act
The Energy Act Kenya has a comprehensive scope that encompasses various forms of energy, ranging from fossil fuels to renewable sources. One of the key mandates of the Energy Act is to facilitate the promotion, development, and utilization of renewable energy. This includes specific renewable energy sources such as biodiesel, bioethanol, biomass, solar power, wind power, and hydropower.

By providing a supportive framework, the Energy Act plays a crucial role in facilitating the transition towards a green economy. It aims to achieve

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24 Climate Change Act 2016, Section 3(1)
25 Energy Act 2019
environmental protection and address the challenges posed by climate change. The Act's provisions and provisions for renewable energy development contribute to fostering sustainability and reducing dependence on fossil fuels.27

2.1.3 Intersection of Construction and Environmental Legislation in Kenya
One of the key requirements for construction projects in Kenya is the Environmental Impact Assessment (EIA). The EMCA mandates that any project likely to have significant environmental effects must undergo an EIA process before it can be approved.28 This assessment evaluates the potential environmental impacts of the project, identifies measures to mitigate those impacts, and ensures compliance with environmental standards.29

Construction companies are required to submit an Environmental Impact Assessment Study Report to the National Environmental Management Authority (NEMA) for review. The report should include information on the project's potential impacts, proposed mitigation measures, and a plan for monitoring and managing environmental aspects throughout the construction process.30

Kenya's environmental legislation also focuses on the protection of natural resources affected by construction activities. For instance, the Forest Conservation and Management Act prohibits deforestation and regulates the use of forest resources.31

Similarly, the Water Act safeguards water resources by promoting sustainable water use and preventing pollution. Construction projects that involve water extraction, such as for irrigation or building purposes, must comply with the act's provisions and obtain appropriate permits.32

27 Ibid
28 Environmental Management and Coordination Act (1999)
29 Section 58
30 Section 60
31 Forest Conservation and Management Act of 2016
32 Water Act of 2016
The construction industry generates a significant amount of waste, including construction debris, hazardous materials, and non-biodegradable waste. Proper waste management is essential to minimize environmental impacts and promote sustainable practices.

Kenya has established regulations for construction waste management under the EMCA. Construction companies are required to implement waste management plans, which include segregating waste, recycling materials where feasible, and disposing of hazardous waste properly. Violations of waste management regulations can result in penalties and legal consequences.33

Ensuring compliance with environmental legislation in the construction sector is crucial for achieving sustainable development goals. The National Environmental Management Authority (NEMA) is the primary regulatory body responsible for enforcing environmental laws and regulations. NEMA conducts regular inspections, issues permit, and takes legal action against non-compliant construction projects.34

To enhance compliance, the government has also introduced initiatives such as environmental audits and certifications, where construction companies are assessed for their environmental performance. Adhering to these audits and obtaining environmental certifications can improve a company's reputation and increase its competitiveness in the market.35

3.1 Factors Contributing to Construction Disputes and its Long-Lasting Effects

Over the years, human activities have become an arguable challenge in mitigating risks to the earth's natural process which are strained beyond limits

33 Environmental Management and Coordination Act (1999)
35 Environmental Management and Coordination Act (1999)
and cause major environmental problems.  

Humans in particular are known for their arduous and strenuous tasks which may benefit themselves and the present generation without considering future effects. It must be clear to note that when humans damage the environment, the quality of life is not only affected for everyone but also biological diversity as well.

The impacts of construction activities on the environment can originate from different sources such as from the individual projects, the demand for raw material necessary for the execution of the projects, the processing and production of the raw material as well as from the finished construction projects.

The main adverse effects of construction upon the environment include; land misuse (erosion, deforestation), existing site dereliction, habitat destruction, air emissions/pollutants and health and safety impairment.

The environmental damage in Kenya coincides with its economic growth which is no coincidence. It is clear that the extent of environmental degradation carries significant economic and social implications, both in the present and the long term. These implications encompass various costs, including the immediate loss of production and consumption opportunities, expenses related to pollution control and mitigation measures, and the indirect costs affecting other sectors of production and consumption. Additionally, there are social costs associated with the strain on community social structures, heightened potential for

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39 Ibid
competition and conflicts or disputes over resources, and various other consequences.\textsuperscript{40}

A study conducted by Kumaraswamy and Yogeswaran provides a comprehensive reference to the common sources of construction disputes, which primarily revolve around contractual matters such as variations, extension of time, payment issues, quality of technical specifications, availability of information, administration and management challenges, unrealistic client expectations, and determination.\textsuperscript{41}

Smith characterizes conflict and disputes as an inherent and widespread problem in the construction sector. Conflict can hamper communication between individuals, strain personal and professional relationships, and diminish overall effectiveness.\textsuperscript{42} Additionally, conflict generates tension and distracts team members from performing their tasks.\textsuperscript{43} If not properly managed, disputes can lead to project delays, a decline in team morale, increased project costs, and most significantly, damage to ongoing business relationships.\textsuperscript{44}

In Kenya, a delay of construction project may lead to an increase in cost, a risk that owners and managers are unwilling to take, and as such there is a need to cut corners in order to complete a project, which will inevitably affect the environment.

\textsuperscript{42} "Factors of Conflict in Construction Industry: A Literature Review" by N. Jaffar, A. H. Abdul Tharim, and M. N. Shuib.
\textsuperscript{44} Cheung, E., & Suen, H. (2002). Effective dispute management in the construction industry.
4.1 Addressing Construction Contract Disputes through Dispute Resolution

A Dispute resolution in construction contracts is vital because it prevents not only potential legal action but also can help reduce environmental risks. Mainly construction disputes are known to take place due to either miscommunication between the parties or even conflict due to contract delates, failure to enforce the agreement or even unsubstantiated claims.\(^4^5\)

4.1.1 Alternative Dispute Resolution Methods in Construction Disputes.

Negotiation

Direct negotiation is an informal and voluntary dispute resolution process where the parties involved or their representatives attempt to resolve the dispute without the involvement of a neutral third party.\(^4^6\) It is a private and confidential process that focuses on finding mutually acceptable solutions that meet the needs and interests of both parties. The success of negotiation depends on effective interpersonal communication skills. Negotiation is typically the first step in resolving a dispute and aims to reach a resolution at this stage.\(^4^7\)

Adjudication

Adjudication is a dispute resolution mechanism that can be used in construction contracts, particularly when arbitration is not suitable or available and is one of the most common forms of dispute resolution for construction disputes in Kenya.\(^4^8\) It allows for the resolution of certain disputes before the completion of the works. Adjudication provides a means to address issues such as


\(^{47}\) Ibid

\(^{48}\) Ibid
withholding of certificates or retention monies that could significantly impact cash flow. It offers a quicker and more efficient resolution process.\(^4^9\)

**Arbitration**

Arbitration is a dispute resolution process whereby the conflicting parties agree to submit the dispute to one or more independent arbitrators.\(^5^0\) It is often regarded as a form of private litigation, however the parties involved in the conflict are bound to obey the arbitration\(^5^1\) outcome. Drawbacks of arbitration include challenges related to the arbitrator's jurisdiction and competence.

**Mediation**

Mediation is a facilitative process where an impartial third party, the mediator, assists the disputing parties in reaching an agreed resolution. It is a consensual process that involves a brokered or facilitated negotiation.\(^5^2\) Unlike arbitration or litigation, a mediator does not make decisions for the parties but helps them find a mutually acceptable settlement. Mediation emphasizes the parties' autonomy in reaching a resolution.\(^5^3\)

**Litigation**

Litigation is a formal dispute resolution process that focuses on the legal rights of the parties involved. It is often confrontational and adversarial in nature, involving the presentation of evidence and arguments in a court of law.\(^5^4\) Disadvantages of litigation include case backlogs, delays, technical points of

\(^{4^9}\) Ibid
\(^{5^1}\) Ibid
\(^{5^3}\) Ibid
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law, inflexible rules of evidence, and judges' limited familiarity with technical aspects of construction disputes. In most instances, the contract itself provides for a dispute resolution clause which allows the parties to refer the matter to Alternative Dispute Resolution before the matter is referred to court. Under Article 159(2)(c) of the Constitution of Kenya, it provides that alternative forms of dispute resolution shall be promoted by the Judiciary.

Conciliation
Conciliation, which is similar in nature to mediation, involves a neutral third-party facilitating settlement discussion. It typically includes formal proceedings where both parties and their legal representatives are present. The conciliator puts forward a proposed resolution based on the discussions. Mediation is also known as “brokered negotiation”. Although the parties may agree to a settlement, they retain the right to pursue arbitration or litigation if a satisfactory resolution is not reached. Conciliators or mediators cannot subsequently serve as arbitrators unless both parties agree in writing.

5.0 Integrating Environmental Considerations in Construction Dispute Resolution
Buildings handle more than 50% of the global usage of resources and energy and the resulting emissions and this indicates the need to integrate environmental consideration when solving construction dispute.

55 Ibid
58 Ibid
60 Andrić, Koc & Al-Ghamdi., 2019
5.1 Environmental Impact Assessment (EIA) is a management tool under EMCA which helps to identify the likely negative impacts of a proposed project and assist in decision on whether to go on with a project or not. It is also useful in identifying and putting in place mitigating measures for the identified negative impacts of a proposed project. This helps in highlighting environmental issues to guide policy makers, planners to make environmentally sustainable decisions. It may necessitate changes, redesigns of components of the project for effective environmental management.

When used for dispute resolution EIA helps to identify the extent of environmental harm caused by the project and assist in evaluating the responsibility of the parties in dispute through comparing the predicted environmental impact outlined in the report vis a vis the actual impact. EIA can be used to determine if the party to the dispute adhered to its obligations and thus determine their liability during resolution. It facilitate better informed judgments when balancing environmental and developmental needs, contributes to the implementation of national policies on sustainable development and precautionary action. Environmental action plans and management plans are formulated and they set out the mitigation measures needed for environment management. Environmental management plans include not only clear recommendations for action but also procedures to implement.

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61 S58,59 EMCA, Principle 17 of the 1992 Rio Declaration on Environment and Development
62 Session-6_pre-reading_Environmental-Impact-Assessment-EIA---Review-Guide-for-Communities.pdf
63 https://nema.go.ke/index.php?option=com_content&view=article&id=119&Itemid=144
64 https://www.fao.org/3/V8350E/v8350e06.htm
65 Ibid
66 Kariuki Muigua ‘Attaining Environmental Justice for Posterity’ (2022) vol.1
67 Ibid
68 https://www.fao.org/3/V8350E/v8350e06.htm
The EIA process also involves expert evidence and testimony. Involvement of environmental experts in construction disputes is key. This expert can be individual person’s consultants or firms duly certified and registered under the Environmental (Registration of Environmental Experts) Regulations\textsuperscript{69} to conduct environmental impact assessment study or environmental audit. They include waste management experts, energy efficiency consultant, Environmental engineers etc. Sustainable experts focus on the promotion of sustainability in various sectors like construction. They develop strategies to reduce environmental impacts of the projects.\textsuperscript{70}

Environmental scientists for example implement and advise on policies and plans for management and protection of the environment. They carry out EIA for development projects and propose solutions to address negative environmental impacts \textsuperscript{71} The main aim of expert involvement is to leverage their expertise and specialized knowledge and give objective analysis and insights to help solve the disputes and this helps to ensure environmental considerations are taken to account leading to sustainable solutions. This is because knowledge is a key asset in reaching accurate decisions.\textsuperscript{72} They help in mitigation of environmental risks since they can evaluate and propose mitigating and remedy strategies. They do so by offering advisory services and giving expertise opinions to construction experts such as planners, contractors on environmental compliance, risk management to minimize or prevent the disputes.

They also offer independent assessment, evaluation and review of the environmental aspects of the projects by taking evidence from the parties and make judgments not biased and can even serve as mediators and conciliators.

\textsuperscript{69} Environmental (Registration of Environmental Experts) Regulations, 2005
\textsuperscript{70} https://www.zippia.com/sustainability-specialist-jobs/what-does-a-sustainability-specialist-do/
\textsuperscript{71} https://www.encyclopedia.com/economics/news-and-education-magazines/environmental-scientist
\textsuperscript{72} https://www.mdpi.com/2071-1050/13/16/9403
since they are impartial parties of the dispute\(^73\) with more specialized knowledge. Their skills are crucial in review of project documents, permits, construction plans, in order to access disputes as to whether there is adherence to the environmental standards.\(^74\) Their evaluation of the situation is objective and give an analysis of potential violation, mitigating measures and remedies to address noncompliance.\(^75\)

5.2 *Construction Dispute resolution agreements* should have provisions which expressly provide for compliance with environmental regulations as well as provisions for mitigating measures to be undertaken by parties to mitigate negative environmental impacts. Parties can agree on the risk management and minimization and include the same in their dispute resolution clauses to make sure dispute resolution leads to green environment. When giving arbitral awards the tribunals can take into consideration the environmental impacts and ensure the resolution leads to environmental protection.

5.3 *Considering compliance with green building certifications* like LEED (leadership in energy and environmental design) and BREEAM (the building research establishment environmental assessment method) in dispute resolution ensures resolution aligns with sustainable building practices.\(^76\) The certifications are widely accepted as standards to assess sustainable performance of building.\(^77\) They help to evaluate the environmental impacts as well as other aspects of sustainable construction in buildings and their integration in construction disputes resolution enhances long term sustainability and provides for valuable guidance in dispute resolution. They

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\(^73\) https://www.jdsupra.com/legalnews/the-creative-collaborative-use-of-1802916/


\(^75\) Ibid

\(^76\) https://www.sharplaunch.com/blog/green-building-certifications/


provide for standard for evaluating sustainable performance of a building hence assess environmental impacts of the project and provide relevant solutions. (Edge) 21excellence in design for greater efficiencies, green star rating systems and (LEED) are international rating tools which Kenya has been using. However due to a global report of building and construction which showed the construction industry consumes 36% of the global energy and contribute 39% carbon emissions the architectural association of Kenya launched a green certification toll in 2019 to assess construction projects to establish their environmental compliance.

6.0 Case Studies and Analysis

Republic v National Environmental Management Authority [2011] eKLR

The appellant (sound equipment limited) was appealing against a decision of the High (Court (Lady Justice R. Wendoh) which dismissed its application for judicial review orders challenging an order by NEMA. NEMA had issued stop orders requiring the appellant to cease its construction project due to concerns of pollution of the Mathare River. The appellant’s appeal was dismissed.

The appellant had a project of construction of ten town houses for residential purposes on a two-hectare piece of his land in 2007. The appellant adhered to all requisite requirements. He prepared and submitted drawings and specifications of the proposed houses to the City Council of Nairobi which had given its approval to the project and thereafter carried out Environmental Impact Assessment Study and submitted it to NEMA. NEMA issued him with an Environmental Impact Assessment Licence subject to conditions which he affirmed his commitment to comply to before starting the construction and during the process of construction e.g. the appellant was required to ensure


[2011] eKLR
environmental protection measures to prevent pollution and ecological deterioration as well as to comply with NEMA’s improvement orders throughout the project cycle.

After receiving its EIA Licence, the appellant started the construction. However, during the course of the project, NEMA issued a stop order stopping the work immediately because the construction was causing the pollution of the Mathare River which ran through the appellant’s land. The project posed environmental threats which could not be reasonably foreseen at the time of the EIA Study as well as its review. NEMA thus directed the appellant to carry out a fresh EIA study.

This is what made the appellant to approach the court for judicial review order to quash the decision of NEMA.

It is clear that failure to adhere to environmental regulations or negative environmental impacts of a project to the environment can lead to suspension of the project and orders of adoption of mitigating measures to prevent environmental degradation prior to proceeding with the project. In solving the dispute NEMA took to account environmental considerations and even ordered a fresh EIA to ensure potential risks are identified and mitigated. This ensure that no further disputes with regard to environmental impacts arise thus ensuring the project runs smoothly.

It is also clear that there are clear mechanisms under EMCA and other acts such and physical planning act which need to be followed before moving to court to ensure construction disputes with environmental issues are solved faster to avoid suspension of such projects.

In the case of Deepak Harakch & another v Anmol Limited & 4 others 81 The dispute arose from an ongoing development by the 1st defendant (anmol limited) on the suit property. The 2nd defendant is the 1st defendants. The 1st

81 [2018] eKLR
defendant acquired the requisite licences and permits from NEMA through EIA Licence, a Certificate of Variation of EIA Licence from NEMA authorizing the alteration of the internal spaces of the project to increase the number of apartment units from twenty-four (24) to forty-eight (48) units. The Nairobi County Government’s Urban Planning Department approved the construction of 48 units of flats on the suit property and the National Construction Authority has similarly tendered evidence and submissions to the effect that the project is compliant.

The project was licensed to contain a basement and 15 levels and at the time of the plaintiff’s application the 2nd defendant was doing level 13. The plaintiff was a tenant who resided in the adjacent property but he has been forced to seek alternative residency because of the debris that fell from the upper levels of the project and also due to the current state of the adjacent. He alleges that the project infringed his right to clean and health environment and seeks injunctive orders to stop the construction pending determination of the suit.

The court held that any injury suffered by the applicant could be adequately be indemnified by damages since the applicant has stated that he was a tenant and he has since relocated to a different residence. …..the balance of convenience does not favour the stoppage of a multi-million project which is nearing completion, particularly in a scenario where all statutory approvals are in place and have not been challenged in the manner stipulated by the statutes.

A challenge against a building approval by the physical planning regulator is supposed to be ventilated through the Liaison Committee established by the Physical Planning Act. An appeal against a decision of the Liaison Committee would lie to this Court. This statutory mechanism was similarly not utilized by the applicant.
Lydia Kaguna Japeth & 2 others v Mbesa Investment Limited & 2 others

The 1st Respondent commenced construction of three (3) towers known as Tower A, B, and C. However, a petition was filed by three applicants for failure to adhere with approvals and permits from the requisite bodies as well as failure to meet the constitutional requirement of the clean and health environment. The construction was reckless and had no protection and safety measures and soot, dust and debris particles escaped to the applicant’s adjacent plots.

All the Petitioners fully satisfied the requisite standards in regard to granting the Conservatory orders. They demonstrated presence of prima facie case with a likelihood of success and showed that in the absence of the Conservatory orders they are likely to suffer prejudice by the construction of the Respondent’s project.

The court granted conservatory orders that restrained the 1st respondent itself or its representatives from proceeding with the construction pending hearing and determination of the petition.

It’s clear from the above cases and many other construction cases that noncompliance with environmental guidelines has grave implications on the projects. The same can lead to suspension of projects to the detriment of the developer. To avoid this, a developer should ensure adherence to the set practices. Solving construction disputes with environmental consideration has the impact of ensuring the right to clean and health environment as per the constitution is preserved. It also ensures that sustainable development since projects adhere to the environmental considerations from the onset. Any risks likely to arise from the project are identified and mitigated. This ensures that no further disputes in the construction arises and thus the project runs smoothly.

82 [2021] eKLR
7.0 Recommendations for Effective Construction Dispute Resolution in Kenya

In order to ensure construction disputes are effectively solved in Kenya some measures should be adopted:

7.1 Existing environmental and construction regulation and enforcement mechanisms should be strengthened to ensure compliance

Clear regulations with clear guidelines and standards for environmental protection that set limits on emission, waste management, and activities that harm the environment should be encouraged to protect and preserve the environment. The same will also provide a framework for compliance and accountability by establishing clear legal obligations of parties in relation to the set practices. Creation of enforcement mechanisms such as penalties, inspection monitoring compliance led to adherence to the regulations and ensure violations attract consequences. The strengthened regulations lead to environmental justice by imposing standard regulations and protection of people from environmental hazards especially for marginalized and prevent burden of pollution especially on the disadvantaged or marginalized people. This can be done through:

7.1.1 Regular monitoring and reporting green building Performance - Keeping track, timely monitoring and reporting of waste management, air quality, water management practices and other sustainable development ensures adherence to the green building requirements and any deviation is detected early and corrective actions taken to avoid disputes.

Establishing performance indicators related to sustainable practices such as water conservation, waste generation and management and setting clear metrics and targets to align with green building practices water meters to measure the

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Ibid
performance of the indicators from the data collected and note any changes and modifications in the project affecting sustainability.\textsuperscript{85} This ensures that the projects are evaluated to ensure compliance with environmental requirements and ensure any non-compliance is corrected. This ensures continuous improvement and compliance.

Regulatory agencies responsible for environmental oversight and enforcement need to be equipped with resources and expertise to carry on the mandate. This can be done through investing in training programs and capacity building for the regulatory agencies, enforcement officials and other stakeholders to equip them with knowledge and skills to enforce the environmental regulations.\textsuperscript{86}

### 7.1.2 Penalties and sanctions

The implementation of clear guidelines on the penalties and criteria for imposing them will ensure the penalties are proportionate to the severity of the violation and serve a deterrence effect and that they are not arbitral.\textsuperscript{87}

### 7.2. Enhancing awareness and training and public awareness

Sometimes the reason for non-compliance and the cause of the construction disputes is lack of knowledge and awareness on environmental issues. Public awareness and participation raise awareness and creates collective responsibility and commitment to adhere to environmental regulations. Human capacity for sustainable development is currently insufficient\textsuperscript{88} and should be enhanced through creating awareness.

It can be done through Outreach, workshops or public awareness campaigns to educate the public on their environmental regulation and their role in protection.

\begin{footnotesize}
\textsuperscript{85} https://www.mdpi.com/2071-1050/11/3/560


\textsuperscript{87} https://www.oecd.org/env/outreach/42356640.pdf

\end{footnotesize}
of the environment. Awareness campaigns can also be done via various communication channels like social media, radios, TVs targeting different populations. Collaborate with NGOs civil societies, onsite trainings and inspections.

Developing and maintaining online resources \(^\text{89}\) such as websites, portals, brochures showcases which are user friendly to allow access to environmental and construction laws and guidelines making such resources easily and freely available to the public and include attractive and engaging features such frequently asked quiz to engage with the public.

This will lead to increased and better understanding and incorporation of environmental laws in construction hence adoption of better environmental practices. The same also leads to sharing of knowledge, and experience as well as exchange of ideas in relation to the green building practices thus fostering continuous improvement and adherence.

7.3 Collaboration among stakeholders
The stakeholders such as project owners, contractors, subcontractors’, designers’ consultants, experts, legal professionals’ financial institutions involved in green financing need to collaborate to leverage their collective knowledge in order to help in understanding complex disputes and offer quality and practical solutions.\(^\text{90}\) The same also leads to enhanced understanding of the set principles and regulations as well as issues relating to disputes leading to mutually agreeable solutions.

Collaboration also leads to streamlined communication and knowledge sharing on the emerging trends, effective practices and strategies and solutions for the dispute’s resolution. This helps in cooperative dispute resolution leading to timely resolution and minimized misunderstanding making negotiations of disputes possible without delays.

\(^{89}\) https://pachamama.org/environmental-awareness
Through identifying of the possible risks for non-compliance with the set environmental practices and standards the stakeholders can collaborate to develop risk management strategies and preventive measures and the assessment of possible environmental impacts of projects. This proactive approach reduces likely disputes from arising.

By pooling their expertise, knowledge and skills ensure the experts maximize efficient use of the resources as well as cost effective solution for dispute resolution and environmental conservation. This will promote a clear understanding of the environmental obligations of each stakeholder and thus compliance.

8.0 Conclusion
Construction industry makes a great contribution to the country’s economy. It has immense effects on the environment which need to be urgently dealt with as soon as they arise. This is because the construction sector contributes largely to environmental impacts. real estate sector represents high share of energy use and carbon dioxide emission with the building and construction accounting for 36% of global energy use and 37% carbon dioxide emission globally in 2020 and the sector has a major role to play in achieving the objectives of the Paris agreement in relation to climate change as per united nations environmental programme emission gas report.

There is need to preserve a sustainable system to improve the quality of life based on the co-existence between human and nature. Environmentally related disputes are drastically increasing in construction and have an impact on

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...delaying the construction projects leading to higher costs.\(^95\) It is thus crucial to integrate environmental considerations in the onset of construction projects as well as at the dispute resolution mechanisms stage to ensure disputes do not spiral to lengthy processes and also ensure involvement of environmental experts, mitigation of environmental negative impacts, and adherence to green building practices such as waste management.

It is clear that despite there being laws and regulations on both construction and environment issue, compliance has been problematic.

8.1 The importance of such integration is:
Environmental disputes pose various risks to construction such as project delays, cost overruns, design changes, and interruption. Reduction of these onsite disputes help meet the project goals while avoiding such delays and interruptions. Integration of environmental factors in construction disputes will ensure green building practices are adhered to the promotion of sustainable development practices ensures that construction projects or activities adhere to sustainable principles e.g., energy efficiency thus mitigating environmental impact of construction leading to long term environmental conservation e.g., reduced waste management.\(^96\)

The same leads to long term project viability since potential conflicts of environmental impacts are identified and mitigated hence the project flows smoothly and reduces delays and disputes with regard to environmental compliance. The reputation of the project is improved and obtaining permits and approvals becomes easier leading to market competitiveness. This is because it signifies commitment to environment and sustainable practices thus attracting investors or customers who value environmental friendliness.

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\(^95\) [https://www.sciencedirect.com/science/article/pii/S2090447922001265#s000](https://www.sciencedirect.com/science/article/pii/S2090447922001265#s000)
\(^96\) Ibid
Adherence to the environmental regulation leads to avoidance of legal penalties for noncompliance with such laws. It also prevents unnecessary project delays due to the environmental disputes so no project interruptions thus saving on costs of extended timelines.

8.3 The future of construction dispute resolution in Kenya

Kenya holds a great potential for positive transformation with regard to construction dispute resolution. It has several laws and regulations on both construction and environmental matters. The statutes aim at ensuring that projects adhere to environmental requirements to ensure the right to clean and health environment is preserved. They provide for establishment of specialized bodies to canvass the construction disputes while putting environmental issues into considerations. This way lengthy litigation processes are avoided by ensuring projects do not have to be suspended due to non-compliance. Such institutions include NEMA, tribunals like NET, liaison committees. There are several environmental experts and guidelines for the same to ensure environmental experts have requisite qualifications and skill. Above all aspects such as EIA are embraced in construction projects to mitigate possible environmental risks.

Kenya is leveraging technologies such as the adoption of green building material. Many buildings are seeking eco-friendly construction materials to conserve the environment egg Roofing alternatives such as solar reflective roofs and timber. Green building techniques have also been adopted by using technology to create buildings with minimum to negative effects to the environment from the design, operation construction and even demolition. E.g zero energy buildings to produce their electricity through renewable energy so no need to connect the two-electricity grid. They rely on renewable energy generators like wing and solar.

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Kenya is joining the league of countries employing environmentally sustainable culture in real estate development. For example, UNEP Nairobi has 6000 square meters of solar panels making it the first solar power UN office in the world.  

NIFC authority is keen to enhance the operating environment and promote green finance while collaborating with both domestic and other stakeholders to transform the market. Kenya sources of green finance are mainly external loans and grants from international public institutions though national government distributes some money to green related projects.  

Kenya green bond programme was launched in 2017 with the issuance of Kenya first green bond been on October 2015. There is Policy guidance note on green bonds, revised list of rules with provisions of green bonds and green bond issuance guidance and the Kenya green programme to guide on green financing.

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100 https://nifc.ke/sector/green-finance/
102 The Kenya green bond market issuers guide 2018
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Using Artificial Intelligence (AI) to Address Contemporary Concerns About Arbitration as an Alternative Dispute Resolution Mechanism in Kenya: Eunice Nyiero

Using Artificial Intelligence (AI) to Address Contemporary Concerns About Arbitration as an Alternative Dispute Resolution Mechanism in Kenya

By: Eunice Nyiero*

Abstract
On 27th May 2023, the BBC (British Broadcasting Corporation) published a story that grasped the AI community with intrigue. An American lawyer was facing charges after he appeared in court and filed supporting case laws in his case which were nonexistent. The Judge in the matter was quoted saying that the court was faced with an unprecedented circumstance after filing was found to reference example legal cases that did not exist. Upon scrutiny by court, it was established that the individual who was responsible for the legal research solely depended on AI and Chat GPT (An AI software) on his research. None of the cited cases ever happen, nor were they real and there the case laws and content were false.¹

This scenario raises many questions but subsequently raises pertinent opportunities as well. Could AI be used in legal research? Could it be adapted in Alternative dispute resolution. Could its entrance in litigation be of use and if so, what are the perimeter of its use?

This paper seeks to interrogate the use of Artificial Intelligence as a complementary tool in addressing alternative dispute resolution’s concerns in practice. The article will address the setbacks in ADR and how AI can be positively used to influence a positive, accurate and timely feedback on ADR matters.

Alternative Dispute Resolution
Dr. Kariuki Muigua Ph.D states that Development is not feasible in a conflict situation and that Conflicts and disputes must be managed effectively and

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¹ BBC News; ChatGPT: US lawyer admits using AI for case research, By Kathryn Armstrong, 27th May 2023
expeditiously for development to take place.\(^2\) He further states that conflicts and disputes management mechanisms consist of alternative dispute resolution mechanisms (ADR) such as negotiation, mediation, conciliation, expert opinion, mini-trial, ombudsman procedures, arbitration; traditional dispute resolution mechanisms and also formal mechanisms namely court adjudication.\(^3\)

Alternative Dispute Resolution (ADR) has been defined as the resolution of conflicts without taking recourse to courts of law.\(^4\) ADR has come a long way and to delve into its origins, you’d need to look at anthropological and sociological studies to get a sense of how early humans may have traditionally resolved disputes without resorting to the use of fists, clubs, or spear-arrows.\(^5\) Many of the ancient or Traditional Dispute Resolution Mechanisms (TDRMs) of resolving conflicts such as conciliation, reconciliation, negotiation etc. are significantly different, at least in form, from modern techniques of dispute resolution. For instance, modern ADR mechanisms have been used to resolve disputes related to intellectual property, employment, construction, and international trade, while traditional ADR mechanisms were mainly limited to resolving disputes related to communal, labor and commercial disputes.\(^6\) Further, modern ADR mechanisms are broader in scope of arbitral matters, wider in territorial accessibility, uniformity and coordination in arbitration rules and policies across borders, less formal, use of technology to facilitate dispute resolution, and place a greater emphasis on collaboration and cooperation between parties than traditional.

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Member Chartered Institute of Arbitrators (MCI Arb), Member of law Society of Kenya (LSK), Member of East African Law Society (EALS), Member Federation of women Lawyers (FIDA), Senior Partner at Qexle Legal Consultancy.


\(^3\) Ibid.

\(^4\) Muigua, K. Reflections on ADR and Environmental Justice in Kenya.


Last accessed on 13th March 2023.

\(^6\) Muigua, Kariuki, and Francis Kariuki. @ADR, access to justice and development in Kenya. (2014)
As technological advances increasingly shape the future and the way we do things including resolving disputes, ADR will keep evolving to be able to keep up and serve the society.

**Advantages of Alternative Dispute Resolution**

Formal mechanisms for conflict management for instance court processes have not always been effective in managing commercial conflicts and have been mostly inaccessible by financially limited persons or uninformed individuals due to legal technicalities, complex procedures, high costs and delays.\(^7\)

This necessitated a shift towards other mechanisms for conflict management also known as ADR and/or TDRMs which have offered a variety of advantages that have lent credence to their use. Such advantages have included cost-effectiveness, time-efficiency, confidentiality, flexibility, relationship preservation, increased control etc. Overall, ADR mechanisms have generally been a useful alternative to courts, offering many advantages that have helped parties save time and money, maintain confidentiality, preserve relationships, and increase control over the outcome of the dispute.\(^8\)

**Setbacks facing Alternative Dispute Resolution**

ADR is not without challenges as it has its fair share of impediments that cause significant delay and/or estop the ADR process altogether.

Common challenge of ADR is in its very nature of inclusivity of parties to “lead the proceedings”.\(^9\) The voluntary participation makes it impossible where one party is unwilling to participate; limited legal protection or inability to legally enforce outcomes; lack of finality of resolution made which can result in the parties returning or going to court with the same issues in future or seeking

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\(^7\) Muigua, Kariuki, and Francis Kariuki. "ADR, access to justice and development in Kenya." (2014).

\(^8\) Muigua, Kariuki, and Francis Kariuki. "ADR, access to justice and development in Kenya." (2014).

\(^9\) Ibid
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Further legal action to resolve the dispute; and uneven negotiating command especially where there is information asymmetry. Another challenge commonly faced in ADR is the limited jurisdiction of arbitral matters. ADR is limited to matters or disputes limited to financial or commercial nature. This leaves out disputes that touch on criminal offenses, matrimonial disputes, guardianship matters, insolvency, divorce and tax law unless directed by the courts to tribunals and/or similar ADR outfits.

Arbitration

Arbitration, which is one of the more commonly used forms of ADR and the focus of this paper, has been defined as a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.

Arbitration as a dispute resolution mechanism between parties, be they States or individuals, is set out under article 33 of the Charter of the United Nations. Article 33 of the United Nations Charter outlines the various conflict management mechanisms that parties to any dispute may resort to and provides that the parties to a dispute shall, first seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Arbitration is also recognized in Kenya in our Constitution 2010, under article 159(2)(c) which states that “In exercising judicial authority, the courts and

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Tribunals shall be guided by the following principles...alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)”.

Further, arbitration in Kenya is recognized under and governed by the Arbitration Act, 1995, the Civil Procedure Act (Cap. 21) and the rules thereto. The Act is based on the Model Arbitration Act of the United Nations Commission on Trade Law. The 1995 Act was amended through the Arbitration (Amendment) Act 2009 which was assented to on 1st January 2010.

The principal characteristics of arbitration are that its consensual, confidential, the parties choose the arbitrator(s), there is minimum emphasis on formality which encourages expeditious disposal of matters, and the decision of the arbitral tribunal is usually final save for instances of blatant cases of bad arbitrating and the enforcement of awards is relatively easy to enforce. Arbitration has become very expensive, particularly where the dispute concerned is complex and requires the involvement of multiple experts or where the forum for the dispute resolution is outside Kenya. This has made arbitration almost unbearable for parties who ordinarily foot the huge bill. For instance, according to the Nairobi Centre for International Arbitration (NCIA), a non-refundable registration fee to be advised by the Centre at the time of filing a request for a case with a maximum of Kenya Shillings 10,000 is payable by the party initiating Arbitration. An arbitrator’s hourly rate is capped at Kenya

19 Ibid.
20 Ibid
21 Ibid
22<https://ncia.or.ke/domesticarbitration/#:~:text=Arbitrators%20fee,of%20KES%2025%2C00%20per%20Hour.> Last accessed on 14th March 2023.
Shillings 25,000. Administrative costs on the other hand are placed at 1.5% of the rate charged for arbitrator’s fee.\textsuperscript{23}

Lately there has been concerns on the actual cost effectiveness of Arbitration with some arguing that Arbitration is becoming more expensive than litigation.\textsuperscript{24}

The arbitral tribunal is thus mandated to determine their fees.\textsuperscript{25} Section 32B (3) of the Arbitration Act provides that the arbitral tribunal may withhold the delivery of an award to the parties until full payment of the fees and expenses of the arbitral tribunal is received.\textsuperscript{26}

Costs may be further compounded in instances where one of the parties appeals in the Courts of Law thereby making the entire process nearly moot and more expensive.

**Inadequate Legal and Institutional Framework on International Commercial Arbitration**

It is safe to say that more can be done to improve on legal mechanisms and infrastructure for the effective organization and conduct of international commercial arbitration in Kenya which has consequently denied local international arbitrators the for a to showcase their skills and expertise in international commercial arbitration.\textsuperscript{27} Inasmuch as some progress has made towards addressing this challenge, for instance the enactment of the Nairobi Centre for International Arbitration Act and the subsequent establishment of the Nairobi Centre for International Arbitration under section 4 of the Act, much

\begin{itemize}
\item \textsuperscript{23}Ibid
\item \textsuperscript{24} Arbitrator’s fees and rights to access justice in Kenya, By Kariuki Muigua, July 5\textsuperscript{th} 2022
\item \textsuperscript{25} Ibid
\item \textsuperscript{26} Arbitration Act, 1995
\item \textsuperscript{27} Excerpt on a paper written by Muigua, Kariuki. On "Nurturing International Commercial Arbitration in Kenya." (2016).
\end{itemize}
institutional capacity building is required to address this issue. Many competent local arbitrators’ of overwhelming brilliance, expertise and knowledge need to be put to the forefront in such commercial arbitration to share and enrich the sector with their awards, thoughts, intellectual input, wisdom and skill.

**Limited Competence and Expertise**
There is a shortage of qualified and experienced arbitrators in Kenya that may be attributed to the high cost of training arbitrators and the poor market uptake of arbitral services which drains supply. It has been reported that Kenya has less than 1,100 qualified Arbitrators.

As many fields become highly specialized and technical, the number of arbitrators needed within niche areas struggles to keep up. For example, there are very few known expert arbitrators focusing purely on aviation disputes in Kenya.

**Resistance to Arbitration**
Many parties may resist arbitration, preferring to resolve disputes in court where they believe they will have a better chance of winning. Resistance may also be informed by perception of bias or perception that arbitration is too expensive.

**Enforceability**
The award must be capable of being enforced. This implies that if for instance it is an award of for payment of money, it must clearly state the award amount, to whom it is to be paid and by whom.

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28 Ibid.
29 Ibid
31 Ibid
Limited precedential value
As decisions are typically non-binding to future adjudicators, there is little value in precedence which can lead to different outcomes involving cases with similar facts and/or issues. Nevertheless, some arbitrators have tried to adopt the precedent method of award writing by adopting other decisions and award rulings in their findings especially in technical areas that touch on construction where most if not all facts are completely similar.

Credibility of Arbitrators
The credibility of arbitrators as a faster and transparent means of resolving dispute is raising eyebrows as concerns over hefty cash awards heightens. The ordered award to National social security Fund (NSSF) to pay Ksh 500 Million in damages to Pan African Builders and contractors has raised significant questions in the credibility of the arbitrators. The settlement was disputed by the NSSF employees.

Similarly, Kenya pipeline corporation was then ordered by arbitrators to pay a total of ksh 4.6 billion to oil marketer Kenol/kobil for contravening transport and storage agreement. The credibility of the arbitrators have since been questioned by public; a perception that needs to be changed if arbitration is to be fully embraced.

Use of Technology in Arbitration
AI technology is already impacting and gaining traction within the legal sector changing the way lawyers think, the way they do business and the way they interact with clients. Lawyers are currently using AI-infused technologies like

33 The standard Digital: Credibility of Arbitrators in Kenya now in focus< by james Anyanzwa, 29/6/2012
34 Ibid
36 Judy Sobowale, ‘How artificial intelligence is transforming the legal profession’ available at <http://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession>
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Westlaw, LexisNexis and Google and experts believe the time is ripe to also seriously explore the technology’s use throughout the entire arbitration process in order to, among other things, enhance efficiency and reduce costs.37

The sole purpose of ADR has been to resolve disputes amicably between the parties with minimum if not zero interventions from the Courts.38 The less intervention of judiciary is the backbone of ADR. Therefore, the role played by technology is important in this context.39 Technology has over the years provided opportunities to facilitate communication and so assist in prevention and management of disputes.40 Technologies such as web conferencing also known as Online Dispute Resolution have revolutionized trials by bridging the geographical and time gap that existed amongst internationally disputing parties.41

The use of technology to help resolve some of the challenges facing arbitration has grown tremendously and with the advent of AI, this trend will continue.42 As this paper shall show later, technology, specifically AI, has the potential to resolve many of the challenges facing Arbitration in Kenya.

Artificial Intelligence
Artificial Intelligence (AI) refers to the development of computer systems that are able to perform tasks that have previously been undertaken by human beings and would typically require human intelligence.43 Examples of these

37 Ibid
38 Ibid
39 Ibid
40 Ibid
41 Ibid
42 42 Judy Sobowale, ‘How artificial intelligence is transforming the legal profession’ available at <http://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession>
tasks are visual perception, speech recognition, decision-making, and translation between languages.\textsuperscript{44}

The difference between AI and other tools for automation and legal technology is their ability to learn and evolve each time they are deployed.\textsuperscript{45} AI identifies patterns and varies its algorithm based on already-existing data and user feedback.\textsuperscript{46} It identifies features without human intervention by learning from heavy volumes of pre-existing data. AI tools today often make use of deep learning and natural language processing to perform tasks that require human intelligence and present them in comprehensible form.\textsuperscript{47} There are three (3) main types of AI based on its capabilities, that is, weak AI, strong AI, and super AI.\textsuperscript{48}

**Weak AI**
This AI can only focus on one/specific task and cannot perform beyond its limitations e.g., digital voice assistants such as Siri and Alexa.\textsuperscript{49}

**Strong AI**
This AI can understand and learn any intellectual task that a human being can (Strong AI is currently only theoretical).\textsuperscript{50} It can tackle any task, whether it be reasoning, music composition or logistics, that a human can handle and has all the potential of a human brain.

\textsuperscript{44} Ibid.
\textsuperscript{46} Ibid
\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid
\textsuperscript{49} Ibid
Super AI
This is an AI that exceeds human cognition in every possible way and is the most far-off theory of artificial intelligence but is generally considered to be the eventual endgame of creating an AI. To illustrate this, take the example of an artificial general intelligence functioning at the level of average human intelligence. It will learn from itself, using the cognitive capabilities of an average human to reach genius-level intelligence.

Can AI address the Problems affecting Arbitration in Kenya
Having said all these nice things about AI, the pertinent question of whether this piece of technological marvel has any utility in improving arbitration in the country.

Artificial Intelligence (“AI”) follows the logic that if all attributes of learning and intelligence is accurately traced in-depth, it can be simulated through a computer program. In other words, ‘what holds good for [Human Intelligence], also applies to AI’. AI is increasingly being used for in the legal industry for various tasks, including practice management, conflicts management, contract review and due diligence, legal assistance, e-discovery review, and outcome prediction. At the outset, AI tools can be categorized into four based on their functional complexity.

First, simple AI tools used for accurate and efficient legal research. Second, AI tools used for selecting suitable experts, counsels, and arbitrator. Third, AI tools used for facilitating procedural automation by translating, transcribing,

52 Ibid
54 Ibid
55 Ibid
56 Ibid
57 Ibid
summarizing evidence, and even drafting compulsory parts of legal documents and arbitral awards.\(^{58}\) Fourth, AI tools used for their use in the adjudication process (including the ‘tools of predictive justice’)\(^{59}\)

Technology has seen arbitration make serious milestones and enhance access to justice. In fact, technology has spread throughout the entire facet of human life.\(^{60}\) Very little has been unaffected by technology. The same may be true of AI. As its scope and usage grows, so will the need to incorporate the same not only in courts of law but also in ADR and in arbitration specifically.\(^{61}\) This paper believes that AI has great potential to not only enhance the advantages of arbitration but to also help address some of the setbacks facing arbitration.

**Reduction of Costs**

The high costs of arbitration primarily revolve around legal & arbitrator’s fees - billed in hours, costs of experts, cost of discovery and potential appeals. To substantially reduce costs, the case must be efficiently managed, and the billable hours must be reduced and the discovery process automated. Arbitration often involves the exchange of large volumes of documents, which can be time-consuming to review manually. AI-powered tools can help automate the process of document review, reducing the time and costs associated with this task.\(^{62}\)

Also, as arbitration often involves parties from different countries who may speak different languages. AI-powered translation tools can help bridge the language barrier and facilitate communication between parties. This will eliminate the cost of getting translators and cut the time used in translation.


\(^{59}\) Ibid


\(^{61}\) Ibid

\(^{62}\) Ibid
Decision-making
AI can assist arbitrators in making decisions by providing relevant information and legal precedents. This can help ensure consistent and fair decisions are made in line with legal principles.63

Although something that is probably in the distant future, AI has the potential of rendering awards by itself in a much faster and more consistent manner as compared to arbitrators who take may months or years to render an award. AI is also capable of independently learning from past cases to produce even better awards.64

Enhancing Expertise
AI can help by supporting the existing arbitrators be more efficient by providing technical assistance or reducing administrative tasks thereby giving the arbitrator sufficient time to focus on critical issues around the dispute. This will allow them take up more work and deliver awards in record time.65 AI has the potential of replacing expert witnesses and therefore reduce costs associated with engaging experts to guide the arbitrator. As the capacity of AI grows, its ability to enhance expertise will grow as well.66

Data & Predictive analytics
Resistance to arbitration has also been a challenge. AI can help predict the outcome of a case based on historical data and other relevant factors. This can help parties better understand the risks and benefits of pursuing arbitration and may facilitate settlement negotiations or encourage the use of arbitration.67 Predictive analytics is a tool that will help parties decide whether to engage in

63 Ibid
64 Ibid
66 Ibid
67 Ibid
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arbitration or not. The effect of this will be two-fold. First is that the parties may decide to negotiate and settle the matter or secondly is that the parties will have a fairly good understanding of how the arbitral award is likely to be awarded therefore giving the parties some level of confidence in the process and outcomes.

**Precedent**

As AI is very consistent with decision making, it could boost the precedential value of its decisions and ensure that confidence in awards is at its peak. This will also help arbitrators get a sense of what direction the awards need to take based on similar facts and issues. As AI grows, an entire global database of awards will be at its disposal and therefore making the award of international disputes more harmonious and the weight of such awards will have grown substantially.

**Removing Corruption or Perception of Corruption**

AI can set up case management processes that cannot be unfairly altered or corrupted and therefore this makes the arbitrator less likely to be corruptible by either of the disputing parties. This will not only guarantee fair play but also drastically improve confidence in the arbitral process thus boosting uptake of arbitration services in all sectors of the economy.

Removing the perception of corruption or corruption itself will also facilitate access to justice and in deed make the world a better place.

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68 Ibid
69 Ibid
70 Ibid
71 Ibid
73 Ibid
74 Ibid
Potential Risks of the use AI in arbitration

Overall, AI has the potential to streamline the arbitration process, reduce costs, and improve decision-making. It’s worth noting that AI will initially be used in conjunction with human judgment, as it is not a substitute for human expertise and experience.\(^75\)

The second risk is that as human intervention becomes less and less, human judgement and empathy may suffer as a result of fully using AI.\(^76\) Empathy and judgement are fundamental human traits and the use of AI may remove this aspect potentially leading to awards that lack any moral basis or human touch. Awards may end up being technically correct but morally absurd.\(^77\)

The third risk involved with the use of AI is that there is currently no legal framework, allowing or disallowing the use of AI in the country or even globally.\(^78\) Awards generated by or with the assistance of AI may be successfully challenged since this is a grey area. Regulatory framework for both weak and strong AI needs to be set in place to remove the grey areas and to fully and legally allow for the use of the same.\(^79\)

Conclusion

AI is currently in its infancy stages and many practitioners are grappling with how AI can be implemented in the practice of not only arbitration but all facets of adjudication and alternative dispute resolution. As of now, the case management process may be replaced by AI but a lot still needs to happen before AI can fully take over the entire process. As we wait for that day which is bound to arrive, we must embrace the benefits that weak AI offers today. We must also prepare for the changes that it portends by equipping ourselves with the necessary tools that will allow us to thrive when it completely takes over.

\(^{75}\) Ibid
\(^{76}\) Ibid
\(^{77}\) Ibid
\(^{78}\) Ibid
\(^{79}\) Ibid
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