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ALTERNATIVE DISPUTE RESOLUTION

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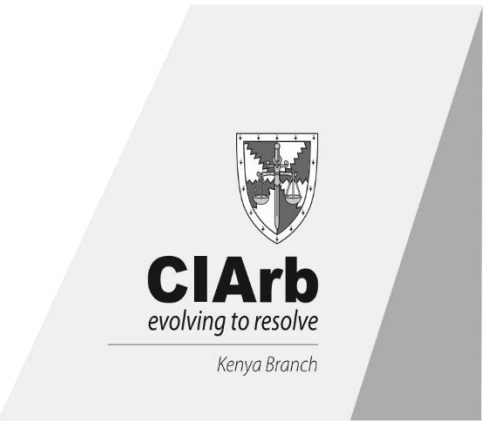

ALTERNATIVE DISPUTE RESOLUTION

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Editor's Note

Alternative Dispute Resolution (ADR) Journal, Volume 11, No. 2.

We are pleased to launch another issue of the *Alternative Dispute Resolution (ADR) Journal*, Volume 11, No. 2.

The ADR Journal is a publication by the Chartered Institute of Arbitrators (CIArb), Kenya that spearheads intellectual discourse on pertinent and germane issues in Alternative Dispute Resolution and other related fields of knowledge. It offers a platform where scholars, ADR practitioners, judicial officers, law lecturers and students can share knowledge, ideas, emerging jurisprudence and reflects on the practice of ADR. The Journal is aimed towards advancing the growth of ADR as a viable tool for the management of disputes in Kenya and across the globe.

The role of ADR in access to justice has gained recognition in the recent past. In Kenya, the Constitution advocates for the promotion of ADR mechanisms towards achieving access to justice. The Journal addresses some of the current concerns and challenges facing ADR mechanisms and proposes recommendations towards enhancing the suitability of ADR mechanisms in the quest towards Access to Justice.

The ADR Journal is devoted to the highest quality academic standards. It is peer reviewed and refereed in order to achieve this goal.

This volume contains papers and case reviews on salient themes in ADR including *Sports Disputes Resolution: Innovation in Sports Arbitration and Mediation; Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession; Dispute Avoidance and Provisionally Binding Decisions: The Quick-Fix in Construction Dispute Resolution?; Restoration of International Arbitration in Tanzania: The New Investment Act; Mediation of Election-Related Disputes in Kenya: Challenges, Opportunities and Way Forward; Natural Resource Conflicts: Addressing Inter-Ethnic Strife through Environmental Justice in Kenya; Enforcement of Arbitral Awards; Non-Arbitrability of Disputes; The Challenge of Practicing Reconciliation in*

Conflict Management: A Critical review of Joanna Santa-Barbara's "Reconciliation" and *Bridging the Gap to Sustainable Development through Mediation in Kenya.* It also contains a review of *the Journal of Conflict Management and Sustainable Development, Volume 10, Issue 2.*

The Journal continues to shape the landscape of ADR practice in Kenya and beyond. It is one of the most widely cited and referenced publications in ADR. The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us to continue improving the Journal.

I wish to thank the contributing authors, Editorial team, reviewers and everyone who has made this publication possible.

The Journal is committed towards equality and non-discrimination in academia and offers a platform where everyone can share his/her ideas and thoughts on key issues in ADR. To this end, the Editorial Board welcomes and encourages the submission of papers, book reviews and case summaries on emerging and pertinent issues in ADR to be considered for publication in subsequent issues of the Journal.

The Editorial Board receives and considers each article but does not guarantee publication. Submissions should be sent to the editor through *editor@ciarbkenya.org* and *adrjournal@ciarbkenya.org* and copied to *admin@kmco.co.ke.*

The Journal is available online at *https://ciarbkenya.org/journals/*

Dr. Kariuki Muigua, Ph. D; FCIArb; C. Arb
Editor.
Nairobi, April 2023.

List of Contributors

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Dr. Kariuki Muigua is a distinguished law scholar, an accomplished mediator and arbitrator with a Ph.D. in law from the University of Nairobi and with widespread training and experience in both international and national commercial arbitration and mediation. Dr. Muigua is a Fellow of Chartered Institute of Arbitrators (CIArb)-Kenya chapter and also a Chartered Arbitrator. He also serves as a member of the National Environment Tribunal. He has served as the Chartered Institute of Arbitrator's (CIArb- UK) Regional Trustee for Africa from 2019 -2022.

He became the first winner of the Inaugural CIArb (Kenya Branch) ADR Lifetime Achievement Award 2021. He was also the winner of the ADR Practitioner of the Year Award 2021 given by the Nairobi LSK and the ADR Publisher of the Year 2021 awarded by CIArb Kenya. He was also awarded the ADR Practioner 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 is an Advocate of the High Court of Kenya of over 30 years standing and practicing at Kariuki Muigua & Co. Advocates, where he is also the senior advocate. His research interests include environmental and natural resources law, governance, access to justice, human rights and constitutionalism, conflict resolution, international commercial arbitration, the nexus between environmental law and human rights, land and natural resource rights, economic law and policy of governments with regard to environmental law and economics. Dr. Muigua teaches law at the Centre for Advanced Studies in Environmental Law and Policy (CASELAP), Wangari Maathai Institute for Peace and Environmental Studies (WMI) and the Faculty of Law, University of Nairobi.

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Dr. Ken possesses a comprehensive understanding of the practice and procedures in ADR having acted as adjudicator, arbitrator and mediator in a wide range of disputes. He sits as a member of the Dispute Resolution Panel of the Architectural Association of Kenya (AAK) and also has vast experience in ADR training having engaged in the various participant training events as a trainer for the Chartered Institute of Arbitrators (Kenya Branch).

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Jacqueline Waihenya is an Advocate of the High Court of Kenya having been admitted to the bar in 1998 and she is the Managing Partner of JWM LAW LLP (formerly Jacqueline Waihenya Maina & Co. Advocates) which she founded in 2012.

She holds an LLM from the University of Nairobi specializing in Public Finance & Financial Services Law. She is currently pursuing an LLM in International Dispute Resolution at Queen Mary University of London.

She is the Vice Chairperson of the Chartered Institute of Arbitrators – Kenya Branch and is a Fellow of CIARB and she holds a diploma in International Arbitration. She was the CIARB Kenya Branch Treasurer for 3 years before that and successfully steered the Institute's treasury during the first year of the COVID Pandemic. She further holds an Advanced Certificate in Adjudication from the said Institute and is accredited as a Tutor with CIARB.

She was appointed to represent CIARB on the National Steering Committee National Steering Committee for the Formulation of the Alternative Dispute Resolution Policy 2020.

Jacqueline is an International Mediation Institute Certified Mediator. She is also a Chartered Mediator with the Institute of Chartered Mediators & Conciliators (CM-ICMC) and is one of the pioneer Kenya Judiciary Accredited Mediators.

She is an Associate Editor of the ADR Journal of CIARB Kenya and is the Editor-in-Chief of the Mombasa Law Society Journal. She has published several peer reviewed articles in International Commercial and Investment Arbitration and Mediation and addressed various conferences.

She sits on the Continuing Professional Development Committee of the Law Society of Kenya and is also the Treasurer of the Mombasa Law Society where she founded and convened the Alternative Dispute Resolution Committee as well as the Admiralty & Maritime Committee.

Jacqueline is also a Governance Practitioner. She is a Fellow of the Institute of Certified Secretaries of Kenya (ICS) and was recently elected to the governing council of ICS where she chairs the Research & Publications Committee. She is also an Accredited Governance Auditor, a Legal & Compliance Auditor and Governance Trainer.

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Bernard Murimi Nyaga is an Advocate Trainee at the Kenya School of Law. He is a holder of Bachelor of Laws Degree from the leading University of Nairobi. With a special focus on tech and ADR, he also holds certifications in Data Protection from CIPIT- Strathmore University, Commercial Mediation and Domestic Arbitration from the Chartered Institute of Arbitrators (CIArb) Kenya Branch. A diligent public speaker, writer and mooter who won the 2nd Runners

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Shalom Bright Omondi is a 3rd year Law (LLB) student from Jomo Kenyatta University of Agriculture and Technology (JKUAT) in Kenya, where he continues to hone in his legal research and writing skills. He has since gone on to work as a Researcher at Africa Health Law, where he continues to contribute to Africa Health rights by researching and providing insights on various health law issues in the Kenyan Sphere.

Additionally, Shalom has gained valuable experience working as a Legal Trainee at Transparency International, where he has been involved in conducting legal research and analysis, as well as drafting legal documents. He is also an ADR legal writer, demonstrating his proficiency in alternative dispute resolution methods. As a Student Member of Young Arbiter Society- Jkuat Karen Chapter, Shalom is actively involved in promoting arbitration as a preferred method of dispute resolution.
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Christopher Munene is a 4th year law student currently pursuing his Bachelor of Laws degree at University of Embu. He is a passionate and dedicated mooter, having participated in various national and international moot court competitions. Christopher is also an intern at Adhiambo Okech & Associates Advocates LLP, where he has gained practical experience in the legal field. He is also an Alternative Dispute Resolution methods enthusiast having participated in various fora's on the subject.

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Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession

By: ***Kariuki Muigua****

Abstract

The COVID-19 pandemic has destabilized the traditional ways through which many professions operated and ushered in a new era of technology. One of the sectors that has been caught by the wind of change is the legal profession. The use of technology as a tool of access to justice has been embraced by the legal profession as a matter of necessity. Such technology includes the use of virtual court sessions, digital filing through the e-filing platform, electronic case management systems and digitization of land services. This has arguably marked the beginning of a worldwide trend that is likely to proceed post COVID-19.

Technology is revolutionizing the way businesses and various sectors operate. However, technology comes with its advantages and disadvantages. The use of technology in the legal profession has been hailed for promoting efficiency, cost effective and expeditious management of disputes. However, it has also come with its share of concerns such as data privacy and loss of employment due to automation of legal services.

The paper seeks to critically discuss the impact of technology on modern legal practice in Kenya. It seeks to reconcile the two opposing views by discussing both the advantages and disadvantages of technology in modern legal practice. The paper argues that the legal profession has more to gain than lose if it embraces technology as a tool of access to justice. The paper explores the various ways through which the legal profession can utilise legal technology to not only enhance access to justice but also improve the efficiency of law firms, the Judiciary and even law schools. It suggests practical ways through which the legal profession can embrace technology as a tool of trade in commerce

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and dispute resolution while also noting to address the concerns associated with the use of technology in the legal profession.

1. Introduction

Technology has impacted the nature and practice of the legal profession in Kenya and across the globe in the 21st century. Traditionally, legal practice in many parts of the world including Africa has been through physical processes such as in person court room attendances where different players including judicial officers, advocates and litigants participate in court processes[1]. However, this position is no longer tenable due to rapid developments that have been witnessed at the global stage. The outbreak of the Coronavirus disease (COVID-19) pandemic destabilized the global economy which resulted in a ripple effect on many sectors including the legal profession[2]. The preventive measures recommended by the World Health Organisation and imposed by most states such as physical distancing meant that it became difficult for most professions to operate from their traditional physical places[3].

The legal profession was not spared by the effects of the COVID-19 pandemic. Due to the preventive measures adopted in most states, the physical attendance of employees at places of work such as law firms became difficult[4]. To address

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[1] Could the Pandemic Be Grinding Justice to a Halt?' (*ALN Kenya*) <*https://www.africalegalnetwork.com/kenya/news/coronavirus-pandemic-grinding-justice-halt/*> accessed 4 April 2021; 'IBA - The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months' available at *https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=bd404ce3-3886-48a8-98f6-38eaaccd5f53 (accessed on 22/06/2022)*

[2] Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' available at *http://kmco.co.ke/wp-content/uploads/2020/06/Legal-Practice-and-New-Frontiers-Embracing-Technology-for-Enhanced-Efficiency-and-Access-to-Justice-Kariuki-Muigua-Ph.D-June-2020.pdf (accessed on 22/06/2022)*

[3] Ibid

[4]Meganne Tillay | February 28 and 2020 at 03:39 AM, 'Baker McKenzie Shuts down London Office Following Coronavirus Scare' (*Law.com International*) available at

this challenge, law firms devised alternative methods of work such as remote working. The Judiciary in Kenya also acknowledged the effects of the COVID-19 pandemic and adopted alternative means of access to justice such as virtual court sessions and electronic filing (e-filing) of court pleadings and documents. Conveyancing practice has also been disrupted through the digitization of services by the Ministry of Lands through the Ardhisasa platform. This has arguably disrupted the legal profession in an unprecedented manner[5].

The disruptions caused by the COVID-19 pandemic have brought to light, the impact of technology on modern legal practice. Processes such as virtual court sessions, electronic filing and remote working heavily rely on technology for their success. It can thus be argued that the legal profession has adopted technology as a matter of necessity. This can also be attributed to the ascendancy of information technology, the globalization of economic activity, the blurring of differences between professions and sectors, and the increasing integration of knowledge[6].

However, while legal technology has won critical acclaim for streamlining and improving the accuracy, efficiency and effectiveness of laborious processes within daily practice, it has also been criticized for the concerns it raises such as data privacy and loss of employment due to automation of legal services. The paper seeks to critically discuss the impact of technology on modern legal practice in Kenya. It seeks to reconcile the two opposing views by discussing

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https://www.law.com/internationaledition/2020/02/28/baker-mckenzie-shuts-down-london-office-following-coronavirus-scare (accessed on 22/06/2022)

[5] Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' available at *http://kmco.co.ke/wp-content/uploads/2021/04/Embracing-Science-and-Technology-in-legal-education-for-Efficiency-and-Enhanced-Access-to-Justice-Kariuki-Muigua-April-2021.pdf* (accessed on 22/06/2022)

[6] Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' From Washington Lawyer, May 2011 available at *https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm* (accessed on 22/06/2022)

both the advantages and disadvantages of technology in modern legal practice. The paper argues that the legal profession has more to gain than lose if it embraces technology as a tool of access to justice. It suggests practical ways through which the legal profession can embrace technology as a tool of trade in commerce and dispute resolution while also noting to address the concerns associated with the use of technology in the legal profession.

In this paper, 'legal technology' (Legal Tech) is used to mean the use of technology and software to provide and aid legal services[7]. Legal Technology applies technology and software to assist law firms in practice management, billing, big data, e-discoveries, predictive analytics, knowledge management and document storage[8]. While Legal Tech is meant to enable the bigger firms improve overall efficiency in order to adapt to a progressively popular agile working environment, it also allows smaller firms and sole practitioners to compete with the leading names in the field, giving them access to powerful research tools[9].

This paper discusses these new developments and proceeds on the hypothesis that the legal profession has more to gain than lose if it continues to embrace technology as a tool of access to justice.

2. Legal Practice in Kenya in the Modern Era: Challenges and Prospects

Since the introduction of the formal justice system in Kenya during colonialism, the legal profession has been a major player in facilitating access to justice[10].

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[7] What Is Legal Technology and How Is It Changing Our Industry?' (*The Lawyer Portal*, 29 January 2019) available at *https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry* (accessed on 22/06/2022)

[8] Business Models for Law Firms - p.Xel Marketing Agency' available at *https://www.p-xel.co/business-models-for-digital-disruption-in-the-legal-industry* (accessed on 22/06/2022)

[9] What Is Legal Technology and How Is It Changing Our Industry?' available at *https://www.thelawyerportal.com/blog/what-is-legal-tech-and-how-is-it-changing-industry* (accessed on (22/06/2022)

[10] Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' Op Cit

However, the road towards access to justice in Kenya has been riddled with many obstacles including high fees of litigation, geographical location of courts, complexity of rules and procedures among others[11]. These problems are compounded by economic turbulence due to societal and economic changes; adaption to new technology; compliance and ethical issues; and continuing professional development which directly impact on the legal profession especially among lawyers[12]. The changing times and the above listed issues have made clients to continue to demand efficiency and responsiveness from their lawyers for less cost.

These challenges have been exacerbated by the COVID-19 pandemic which changed the landscape of the legal profession. The idea of remote working which was widely embraced as a result of the pandemic has not only changed the way lawyers view their approach to legal work but has also created an opportunity for them to weigh and reconsider how law firms will operate in the near future[13]. It is also argued that as law firms embrace the idea of working remotely due to the COVID-19 pandemic, there has been a growing likelihood that physical offices will look very different in the future compared to what they are now[14]. These are some of the expected and unexpected effects of the COVID-

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[11]*Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution*, ICJ Kenya, Vol. III, May, 2002; See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, pp 6-7, a Paper presented by the author at the In-House Legal Counsel, Marcus Evans Conference at the Tribe Village Market Hotel, Kenya on 8th& 9th March, 2012.

[12] Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., The legal profession and the new constitutional order in Kenya. Strathmore University Press, 2014, p. 242.

[13] Samantha Stokes | April 27 and 2020 at 06:59 PM | The original version of this story was published on The American Lawyer, 'The Coronavirus Will Change the Legal Industry's Approach to Remote Work—But How?' (Law.com International) available at *https://www.law.com/international-edition/2020/04/27/the-coronavirus-will-*change-the-*legal-industrys-approach-to-remote-work-but-how-378-140355/* (accessed on 23/06/2022)

[14] Paul Hodkinson | May 05 and 2020 at 01:00 AM | The original version of this story was published on The American Lawyer, 'Welcome to the Law Firm Office of the Future: Smaller, Higher-Tech and One-Way' (Law.com International) available at

19 pandemic on law firms where remote working is expected to take off as never before and firms will operate with more prudent and flexible financial models[15]. Despite the challenges highlighted above, modern legal practice is considered one with staggering prospects. It has been argued that the strength of the 21st century lawyer lies in the understanding and use of Technology as a practice tool and area of core competence[16]. For a long time, the legal profession and lawyers in particular have been characterized as technology antagonists who are slow to change and wary of innovation[17]. However, this position is no longer tenable in modern legal practice. The practice of law has evolved from an era of using desktop phones, filing cabinets, and yellow legal pads to a period when all these have been replaced by laptops, tablets, cell phones, and other mobile devices and often virtual or cloud-based platforms[18]. This coupled with the challenges in legal practice that have emerged as a result of the COVID-19 pandemic means that technology has become part and parcel of the legal profession. The paper discusses the extent to which the legal profession has embraced technology in Kenya largely as a result of the COVID-19 pandemic. It further discusses the challenges and prospects associated with the use of legal technology.

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https://www.law.com/international-edition/2020/05/05/smaller-higher-tech-and-one-way-welcome-to-the-law-firm-office-of-the-future/ (accessed on 23/06/2022)

[15] Ibid

[16] Kingsley Ugochukwu Ani, 'The 21st Century Lawyer: Challenges and Prospects' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3270279 *https://papers.ssrn.com/abstract=3270279* (accessed on 23/06/2022)

[17] Ready or not: artificial intelligence and corporate legal departments' available at *https://legal.thomsonreuters.com/en/insights/articles/artificial-intelligence-ai-report* (accessed on 23/06/2022)

[18] Gaffney Nick, 'Law Practice Management: Transforming a Law Practice with Technology' available *https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2017/september-october/law-practice-management-transforming-law-practice-technology/* (accessed on 23/06/2022)

3. Progress Towards Embracing Technology as a Tool of access to Justice in the legal Profession in Kenya

3.1 Virtual Court Infrastructure

The outbreak of the COVID-19 pandemic severely affected the administration of justice. Physical court sessions were no longer tenable due to the need to avoid the risk of transmission of COVID-19 and ensure the health of judicial officers, lawyers and litigants[19]. At the height of the pandemic, the Judiciary in Kenya announced a scale down of court activities throughout the country due to the concerns created by the outbreak of the pandemic[20]. Courts were seen as possible hotspots for the spread of the pandemic owing to the large crowds of persons including judicial officers, advocates, court staff and litigants who are normally part of the day to day court operations[21]. This forced the judiciary in most countries including Kenya to embrace technology in order to continue administering justice in the midst of the pandemic.

Owing largely to the impact of the COVID-19 pandemic, the Judiciary in Kenya has enhanced the use of technology in judicial proceedings including the use of e-filing; e-service of documents; digital display devices; real time transcript devices; video and audio conferencing; digital import devices and electronic delivery of rulings and judgments[22]. This represents an important milestone towards embracing technology as a tool of access to justice in the legal profession.

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[19] Virtual Hearings: The Way Forward in the UK in Uncertain Times' *https://www.dentons.com/en/insights/alerts/2020/march/29/virtual-hearings-the-way-forward-in-the-uk-in-uncertain-times* (accessed on 23/06/2022)

[20] Muigua. K., 'Virtual Arbitration Amidst Covid19: Efficacy and Checklist for Best Practices' available at *http://kmco.co.ke/wp-content/uploads/2020/05/Virtual-Arbitration-Proceedings-Amidst-COVID-19-Efficacy-and-Checklist-for-Best-Practices69523-Revised.pdf* (accessed on 23/06/2022)

[21] Ibid

[22] Kenya Law: Electronic Case Management Practice Directions, 2020' available at *http://kenyalaw.org/kl/index.php?id=10211*, Rule 6, (accessed on 23/06/2022)

It has been rightly pointed out that the COVID-19 pandemic may prove a catalyst for courts to embrace technology and reduce their reliance on in-person hearings and hard copy documents, particularly for case management purposes, even after the pandemic[23]. This calls for the continued use of legal technology post COVID-19 pandemic period as well as infrastructural investment to ensure that the processes run smoothly and efficiently[24]. It also calls for equipping the courts and all registries with the relevant infrastructure through setting up some permanent virtual courts and tribunals[25]. Embracing virtual court technology is likely to be an essential component of access to justice both now and in the future.

3.2 Digitization of Legal Services

There have been significant strides towards digitization of legal services in order to enhance efficiency and service delivery. Key among these services include land registration. The Land Registration Act mandates the Registrar to maintain the register of lands and other related documents in a secure, accessible and reliable format including electronic files[26]. The Act further requires the Registrar to make information in the register accessible to the public by electronic means[27]. To give effect to the above provisions, the Cabinet Secretary for Land and Physical Planning formulated the Land Registration (Electronic Transactions) Regulations, 2020 vide a legal notice[28]. The regulations mandate the Chief Land Registrar to maintain an electronic land registry[29]. They further provide that all registry transactions under the Land Registration Act shall be carried through

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[23] The Remote Courtroom: Tips and Tricks for Online Hearings' available at *https://www.ashurst.com/en/news-and-insights/legal-updates/the-remote-courtroom-tips-and-tricks-for-online-hearings* (accessed on 23/06/2022)

[24] Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' Op cit

[25] Ibid

[26] Land Registration Act, No.3 of 2012, S 9 (1) (b)

[27] Ibid, S 10

[28] The Land Registration (Electronic Transactions) Regulations, 2020, Legal Notice 130, Government Printer, Nairobi

[29] Ibid, Regulation 4

the electronic registry[30]. This has facilitated the digitization of land records through the creation of a Document Management System (DMS) for all approved physical development plans[31]. Further, it has resulted in the development of a system for the management for land titles documents that involves scanning, indexing and archiving deed files and land rent cards among other digital processes.

In addition, the Ministry of Lands and Physical planning and the National Land Commission have jointly developed the Ardhisasa platform that allows citizens, other stakeholders and interested parties to interact with land information held and processes undertaken by Government[32]. The platform is aimed at enhancing the security of land records, speeding up land transactions, efficient allocation of settlement files, achieving reasonable timelines in all settlement transactions and curbing fraud and corruption[33]. This has contributed in reducing human interactions, delays and inconveniences that characterized manual registries.
The digitization of legal services has also been facilitated via other platforms such as the Kenya Law platform by the National Council for Law Reporting that offers access to laws of Kenya, bills pending in Parliament, judgments and rulings, publications among other services[34]. Further, the eCitizen platform offers a gateway to most government services some which were exclusively undertaken by lawyers such as the registration of companies and businesses[35]. Digitization of legal services has changed the landscape of legal practice in Kenya. While the move has been praised for enhancing efficiency and expeditiousness in the delivery of legal services, it has also been faced with its fair share if challenges as shall be discussed.

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[30] Ibid, Regulation 6
[31]'Digitization of Land Records in Kenya' available at *https://mmsadvocates.co.ke/digitization-of-land-records-in-kenya/* (accessed on 23/06/2022)
[32] What is Ardhisasa, available at *https://ardhisasa.lands.go.ke/home* (accessed on 23/06/2022)
[33] Ibid
[34] Kenya Law, available at *http://kenyalaw.org/kl/* (accessed on 23/06/2022)
[35] eCitizen, available at *https://www.ecitizen.go.ke/ecitizen-services.html* (accessed on 23/06/2022)

4. Challenges and Concerns with the use of Technology as a tool of Access to Justice in the Legal Profession

4.1 Data Privacy/Information Security Concerns

The use of legal technology such as videoconferencing, e-filing and e-service of documents creates data privacy/information security concerns. The technological systems supporting these processes such as e-filing platform and emails may be subject to cyberattacks such as hacking[36]. In such cases, unauthorized persons may access the system and engage in unwarranted practices such as stealing of information, deleting information or sending unwanted information to the detriment of some parties[37]. It is thus important to address the cybersecurity concerns associated with the use of legal technology in order to ensure the success and efficiency of legal technology.

4.2 Challenges in using Legal Technology

The fast pace of technological revolution could result in the legal profession lagging behind in keeping up with changes. This can be seen through the use of old technologies in some law firms such as old versions of desktops and hard drives used for storage of data at the expense of modern technologies such as laptops and cloud based storage systems. Further, the ability of judicial officers and lawyers to effectively use legal technology is also a challenge[38]. There have been cases of judicial officers and lawyers having challenges in joining virtual court sessions or using the e-filing platform[39]. The success of legal technology thus lies with judicial officers and lawyers possessing the requisite skills and keeping up with technological revolution in order to enhance efficiency.

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[36]Ngotho, P., "Expediting Ad Hoc Arbitrations through Emails: the Experience of a Kenyan Arbitrator," (2015) 1 Alternative Dispute Resolution, pp 133-134.
[37] Ibid
[38] Kenya Institute for Public Policy Research and Analysis (KIPPRA), 'Leveraging on Digital Technology in Administration of Justice' available at *https://kippra.or.ke/leveraging-on-digital-technology-in-administration-of-justice/* (accessed on 24/06/2022)
[39] Ibid

4.3 Risk of Technological Failure

Since processes such as virtual court sessions rely on internet connectivity, affordable and secure internet connectivity is crucial for the success of the process. The conduct of virtual court proceedings in Kenya has been faced with challenges such failure of video links or poor internet connectivity that hinders the success of the process[40]. It further becomes difficult to address such technical issues since participants would be in different locations[41]. In criminal cases being conducted virtually where accused persons do not have strong internet connection, their ability to fully defend themselves may be compromised undermining the right of access to justice[42]. Further, these challenges may be compounded by poor or limited electrical connectivity. The success of legal technology is thus predicated upon the ability to maintain the efficient working of such systems.

4.4 Credibility Concerns during Examination of Witnesses

Where witnesses are examined virtually, there are concerns that the loss of in-person observation will impair a court's ability to assess the credibility and strength of the evidence especially during cross examination[43]. One of the advantages of in person court hearings is that a court is able to discern the credibility of a witness by observing his/her body language, facial expressions and tone. Assessment of such non-verbal cues is essential in determining the credibility of a witness[44]. This purpose may be defeated through the use of legal technology such as virtual court proceedings a situation that could potentially undermine the right of access to justice.

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[40] Walker.J., Virtual Hearings: An Arbitrator's Perspective, available at *https://int-arbitrators.com/wpcontent/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf* (accessed on 24/06/2022)

[41] Ibid

[42] Ibid

[43] Walker.J., Virtual Hearings: An Arbitrator's Perspective, available at https://int-*arbitrators.com/wpcontent/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf* (accessed on 24/06/2022)

[44] Ibid

4.5 Loss of Jobs

There are concerns that embracing legal technology could result in loss of jobs due to automations of legal services. The automation of land services through the electronic land registry and Ardhisasa platforms can potentially result in loss of business for conveyancing advocates and clerks who conducted services offered by such platforms. Further, services offered by e-citizen platform such as registration of businesses and companies can be done by any person potentially resulting in loss of employment for lawyers who initially provided such services.

4.6 Costs

The costs associated with the use of legal technology could result in a large majority of the population being locked out of the justice system. The use legal technology relies on devices such as computers, laptops, smartphones and internet connectivity that may be out of reach for poor citizens. It is thus important to take into account such concerns in the move towards embracing legal technology in order to ensure that the right of access to justice for all Kenyans is upheld.

5. Way Forward: Embracing Technology for Enhanced Efficiency and Access to Justice in the Legal Profession

5.1 Investing in Legal Technology

The challenges brought about by the COVID-19 pandemic have brought into focus the need to embrace technology as a tool of access to justice in the legal profession[45]. Legal technology such as the use of virtual court sessions has now been embraced by the judiciary. Further, law firms have embraced legal technology through aspects such as remote working. While this technology has been widely adopted due to the challenges brought about by the COVID-19

[45] Virtual Hearings: The Way Forward in the UK in Uncertain Times available at *https://www.dentons.com/en/insights/alerts/2020/march/29/virtual-hearings-the-way-forward-in-the-uk-in-uncertain-times* (accessed on 27/06/2022)

pandemic, there is need for both the judiciary and law practitioners to continue embracing legal technology post COVID-19[46]. This necessitates investment in legal technology in order to enhance efficiency, cost effectiveness and expeditiousness in the administration of justice[47].

Investment in technology is also crucial in helping lawyers and law firms to reap from the fruits of globalization and enhance their appeal at the global stage. Lawyers can use the technology to tap into the ever growing international Alternative modes of Dispute Resolution such as international arbitration, mediation and Online Disputes Resolution (ODR) especially in the face of rapidly growing networking and borderless legal practice, with the introduction of diverse social media platforms that allow interconnectivity beyond the national boundaries and enabling cross-border relationships between clients and their lawyers and law firms amongst themselves[48]. They should tap into the tremendous growth of international trade, interstate deals, bilateral and multilateral treaties, where legal practice is increasingly becoming global and smart practitioners must therefore up their game with international best practices as with the advent of internet, telecommunication systems, clients are no longer limited to lawyers in their regions nor are they limited to the need for legal services within their jurisdiction[49]. Investment in legal technology is likely to enhance the role of the judiciary in the administration of justice and promote the success of law firms.

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[46] Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' Op cit

[47] Ibid

[48] Emmanuel Oluwafemi Olowononi and Ogechukwu Jennifer Ikwuanusi, 'Recent Developments in 21st Century Global Legal Practice: Emerging Markets, Prospects, Challenges and Solutions for African Lawyers' (2019) 5 KIU Journal of Social Sciences 31; Samuel Omotoso, 'Law, Lawyers and The Social Media in The 21st Century: Challenges and Prospects' Law, Lawyers and The Social Media in The 21st Century: Challenges and Prospects available at h*ttps://www.academia.edu/40663364/Law_Lawyers_And_The_Social_Media_In_The_21st_Century_Challenges_And_Prospects* (accessed on 27/06/2022)

[49] Ibid

5.2 Safeguarding the Privacy of Data

The use of legal technology is associated with certain risks and challenges as far as data is concerned such as cyber-attacks and data breaches[50]. There is need for the legal profession to invest in data protection infrastructure in order to enhance efficiency and protect clients' data regardless of the status of the local data protection laws[51]. This may also necessitate relooking into the existing laws on data protection in order to enhance their effectiveness[52]. Further, it is essential to equip players in the legal profession such as judges and lawyers with necessary skills and knowledge regarding data protection including information security management[53]. Through this, it becomes possible to guarantee the privacy, confidentiality and integrity of data available to legal practitioners.

5.3 Rolling Out E-Literacy Training/Education

As the legal profession continues to embrace technology, there is need for sustained and enhanced e-literacy training on the efficient use of such technology. The training should target all players in the legal profession including judicial officers, lawyers and staff. The Judiciary can liaise with relevant stakeholders including the government and technology firms in order to facilitate such training. Such training should also target law students whereby law schools should design relevant courses to be included in their curricula in order to arm them with relevant skills. The training should also target the public in order to enable citizens have meaningful interaction with the justice sector

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[50] Katharine Perekslis, 'Four Strategies to Navigate Data Privacy Obligations for Compliance, Litigation, and E-Discovery Professionals' (Law.com) available at *https://www.law.com/native/?mvi=7bd540437dde4b60991f35c257adc521* (accessed on 27/06/2022)

[51] Muigua.K., 'Embracing Science and Technology in Legal Education for Efficiency and Enhanced Access to Justice' Op cit

[52] Ibid

[53]What Is Information Security Management?' (*Sumo Logic*) available at *https://www.sumologic.com/glossary/information-security-management/* (accessed on 27/06/2022)

through platforms such as the e-filing portal[54]. Such training can enhance the capacity of judicial officers and lawyers and contribute towards enhanced use of legal technology. Further, staff such as law clerks should also be trained on the use of legal technology in order to prevent the risk of losing jobs by ensuring that they are adept with new developments and are able to discharge their roles through the use of technology.

5.4 Capacity Building

With the ongoing investment in physical infrastructure to enhance the use of technology in the administration of justice, there is need to put in place legal and institutional frameworks to not only facilitate the uptake of technological developments but also to ensure that there is an effective regulatory framework to deal with numerous challenges that arise from legal technology[55]. Institutions such as the Law Society of Kenya should enhance their capacity and that of lawyers in legal technology through measures such as incorporating training in Information Communication Technology (ICT) in its Continuing Professional Development (CPD) training. Further, legal institutions such as the judiciary and law firms should be collaborative, diverse, international, technologically friendly, and entrepreneurial in order to enhance their capacity in the use of legal technology[56].

5.5 Enhanced e-filing and service of Court Pleadings and Documents

The judiciary should consider fully adopting and shifting to electronic systems for filing documents. This would save both law firms and courts enormous resources in terms of finances and storage facilities for the hardcopy documents. It would also enhance efficiency in terms of accessibility and review of the

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[54] Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' Op Cit

[55] Ibid

[56] Kellogg Sarah, 'Cover Story: The Transformation of Legal Education' From Washington Lawyer, May 2011 available at *https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/may-2011-legal-education.cfm* (accessed on 27/06/2022)

documents as both sides can access the documents from anywhere. All that is required is enhancing the security of such data to safeguard privacy. This can be achieved through investing in modern infrastructure as well as offering information management training to the staff charged with such.

5.6 Amendment of Remuneration order to guide on Legal fees payment by clients

The traditional remuneration technique by lawyers generally entail billing for time and services offered based on the Advocates Remuneration Order. However, there is need to implore members of the Bar to transition away from the traditional billable time and services system to alternative billing strategies by understanding that apart from "legal services" and "time", lawyers are also selling knowledge, which may include fixed, results based, hourly, graduated, or any such combination[57]. This situation is further enhanced by legal technology that allows lawyers to serve clients or attend court virtually without the need for physical meetings. This therefore creates a need to consider amending/revising the current Remuneration Order so as to accommodate these new possibilities.

5.7 A Possibility for Virtual Law Firms in Kenya

The COVID-19 pandemic resulted in the closure of some law firms law firms with others allowing employees to work from home a situation that still persists at the moment. This situation has seen cases where some law firms have decided to close their physical offices and turning to virtual firms where their employees will permanently work from home[58]. There is a possibility that this trend will

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[57] Mboya, Apollo, 'The Bar: Challenges and Opportunities', in Ghai, Y.P. and Cottrell, J. eds., *The legal profession and the new constitutional order in Kenya*. Strathmore University Press, 2014, p. 247.

[58] Meganne Tillay | May 27 and 2020 at 10:13 AM, 'Slater & Gordon to Close London Office, Staff to Work from Home Permanently' (Law.com International) <*https://www.law.com/international-edition/2020/05/27/slater-and-gordon-to-close-london-office-staff-to-work-from-home-permanently/?cmp_share*> accessed 3 June 2020; Meganne Tillay, Simon Lock | May 29 and 2020 at 08:38 AM, 'Slater & Gordon Working from Home: How Will It Work?' (Law.com International) available at

continue with lawyers turning to virtual law firms due to the flexibility and cost effectiveness associated with running such firms. It is thus argued that for the profession to stay relevant and thrive, lawyers should consider investing in modern legal practices such virtual law firms in order to reap from the benefits of technology[59].

However, the growth of virtual law firms will inevitably come with certain challenges including those of regulation. The regulators of provision of legal services should adequately prepare to respond to the impact of technology on law practice and lawyer regulation, including the growth in cloud computing, virtual law offices, and outsourcing of legal services[60].

5.8 Globalization of Legal Services through Enhanced Collaboration Between Local and Foreign Law Firms

Some law firms in Kenya have already tapped into the benefits of legal technology by collaborating with other firms in Africa and beyond[61]. Examples of such law firms in Kenya include Bowmans, Iseme Kamau & Maema (IKM) Advocates and Dentons Hamilton Harrison & Mathews that have that have expanded their reach in Africa and beyond through alliances with other firms and opening offices in foreign countries. Such alliances give law firms a global appeal with the ability to access a wider clientele where they are able to tap into the benefits of technology to serve clients across different jurisdictions[62]. There

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https://www.law.com/international-edition/2020/05/29/slater-gordon-working-from-home-how-will-it-work (accessed on 27/06/2022)

[59] Mboya, Apollo, 'The Bar: Challenges and Opportunities' Op Cit

[60] Laurel S Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2011) 80 Fordham L. Rev. 2661, p. 2662.

[61] Karangizi, S., 'Future Proofing the Legal Profession in East Africa | ALSF' available at *https://www.aflsf.org/director-article/future-proofing-legal-profession-east-africa* (accessed on 27/06/2022)

[62] Muigua. K., 'Legal Practice and New Frontiers: Embracing Technology for Enhanced Efficiency and Access to Justice' Op Cit

is need for more local firms to consider the idea in order to broaden their services and serve clients across different jurisdictions.

6. Conclusion

Technology has had a significant impact on the nature and practice of law. The legal profession which has hitherto been slow to adapt to change has been forced to embrace technology as a matter of necessity. This need was laid bare by the COVID-19 pandemic which changed the landscape of legal practice in many countries including Kenya. There is need for lawyers and law firms to embrace technology for them to remain relevant in the face of technological developments and globalization. The Judiciary is further called upon to embrace technology in order to enhance efficiency and access to justice for all. Despite the challenges posed by technology, effective adoption of legal technology can address such challenges and be a game changer in the quest towards access to justice in an efficient, affordable and expeditious manner. Embracing technology for enhanced efficiency and access to justice in the legal profession is an achievable dream.

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Sports Disputes Resolution: Innovation in Sports Arbitration and Mediation

By: ***Kenneth Wyne Mutuma*** [*]

Abstract

In recent years, sports dispute resolution has become an increasingly important issue, due to the advent of sports law and the use of Alternative Dispute Resolution (ADR) mechanisms. This paper provides an in-depth analysis of the innovations in sports arbitration and mediation used to resolve disputes in sports. It examines the legal and institutional framework for sports dispute resolution in both the Kenyan and international contexts, highlighting the strengths and limitations of the existing framework and identifying areas where further innovation may be necessary. In addition, the paper explores opportunities for further innovation in sports dispute resolution, including the use of technology and other emerging trends. It identifies challenges encountered in sports dispute resolution through ADR, such as issues related to bias, jurisdiction, and enforcement of awards, and discusses their potential impact on the effectiveness, fairness, and efficiency of sports dispute resolution processes. Finally, the paper suggests potential reforms and improvements to sports dispute resolution processes, including decentralizing the Court of Arbitration for Sports (CAS), capacity development in sports law, and reviewing current legislation governing alternative dispute resolution for sports in Kenya. These reforms aim to enhance the effectiveness, fairness, and efficiency of the resolution processes, thereby promoting the growth and development of the sports industry.

Key words: *sports law, sports dispute resolution, alternative dispute resolution, sports arbitration and mediation.*

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1.0. Introduction

In many cultures, especially in Africa, sports have played a crucial role in instilling values and social conventions in young people.[1] People used sports as a way to communicate with one another on a social level.[2] As such, participation was prioritized over victory.[3] However, overtime sports became commercialized and participants were heavily compensated. For instance, rugby players in Kenya during the Moi era secured jobs at Posta.[4] In an effort to satisfy the financial incentives at play, such as salaries, accommodation needs, travel, and training costs, the focus of professional sports has shifted from participation to winning.[5] As sports have become more commercialized, sports disputes have also increased involving contracts for athletes and coaches, match fixing, anti-doping rule violations, and non-payments. To maintain the value of sports and to allow the individuals and teams involved to continue with their athletic endeavors, sport disputes require quick resolution.[6] It has been stated that in order for sports conflict resolution to be successful, it must be done in advance of the contested event.[7] For instance, a determination on an athlete's eligibility to compete at the Olympics would be of no use if made after the competition in question has already ended.[8]

Notably, the area of sports dispute resolution has developed both internationally and domestically as a result of the distinctive characteristics of

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[1] Rose Jepkorir Chepyator-Thomson, 1990: Traditional games of Keiyo children: a comparison of pre- and post-independent periods in Kenya
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Dr. Raj Kumar Yadav, 2016: 'Commercialization of Sports and Competition Law'
[6] Kariuki Muigua, 2019: Promoting Sports Arbitration in Africa: A discussion Paper for the Chartered Institute of Arbitrators (Kenya Branch) 2nd Annual Lecture on the theme 'Promoting Sports Arbitration in Africa' held on Thursday 28th November, 2019 in Nairobi
[7] Ibid.
[8] Rigozzi Antonio et al, 2016: 'International Sports Arbitration' *http://lk-k.com/wp-content/uploads/rigozzibesson-mcauliffe-international-sports-arbitration-GAR-2016.pdf*

sports disputes.[9] This chapter aims to critically examine the development of sports law and sports disputes, the legal framework for the mediation and arbitration of sports disputes on a domestic and international level, the opportunities and challenges that currently exist in the resolution of sports disputes using ADR, and the reforms that are tritely suggested for improving the dispute resolution framework.

2.0 The Rise of Sports Law and the Role of Arbitration and Mediation in Sports Disputes

Sports has been existent in Africa from the pre-colonial period to date.[10] The evolution of sports in Kenya is categorized into three eras, namely: pre-colonial era, colonial era, and post-colonial era. Sporting activities in the pre-colonial era included hunting, fishing, and swimming. Through play and sports, children learnt to imitate their elders' behavior and adopt concepts that shaped their sense of self.[11] Sports was also strongly embraced by African communities since they supported the formation of social and cognitive skills necessary for adult existence among African communities.[12] During this period, disputes were non-existent since sporting activities were purely for recreational and self-development purposes among children and the youth. Also, emphasis was placed on participation rather than winning. With the onset of colonialism in Kenya in the 1900s, the British introduced English sports such as lawn tennis, basketball, polo, football and cricket.[13] These sports were primarily played by the upper-class and taught to European and Asian children in expensive boarding schools,[14] which led to the discrimination, segregation and exclusion

[9] Supra. No. 2
[10] Priscilla Ipadeola Abosede, 2014: 'Public/Private Dichotomy in Pre-Colonial Yoruba Society and Gender Inequality in Sports in Contemporary Africa: Towards a Conscious Gender Neutralisation in Contemporary Sports'
[11] Daniel N. Sifuna, 1990: Development of education in Africa: the Kenyan experience
[12] Rose Jepkorir Chepyator-Thomson, 1990: Traditional games of Keiyo children: a comparison of pre- and post-independent periods in Kenya
[13] Robert Crego, 2003: Sports and games of the 18th and 19th centuries. Greenwood Publishing Group.
[14] Ibid.

of Africans from elite sports.[15] After attaining independence in 1963, British social policies were modified by the new African government to reflect the country's changing circumstances.[16] For instance, the Ministries of Education and Culture and Social Services in South Africa was tasked with the responsibility of ensuring a balanced growth of sports in schools and across the country, with a keen interest in Africans who had been prejudiced against for years.[17]

Thereafter, there were deliberations on the establishment of legislation to govern the activities of sportsmen. The Kenya Sports Act was enacted by the national assembly in 2013, whose objective is to "*Embrace sports for development, to encourage and promote drug-free recreation and sports, to set up sports institutions, facilities, and administration and management for the nation's sports, and for related goals*."[18]

In contrast to the pre-colonial era, the growth of professional sports has seen the emphasis shift from participation to competition in order to satisfy the financial incentives at stake.[19] The commercialization of sports has also spurred contract, employment, and tax disputes. Due to the uniquely delicate nature of sports disputes, traditional dispute resolution methods such as litigation have proven inefficient. Particularly, courts lack the capacity to resolve disputes expediently

[15] Rose Jepkorir Chepyator-Thomson, 1990: Traditional games of Keiyo children: a comparison of pre- and post-independent periods in Kenya
[16] Rose Jepkorir Chepyator-Thomson, 1993: Kenya: culture, history, and formal education as determinants in the personal and social development of Kalenjin women in modern sports, *Social development issues*
[17] Black, David Ross, and John Nauright, 1998: Rugby and the South African nation: sport, cultures, politics, and power in the old and new South Africas. Manchester University Press.
[18] Sports Act, No. 25 Laws of Kenya
[19] Kariuki Muigua, 2019: Promoting Sports Arbitration in Africa: A discussion Paper for the Chartered Institute of Arbitrators (Kenya Branch) 2nd Annual Lecture on the theme 'Promoting Sports Arbitration in Africa' held on Thursday 28th November, 2019 in Nairobi

and the resulting verdicts could end up being overtaken by events. An example is when an athlete is scheduled for a competition in a month's time but is unable to take part in the competition until the dispute is resolved. Resolution of the dispute after that time period would be futile. Further, there is a need to preserve the integrity of sportspersons since they are public figures. Formal court processes are public in nature, leaving sports personalities susceptible to reputational damage. Thus, ADR mechanisms come into play to remedy these gaps in sports disputes resolution. Arbitration and mediation are the common ADR mechanisms adopted to resolve sports disputes.[20] Due to its final and binding nature, arbitration is the most preferred ADR method in sports disputes.[21] Mediation, however, is becoming more popular as it preserves relationships and guarantees the parties autonomy over the resolution process, allowing for win-win outcomes.[22] Notably, despite attempts by seasoned ADR practitioners to revolutionize sports dispute resolution in Kenya, the convergence of sports and law has not been fully explored yet since it is a relatively new field.[23]

3.0 The Legal and Institutional Framework for Sports Disputes Resolution

3.1 Kenyan Context

A majority of sports disputes in Kenya are settled through ADR mechanisms, particularly arbitration and mediation, the former being favored in most cases as arbitration awards are deemed binding.[24] The legal framework governing

[20] Ian Blackshaw (2013): "ADR and Sport: Settling Disputes Through the Court of Arbitration for Sport, the FIFA Dispute Resolution Chamber, and the WIPO Arbitration & Mediation Center"
[21] Ibid.
[22] Kariuki Muigua (2018): "Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation." Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution 6.3: 39-61
[23] Kariuki Muigua (2019): "Promoting Sports Arbitration in Africa"; A discussion Paper for the Chartered Institute of Arbitrators (Kenya Branch) 2nd Annual Lecture on the theme 'Promoting Sports Arbitration in Africa'
[24] Ibid.

sports and sports dispute resolution in Kenya is the Sport Act of 2013 and the Constitution of the Football Kenya Federation. Institutions that manage sports activities, disputes and players derive their authority from the Act. These entities include Sports Kenya,[25] the Office of the Registrar of Sports,[26] the Anti-doping Agency of Kenya,[27] the Athletics Kenya Arbitration Panel,[28] and the Sports Dispute Tribunal[29] (Hereinafter referred to as the 'SDT'). The legal and institutional frameworks for sports dispute resolution in Kenya is discussed below.

3.1.1 Legal Framework

Sports dispute resolution in Kenya is governed by the Sports Act of 2013. The Act recognizes the use of alternative dispute resolution mechanisms in settling disputes brought before the SDT.[30] The SDT is established by the Act[31] to hear appeals against decisions relating to selections to Kenyan sports teams, disciplinary decisions and other appeals that are referred to the SDT and the Tribunal has jurisdiction over and agrees to hear.[32] However, the Act remains unclear on the manner in which disputes that the Tribunal has no jurisdiction over, or refuses to hear, are to be resolved. In addition, the Sports Registrar is responsible for the conduct of arbitrations between sports organizations.[33] Notably, the Act is reluctant to acknowledge whether mediation may be employed.

In contrast, the Constitution of the Football Kenya Federation (FKF) limits the use of ordinary courts in football-related disputes and gives arbitration

[25] Sports Act, No. 25 of 2013 Laws of Kenya, section 3
[26] Ibid., section 45
[27] Anti-Doping Act, No. 5 of 2016 Laws of Kenya, section 5
[28] The Societies Act: Constitution and Rules of Athletics Kenya, Chapter 108 of the Laws of Kenya, Art. 40
[29] Sports Act, No. 25 of 2013 Laws of Kenya, section 55
[30] Sports Act of Kenya, No. 25 of 2013 Laws of Kenya, section 59
[31] Ibid., section 55
[32] Ibid., section 58
[33] Ibid., section 45 (2)(d)

preference[34] except where the FKF Constitution or FIFA regulations expressly refer disputes to ordinary courts.[35] In this instance, the rules and regulations governing football in Kenya have a remarkable preference for the use of arbitration as a dispute resolution mechanism. The disputes that fall under this category include those affecting clubs, club members, soccer leagues and their members, officials, or players.[36]

3.1.2 Institutional Framework

Sports Kenya is a body corporate established under the Act,[37] its role being to implement, coordinate and promote national and international sports programs for Kenyans in collaboration with relevant sports organizations, and to oversee the active participation of Kenyans in regional and international sporting activities.[38] The Act specifies a variety of other functions that Sports Kenya is required to perform in conjunction with the primary function.[39]

The Office of the Registrar of Sports is also established under the Act as an office within the public service.[40] The Sports Registrar, who is appointed by the public service commission, is responsible for the registration and licensing of sports organizations and sports personalities, maintaining a register of registered organizations, resolving registration disputes between sports organizations through arbitration and other related roles as prescribed by the Act.[41]

The SDT is established under the Anti-Doping Act and the Sports Act of Kenya, having the mandate to resolve sports disputes through Arbitration.[42] It consists

[34] FKF Constitution, Article 69 (2)
[35] Ibid, Article 69 (1)
[36] Ibid.
[37] Sports Act of Kenya, section 3
[38] John M. Ohaga and Franklin Cheluget Kosgei, 2022: "The Sports Law Review: Kenya" Available at *https://thelawreviews.co.uk/title/the-sports-law-review/kenya*
[39] Sports Act of Kenya, section 4
[40] Sports Act of Kenya, section 45
[41] Ibid.
[42] Anti-Doping Act, section 31; Sports Act, section 55

of nine members and serves sports federations, clubs, athletes, club officials, the Anti-Doping Agency of Kenya (ADAK) and Registrar of Sports.[43] The Kenya Sports Act limits the SDT's jurisdiction to resolving sports related appeals from national sports federations or umbrella national federations, appeals from decisions of the Registrar under the Act and other sports-related disputes that all parties to the dispute agree to refer to the Tribunal and that the Tribunal agrees to hear.[44] In the first instance, this right of appeal only exists if provided by the relevant rules or enabling agreements.[45] The Act also allows for the application of ADR mechanisms in sports disputes as dictated by Article 159 of the Constitution which requires Tribunals to employ alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.[46] Decisions of the Tribunal may only be appealed to the Court of Arbitration for Sport and they cannot be contested in national courts, but are subject to judicial review jurisdiction of the High Court.[47]

Similarly, the Athletics Kenya Arbitration Panel, which was constituted in accordance with Article 40 of the Constitution and the Rules of Athletics Kenya, is the body responsible for overseeing the athletics discipline in Kenya.[48] The panel is responsible for resolving disputes between the executive and members as well as between members through arbitration.[49] The panel only resolves non-disciplinary disputes and thus competition disputes are not included.

Lastly, the Confederation of African Football was founded in 1957 as the governing body for football activities in Africa. The CAF issues certificates to clubs that have met the minimum licensing requirements prescribed by the

[43] Anti-Doping Act, No. 5 of 2016 Laws of Kenya, section 31
[44] Sports Act of Kenya, section 58
[45] Ibid.
[46] Constitution of Kenya, 2010, Article 159 (2) (c)
[47] Ibid. Article 165 (6)
[48] Ibid. No. 5
[49] Constitution and Rules of Athletics Kenya, Article 40.3

statute in order for them to participate in inter-club competitions overseen by the CAF.[50] All clubs in Kenya wishing to qualify for these certificates must also ensure their players are under contract and are duly registered with the FKF.[51]

3.2 International Context

Sports disputes arising in the international community are primarily resolved through arbitration and mediation.[52] The Court of Arbitration for Sport, an institution supervised by the International Council of Arbitration for Sport, hears such appeals and usually makes the final ruling. The Code of Sports-Related Arbitration and Mediation Rules, also known as the CAS Code, provides the procedure to be followed by the CAS and disputants who wish to bring forth an appeal. However, other rules, regulations and codes are also adopted and put into consideration when resolving sports disputes, for example the World Anti-Doping Code, the Olympic Charter and the International Association of Athletics Federation (IAAF) Constitution, particulars of which are extensively discussed below.

First, the Court of Arbitration for Sport (CAS) resolves sports disputes through arbitration or mediation based on procedures that have been specially tailored to the needs of the sports industry.[53] CAS has three divisions namely, the Ordinary Arbitration, Anti-Doping and Appeals Arbitration divisions.[54] The Anti-Doping division reviews issues related to violations of anti-doping rules; the Appeals Arbitration division evaluates decisions made by sports governing

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[50] Confederation of African Football Statute, Article 2

[51] John M. Ohaga and Franklin Cheluget Kosgei, 2022: "The Sports Law Review: Kenya" Available at *https://thelawreviews.co.uk/title/the-sports-law-review/kenya*

[52] James Nafziger and Stephen Ross, 'Handbook on International Sports Law' *https://books.google.co.ke/books?id=fnLIOA0JtgC&pg=PA61&lpg=PA61&dq=international+sports+code&source*

[53] General Information on the Court of Arbitration for Sport, Available at *https://www.tascas.org/en/general-information/frequently-asked-questions.html*

[54] Richard Martin Odongo, 2018: "The lack of Autonomy and Independence of the Sports Disputes Tribunal in Kenya, in comparison to the Court of Arbitration for Sport (CAS)" (Research Paper, Strathmore University)

bodies like FIFA and the IAAF; while the Ordinary Arbitration division resolves issues brought forth under the ordinary system.[55] The Code of Sports-Related Arbitration sets down the rules for how CAS will operate, which outlines the formal requirements for the seat, language, representation, time constraints, fees, and prizes. According to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, an award made by CAS is final, enforceable, and binding on the parties insofar as the state seeking enforcement is concerned.[56] It is worth noting that awards made by the CAS normally do not constitute precedent but act as an important persuasive guide for decision-making in future sports disputes.

The International Council of Arbitration for Sport was established to expedite the resolution of sport-related disputes through mediation or arbitration, as well as to protect the parties' rights and the CAS' independence.[57] It administers and finances the CAS[58] and also has the authority to choose CAS' arbitrators and mediators, as well as to oust them through the Challenge Commission.[59] It is crucial in advancing sports arbitration because it is in charge of CAS's management and funding.[60]

Further, numerous sports federations, national Olympic committees, and anti-doping organizations have endorsed the World Anti-Doping Code 2015, which is an internationally acknowledged commitment against doping in sports.[61] Its objectives are to safeguard athletes' fundamental right to take part in anti-

[55] Code of Sports-Related Arbitration, Part 3 (S 20)
[56] McLaren Richard, 'The Court of Arbitration for Sport: An Independent Arena for the World's Sports Disputes'
[57] Statutes of ICAS and CAS, 'Joint Dispositions' S 2
[58] Ibid.
[59] Ibid. Section 6
[60] Supra. No. 5
[61] James Nafziger and Stephen Ross, 'Handbook on International Sports Law' *https://books.google.co.ke/books?id=fnLIOA0JtgC&pg=PA61&lpg=PA61&dq=international+sports+code&source*

doping activities and to advance equity and justice in sports on a global scale.[62] It outlines a list of prohibited substances, anti-doping rule violations and imposes disciplinary measures against persons who contravene the Code. Appeals relating to international events or international athletes may be made to the CAS,[63] or to independent and impartial bodies in accordance with rules established by the National Anti-Doping Organization in instances where the dispute does not involve international athletes or events.[64]

The Olympic Charter contains regulations and by-laws enacted by the International Olympic Committee (IOC) which also govern the operation and conduct of the Olympic movement and codifies the core tenets of the Olympic movement.[65] It sets out a disciplinary mechanism framework to effectively prescribe disciplinary measures in case of a violation of the Charter, the World Anti-Doping Code and other regulatory mechanisms.[66] The Olympic games-related disputes must be resolved by the Court of Arbitration for Sport, which has exclusive jurisdiction over them under the terms of the charter.[67]

Fédération Internationale de Football Association (FIFA) Statute, the international governing body of football, acknowledges the significance of integrity in sports and works to encourage fair play and ethics in order to stop behaviors like corruption, doping, or match manipulation that could endanger the integrity of games, competitions, players, officials, and member associations or lead to association football abuse.[68] It also acknowledges the CAS' jurisdiction

[62] World Anti-Doping Code, available at *https://www.wadaama.org/sites/default/files/resources/files/wada_anti-doping_code_2018_english_final.pdf*
[63] Ibid. Article 13 (2) (1)
[64] Ibid. Article 13 (2) (2)
[65] Olympic Charter, 'International Olympic Committee' available at *https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/General/EN-OlympicCharter.pdf*
[66] Ibid. Chapter 6
[67] Ibid. Article 61 (2)
[68] FIFA Statute, August 2018 Edition, Article 2 (g)

in resolving disputes.[69] Appeals may be lodged with the CAS within 21 days but after they have been exhaustively subjected to internal dispute management mechanisms.[70] Additionally, it forbids using regular courts unless they are expressly mentioned in regulations.[71]

Lastly, the International Association of Athletics Federation (IAAF) Constitution of 2019 was created with the intention of growing, promoting, and governing athletics worldwide. The constitution specifies a process for resolving internal disagreements in athletic-related matters.[72] Appeals against IAAF decisions can only be lodged with the CAS, which arbitrates such disputes on a mandatory basis in accordance with its Code of Sports-related Arbitration and Mediation Rules.[73] The said appeals must be lodged within 21 days of the IAAF's final decision.[74]

4.0 Opportunities in Sports Disputes Resolution

The commercialization of sports has made it necessary for athletes to sign contracts with their sponsors, clubs, teams, and managers to govern their affairs.[75] This ensures that the athletes' rights and roles are properly enforced, they aren't unfairly dismissed, they're properly compensated, they get fair treatment equal to their colleagues and other employment benefits as listed in the Employment Act, and that managers can effectively oversee and exercise managerial roles.

Sports disputes are distinct from other types of conflicts as they require prompt resolution in order to preserve the sport's integrity and enable the athletes and

[69] Ibid. Article 57 (1)
[70] Ibid. Article 58 (1 & 2)
[71] Ibid. Article 59
[72] International Association of Athletics Federations (IAAF) Constitution, 2019, Article 76
[73] Ibid. Article 84 (3)
[74] Ibid. Article 84 (4)
[75] Rigozzi Antonio et al, 'International Sports Arbitration' *http://lk-k.com/wp-content/uploads/rigozzibesson-mcauliffe-international-sports-arbitration-GAR-2016.pdf*

teams involved to continue with their athletic endeavors.[76] This prompted the establishment of the Sports Disputes Tribunal by the Sports Act and Anti-Doping Act. However, as discussed above, the Tribunal has not been able to sufficiently handle sports disputes as expected. At the onset, there arises a number of opportunities for professionals to take up on in an attempt to resolve these challenges. Since sports law is an emerging area of practice, there is not a sufficient number of experts. Sports enthusiasts who are also legal and ADR professionals may take up this opportunity to provide training in conjunction with dispute resolution institutions to practitioners who wish to specialize in sports dispute resolution Similarly, young professionals in law who have a growing interest in matters related to sports could seek additional online courses and trainings on sports law, which will grow their expertise and secure job opportunities for them, for instance, sports tribunal membership, review of laws governing sports and administering trainings on sports law to the upcoming generation. For instance, FIFA has two highly ranked executive programmes to train legal professionals on Sports Arbitration and in Anti-doping which though featuring a distinctly football orientation further considers other major sports. FIFA also carried out Football Law Talks prior to the World Cup 2022.[77]

In recent years, mediation has proven to be a more efficient method of resolving disputes than arbitration.[78] Consequently, a number of international sports dispute resolution bodies are encouraging disputants to pursue mediation in the first instance.[79] Mediation is instrumental in resolving contractual disputes

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[76] Supra.

[77] *https://www.fifa.com/legal/education/law-programs-diploma/sports-arbitration*> accessed on December 13, 2022

[78] Jacqueline Nolan-Haley (2012): "Mediation: The new arbitration" Harv. Negot. L. Rev. 17: 61.

[79] Devika Jayaraj: "Scope of Mediation in Sports Disputes: Important Tool to Resolve Gender Discrimination and Sexual Exploitation" Available at *https://viamediationcentre.org/readnews/MTQxNw==/Scope-of-Mediation-in-Sports-Disputes-Important-tool-to-resolve-gender-discrimination-and-sexual-exploitation*

between players, clubs, sports associations, and sporting boards.[80] It ensures that proceedings remain private and confidential so as to safeguard the reputation of parties involved, increases the chances of a win-win settlement, and preserves the parties' relationship. In contrast, arbitration seeks to resolve the dispute by imposing a verdict that the tribunal deems appropriate, rather than one that is arrived at by the parties themselves. These qualities render mediation as the most suitable method to resolve labor, disciplinary, and broadcast conflicts,[81] while disputes arising out of violations against rules and regulations can be referred to arbitration.

Further, Artificial intelligence (AI) can also be utilized by tax authorities to revolutionize tax remittance and subsequently reduce tax disputes. This technology enables athletes, including those in foreign countries, to accurately calculate the tax owed, make payments, and upload proof of said payments. Simplifying the process by eliminating complex jargons and procedures will result in fewer tax disputes. In addition, embracing AI in tax dispute resolution, through the use of robot-mediators, could also increase efficiency in cross-border dispute resolution since drawbacks such as language barriers will be eliminated.[82]

5.0 Challenges Encountered in Sports Dispute Resolution through ADR

In Kenya, there are a number of challenges facing sports dispute resolution, including those disputes that are resolved through arbitration and mediation. First, is in relation to the jurisdiction of the SDT. The KSA restricts the Tribunal's jurisdiction to appeals expressly provided by the national sports organizations'

[80] Ibid.

[81] Katie Shonk, 2022: "How Mediation Can Help Resolve Pro Sports Disputes" Available at *https://www.pon.harvard.edu/daily/mediation/how-mediation-can-help-resolve-pro-sports-disputes/*

[82] Jinyan Li and Others, 2020: "Digitalization and International Tax Dispute Resolution: A Window of Opportunity for BRITACOM" Available at *https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3802&context=scholarly_works*

rules.[83] Similarly, appeals involving international athletes, international competitions, or national offenses such as doping do not fall under the Tribunal's jurisdiction. Lack of exclusive jurisdiction over sports disputes may impede on access to justice or may result in rights violations by sports organizations. Equally, violations of sports rules, regulations or contractual obligations by sports organizations could go unresolved if the tribunal refuses to hear the dispute or has no jurisdiction over the matter.

Critics have also raised the need to restructure dispute resolution mechanisms with regard to ADR for conflicts arising out of doping. Doping is defined by the World Anti-Doping Code as the occurrence of one or more anti-doping rule infractions specified in the code.[84] An athlete may be found guilty of doping if he/she, among many other things, is found in possession of prohibited substances, tests positive for use of a prohibited substance, is found to have attempted to consume a prohibited substance or is non-cooperative when required to submit a sample for testing. The Anti-Doping Act in Kenya defines doping as the use of illegal substances and techniques in any sport, whether competitive or leisure, in an effort to unnaturally improve performance.[85] A sportsperson found to have contravened the Anti-Doping Act may be disqualified, banned from competitions or have their results and awards forfeited.[86] Case in point, prominent Kenyan Athlete Asbel Kiprop, famous for his victory at the 2008 Olympic Games in Beijing in which he bagged a gold medal in the 1500m race, was found to have committed a doping offence and was banned from participating in international competitions for four years.[87]

[83] Sports Act, section 58
[84] FKF Constitution, Article 69 (3)
[85] Anti-Doping Act, No. 5 of 2016, S 2
[86] World Anti-Doping Code, Article 9
[87] 'Asbel Kiprop: Former Olympic 1,500 m champion banned for four years for doping' available at *https://www.independent.co.uk/sport/general/athletics/asbel-kiprop-doping-ban-olympic-champion1500m-a8879691.html*

Highlighting this example, the severity of the penalties meted out to athletes found guilty of doping and the investigation methods have come under fire. Critics have hinted that the right to a fair hearing was violated throughout these inquiries, especially in international competitions.[88] This brings about the need for an established international framework for conducting investigations, classifying punishments, and appealing WADA decisions. It is also necessary for doping offences against Kenyan athletes participating in international competitions to be heard and resolved by the CAS and WADA in conjunction with the Sports Dispute Tribunal in Kenya, in order to ensure that there is a fair trial and that Kenyan sportsmen are given equitable opportunity for their defence. Furthermore, mediation should be incorporated in the resolution of such disputes in order to expedite the process while preserving the integrity of athletes in the public eye, as the former is considered a more confidential process and a win-win outcome is plausible.

Additionally, employment in sports is not adequately covered by the existing labour legislation, namely, the Employment Act of 2007. Technical matters present in sports such as contract reviews and contract periods are not adequately catered for by the Act. The Act defines an employee as a person who is engaged for pay or a salary in Kenyan law.[89] All professional sports personnel including players, coaches and team managers fall under the definition of employees, and as such, are subject to the common law and employment protection laws. The Employment Act, which outlines standards for the employment relationship, rights and obligations in employment, termination, and dismissal, governs the relationship between sports persons and their respective clubs.[90] Often, disputes at Kenya's Sports Disputes Tribunal relate to unpaid wages and unjust termination of employment.[91] In this regard, there is a need to implement laws that are fully dedicated to sports employment issues.

[88] Helen Jefferson Lenskyj (2008): "Olympic industry resistance: Challenging Olympic power and propaganda" State University of New York Press
[89] Employment Act, No. 11 of 2007, S 2
[90] Supra.
[91] Ohaga J.M and Kosgei F. C, Op Cit

Further, the Tribunal is only mandated to resolve employment disputes involving national organizations that have rules allowing for appeals to the Tribunal, leaving out parties engaged in contracts that have not expressly have this provision and international athletes participating in international competitions. This calls for a review of the provisions relating to the jurisdiction of the Tribunal under the KSA in order to broaden its jurisdiction to include all employment disputes in the sports arena. At the same time, it would be crucial for sports contracts to provide for resolution of disputes through ADR. This would allow for disputes beyond the Tribunal's jurisdiction to be resolved in a fair and just manner, preserve confidentiality that may be much needed by sports personalities and involve experts in employment law who may give insights and assist with interpretation of the law. Further, a review of the Employment Act is rife, for it to acknowledge the unique nature of employment contracts in sports.

Lastly, tax dispute resolution has also proved to be a challenge in the sports arena, majorly amongst athletes plying their trade in foreign jurisdictions.[92] Herein, they are at times subjected to double-taxation in the host and home countries. For instance, Christiano Ronaldo and Lionel Messi have found themselves involved in tax evasion proceedings with Spanish authorities during their sports careers.[93] In Kenya, income earned overseas by a Kenyan resident is taxable here since law considers such income to have accrued in or come from Kenya.[94] The Income Tax Act further stipulates that taxes paid overseas on income earned outside Kenya is to be deducted from the locally computed tax as long as an athlete provides evidence that he/she indeed paid taxes in the foreign jurisdiction in question.[95] However, complex tax laws have resulted in numerous tax disputes appearing before the SDT. Sports figures and legal personalities must therefore have a thorough comprehension of the tax system.

[92] Income Tax Act, Cap 470, S 3
[93] Robert W. Wood, (2017) 'Tax Lesson's from Soccer's Messi & Ronaldo Tax Evasion Cases' Forbes
[94] FKF Constitution, Article 69 (3)
[95] Supra. & Ibid. No. 17

Additionally, as a way of protecting the interests of sports personalities, it is imperative for training on tax issues to be a mandatory requirement for legal representatives wishing to practice in the sports arena so as to ensure laws are rightfully interpreted and implemented. Similarly, there exists a profound opportunity for arbitrators and mediators who have specialized in Tax to come in and offer their expertise in resolving these disputes through ADR mechanisms.

6.0 Reforms

First, while CAS has been successful in implementing global standards in settling international disputes, its location poses a great challenge in terms of physical and financial accessibility as parties are required to incur steep traveling and accommodation costs. In addition, appeals against decisions by the CAS can only be made before the Swiss Court, where parties wishing to vacate arbitral awards can only be represented by members of the Swiss Bar or attorneys permitted by an international treaty to operate in Switzerland.[96] This could have a negative impact on the confidence of a foreign sportsperson who may believe that their case may be inefficiently handled due to jurisdictional differences.[97] Thus, this chapter proposes the decentralization of CAS to regions such as East Africa in order to reduce travel costs and to allow parties be represented by lawyers from their own jurisdictions. Also, to further reduce the need for athletes and other parties to travel all the way to Switzerland to attend such hearings, CAS can embrace the use of technology like video conferencing while conducting hearing sessions during arbitration and mediation proceedings.[98]

There is also a need for a review of the current legislation governing alternative dispute resolution for sports in Kenya. For instance, the jurisdiction of the Tribunal should not only be limited to national sports organizations whose rules

[96] Francis Kariuki, 'African Traditional Justice Systems'
[97] Ibid.
[98] Supra. No. 5

expressly provide the right of appeal.[99] Such loopholes hinder the efforts to effectively resolve sports disputes, specifically through arbitration, mediation and other ADR processes. This review exercise further requires the help of labour law professionals who will offer clear guidance on matters relating to sports employment matters.

Furthermore, it is trite for implementation of capacity development in sports law. Currently, legal practitioners in the sports arena are inadequately trained as universities and other institutions of higher learning do not offer sports law in their curriculum. Inclusion would be beneficial in training alternative dispute resolution practitioners on developing areas of sports law including contract terminations, resolving player trade conflicts, and rule violations[100] Short courses on the same can also be introduced by ADR institutions in collaboration with the CAS so as to train arbitrators and mediators on technical aspects in the field. These efforts will ultimately result in a more efficient sports dispute resolution system.

7.0 Conclusion

There are many areas of contention in the sports world, such as doping policy violations, non-payment, wrongful dismissal, and match manipulation. Due to the nature of sports disputes, it is essential that matters be resolved expediently, paying consideration to the rights of the parties concerned. Sports disputes, both domestically and internationally, can be effectively resolved through arbitration and mediation, since these processes resolve disputes quickly and minimize any detrimental effects. Notably, there are numerous challenges that affect the effectiveness of these mechanisms such as the SDT's limited jurisdiction, lack of enabling ADR clauses and agreements, as well as capacity deficiencies. This chapter provides recommendations that could assist in resolving the prevailing

[99] Supra. No. 17

[100] Matthew J. Mitten and Hayden Opie (2010): 'Sports Law": Implications for The Development of International, Comparative, And National Law and Global Dispute Resolution'

issues and in turn create favourable conditions for the fair, just and prompt resolution of sports disputes in Kenya.

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Enforcement of Arbitral Awards

By: ***Allen Waiyaki Gichuhi****

Abstract

The enforcement of arbitral awards may seem straightforward at first glance but there are several pitfalls along the way. The Arbitration Act has several strict timelines that must be observed failing which an applicant will suffer a technical knockout if the application is filed out of time. This article explores the various timelines to be aware of and addresses various topical concerns affecting domestic awards. A solution is suggested when faced with exorbitant tribunal fees bearing in mind the three-month timeline to set aside an award. The common question on enforcement of a partial award will be addressed. A suggestion on possible reforms of the Arbitration Act has been made in respect of corruption and fraud with a comparative analysis of other jurisdictions that apply the model law and permit the extension of time beyond the three months deadline for setting aside an award.

1. What is an Award?

The Arbitration Act does not define with any precision what an award is. **Merkin and Flannery on the Arbitration Act 1996**[1] observed that there is no definition of the word "award" in the English Arbitration Act 1996, the Model Law[2] or in the New York Convention. They however define an "arbitral award" as one that ought to consist of a final and unconditional ruling on a claim brought in the arbitration, or on the tribunal's jurisdiction.

It is therefore imperative to read the Arbitration Act and appreciate how it addresses an "arbitral award" leading to its publication, challenge or enforcement.

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[1] 6th Edition (2020) Informal Law

[2] The Kenyan Arbitration Act is based on the Model Law.

Section 3 of the **Arbitration Act** defines an award as follows:

> *"arbitral award" means any award of an arbitral tribunal and includes an interim arbitral award"*

The **Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 2020** defines an "*Award" to include an interim, partial, costs, or final award."*

The finality of an arbitral award is set out in **Section 32A of the Arbitration Act** that states:

"32A. Effect of award

> *Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."*

2. Formal Statutory Validity of an Award

The award must meet certain irreducible minimums set out in Section 32 of the Arbitration Act pertaining to writing, signature(s) of the arbitrator(s), contain reasons unless dispensed by the disputants, set out the seat of arbitration and the specify the date of the award.

The date of the award is important in that time starts running for purposes of any application to set aside the award. The date also will provide for when interest may start running.

3. The significance of the seat of arbitration in international arbitration

The seat of arbitration has significant import in arbitration and is specifically mentioned in the Arbitration Act in the following context:

(a) Section 3(3)(b)(1): the juridical seat of arbitration is determined by or pursuant to the arbitration agreement;

(b) Section 21 (1): The parties are free to agree on the juridical seat of arbitration and the location of any hearing or meeting.
(c) Section 32 (4): The arbitral award shall state the date of the award and the juridical seat of arbitration as determined in accordance with section 21(1), and the award shall be deemed to have been made at that juridical seat.

In the case of **C v D (2007)**[3], the court held as follows:

> *"the seat of arbitration brings in the law of that country as the curial law and it is analogous to an exclusive jurisdiction clause. Not only is there an agreement to curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the Arbitration, so that by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made by the courts of the place designated as the seat of arbitration"*

The seat acquires significance when an international award is sought to be enforced and subsequently challenged in another state. Invariably the court will have to address whether it has jurisdiction to set aside an arbitral award where the seat of arbitration is outside its jurisdiction.

In the case of **Channel Tunnel Group Ltd vs Balfour Beatty Ltd**[4] the court

> *"It is by now firmly established that more than one national system of law may bear upon an international arbitration. Thus, there is the proper law which regulates the substantive rights and duties of the parties to the contract from which the dispute has arisen. Exceptionally, this may differ from the national law governing the interpretation of the agreement to submit the dispute to arbitration. Less exceptionally it may also differ from the national law which the parties have expressly or by implication selected to govern the relationship*

[3] EWHC 154 cited in Tracer Limited v SGS Kenya Limited & another [2017] eKLR
[4] (1993) A.C. 334

> *between themselves and the arbitrator in the conduct of the arbitration: the "curial law" of the arbitration, as it is often called."*

Justice Nzioka identified three options available to a party seeking to avoid the enforcement of an international award in the case of **Tracer Limited v SGS Kenya Limited & another** where her ladyship held:

> *"22. In relation to challenge of an International Arbitral Award and considering the comparative law on this subject, I find that generally an unsuccessful party in Arbitration proceedings who seeks to avoid the award has three options;*
>
> *i) appeal against the award, if this is permitted under the applicable law or the arbitration rules;*
> *ii) challenge the award in the courts of the place where the award was made;*
> *iii) wait until the successful party initiates enforcement proceedings before a court at which stage it can seek to resist enforcement.*
>
> *23. In the third case, the initiative is in the hands of the successful party while in the first two cases the initiative lies with the unsuccessful party. In either case, it is the unsuccessful party that invokes the grounds for challenging the validity of an Award.*
> *24. In the third case the forum selection is a matter for the successful party, while in the first two cases the forum is normally the place where the award is made. Article 34 Model Law provides that after the Award has been made, a party may apply to Court in the place of arbitration to set it aside. It is understood that review of awards by the Courts at the seat of arbitration promotes efficiency in international arbitration by enhancing the trust of the parties in the process."*

The take away from the above is that a careful reading of the arbitration agreement must be undertaken to determine the place and the seat of Arbitration.

4. Partial Awards

Section 32(6) of the Arbitration Act addressed the case of the partial award thus:

"32. Form and contents of arbitral award

(1) An arbitral award shall be made in writing and shall be signed by the arbitrator or the arbitrators.

(2) For the purposes of subsection (1), in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the arbitrators shall be sufficient so long as the reasons for any omitted signature are stated.

(3) The arbitral award shall state the reasons upon which it is based, unless –

(a) the parties have agreed that no reasons are to be given; or

(b) the award is an arbitral award on agreed terms under section 31.

(4) The arbitral award shall state the date of the award and the juridical seat of arbitration as determined in accordance with section 21(1), and the award shall be deemed to have been made at that juridical seat.

(5) Subject to section 32B after the arbitral award is made, a signed copy shall be delivered to each party.

(6) An arbitral tribunal may, at any time, make a partial award by which some, but not all, of the issues between the parties are determined, and the provisions of this Act applying to awards of an arbitral tribunal shall, except in so far as a contrary intention appears, apply in respect of such partial award. [emphasis added]

A partial award may be in respect of jurisdiction, liability or quantum. If the jurisdiction of the tribunal is challenged and the application is dismissed, the aggrieved party must within 30 days move to the high court under Section 17 (6) of the Arbitration Act to decide the matter. If no application is filed within the strict timelines, then the party is time barred from filing any application after 30 days.

5. The significance of the nature of the award and date of publication

Once the award is published, it is final. 32A. of the Arbitration Act states:

"Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."

Whether an award is deemed final or partial depends on what issues have been determined that can lead to its challenge or enforcement. A good exposition of the character of an award is the case of **Charles M Willie Co (Shipping) Ltd v Ocean Laser Shipping Ltd, the Smaro**[5] where the court identified the following three criteria:

(a) A decision which finally determines a claim can be made the subject of an award; if it is determinative of all issues, it is a final award, but if only part of the reference is resolved it is a partial award only.
(b) The arbitrators probably have the discretion to render any decision in the form of an award even a procedural decision (This is not to be encouraged, given that procedural decisions cannot be attacked as soon as the award is made). However, in appropriate circumstances, e.g. involving important points of principle, a procedural decision may be made in the form of an award.
(c) It is doubtful whether all interlocutory decisions can be treated as awards even though they are so expressed.

When an award is rendered save as to costs, then it is deemed as a final award as it has determined all the issues save as to the jurisdiction to address costs. Issue estoppel then operates to bar any party from in future relitigating on any aspect of the award in subsequent legal proceedings.

The Court of Appeal in **Kenfit Limited v Consolata Fathers NRB CA Civil Appeal No. 229 of 2006**[6] held that the High Court can only recognise and enforce a final award by an arbitrator if the award does not reserve any matter for consideration by the arbitration or any other person.

[5] [1999] 1 Lloyd's Rep 649 quoted at page 553 in Merkin and Flannery on the Arbitration Act 1996 (supra)
[6] [2015] eKLR

In **Dinesh Construction Limited & another v Aircon Electra Services (Nairobi) Limited**[7], Majanja J held that the decision by the Court of Appeal *in Kenfit Limited v Consolata Fathers NRB CA Civil Appeal No. 229 of 2006* was per incuriam as the Court of Appeal had not considered that a partial award as defined under Section 3(1) of the Arbitration Act could be enforced. The court held:

> *"40. While I accept that I am bound by the decision of the Court of Appeal in* ***Kenfit Limited v Consolata Father (Supra)****, I hold that the decision was per incuriam as the court's attention was not drawn to* ***section 3(1)*** *of the* ***Arbitration Act*** *which states that, ""arbitral award" means any award of an arbitral tribunal and includes an interim arbitral award." This means that any award whether interim or otherwise is an award and may be enforced as it is an award under* ***section 36(1)*** *of the* ***Arbitration Act****. Further,* ***section 36*** *does not qualify what kind of award may or may not be enforced. As a practical matter, it is inconceivable that an arbitral tribunal can issue interim or partial awards during the proceedings to resolve specific issues but which cannot be enforced until the final award. Just like the court may issue a preliminary decree, the* ***Arbitration Act*** *does not foreclose the issuing of interim awards that may be enforced as the arbitral proceedings continue."*

A final award save as to costs will have determined liability and quantum and time starts running from the date of publication to apply to set aside the award. One should not make the fatal mistake of assuming that until costs have been determined then time to challenge the award has not crystallized. There are instances where a delay may be occasioned in determining cost which may result in the award on costs being rendered outside the three-month period when the final award save as to costs was rendered. For instance, delays could be occasioned by ill health or death of a party or the arbitrator, a party deliberately delays in filing its application for costs so that the three-month period runs out, or a disagreement between the client and the advocate ensues resulting in delays when the client opts to appoint another legal representative.

[7] [2021] eKLR

The minute the award is published then it triggers the running of time to challenge the award or for correction of the award as set out below:

(a) Section 34 requires that any correction and interpretation of arbitral award resulting into an additional award should be made within 30 days after receipt of the arbitral award unless a different period of time has been agreed upon by the parties. The time lines are very strict:

> *34. Correction and interpretation of arbitral award; additional award*
> *(1) Within 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties –*
> *(a) a party may, upon notice in writing to the other party, request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature; and*
> *(b) a party may, upon notice in writing to the other party, request the arbitral tribunal to clarify or remove any ambiguity concerning specific point or part of the arbitral award.*
> *(2) If the tribunal considers a request made under subsection (1) to be justified it shall, after giving the other party 14 days to comment, make the correction or furnish the clarification within 30 days whether the comments have been received or not, and the correction or clarification shall be deemed to be part of the award.*
> *(3) The arbitral tribunal may correct any error of the type referred to in subsection (1)(a) on its own initiative within 30 days after the date of the arbitral award.*
> *(4) Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.*

(5) If the arbitral tribunal considers the request made under subsection (4) to be justified, it shall make the additional arbitral award within 60 days.

(6) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award under subsection (2) or (5).

(7) Section 32 shall apply to a correction or an interpretation of the arbitral award or to an additional arbitral award made under this section.

(b) Section 35 (3) stipulates that an application for setting aside the arbitral award **may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award**, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

It is important to note that the maximum time that the tribunal has to render a corrected or additional award is 60 days. Prudence dictates that the application to set aside the award should be filed within 30 days from the publication of the corrected or additional award. Do not experiment and assume that the three-month time line to set aside the award runs afresh from the date of the publication of the corrected or additional award.

6. When does time start running to challenge the award- is it when you receive notification of publication of the award or when you physically receive the award?

This dilemma has haunted many who make an application to set aside an award on the presumption that the three months period commences upon physical receipt of the award. In many instances, the delay is attributed to the client being unable to settle its portion of the arbitrator's fees on account impecuniosity or the fact that the fees are colossal or in dispute.

Let us consider the first hurdle of non-collection of the award on account of inability to immediately pay the arbitrator's fees that has a serious impact on the three month time line to file an application to set aside an award.

The court in **Lantech (Africa) Limited v Geothermal Development Company**[8] dismissed an application to set aside an award as it was time barred having been filed outside the three-month period. The applicant's explanation for the delay being attributed to delay in settling the arbitrator's fees was dismissed as inexcusable. The court held:

> *"37. My considered view is that the finality of arbitral awards and the expeditious nature of dispute resolution before an arbitral tribunal are the very reasons why parties opt to include arbitration clauses in their agreement.* ***To this end, it would be foolhardy to have a law that provides for strict timelines and for parties to go for arbitration only to stall the process after notification of the delivery of the Award on the basis that either the arbitrator's fees has not been paid or that an application has been made under Section 34 of the Act."*** *(emphasis mine)*

Justice Majanja in the case of **Match Electricals Company Limited v Libyan Arab African Investments Company Limited & another**[9] struck out the application to set aside an award by the party who filed three months after publication of the award. The delay was on account of non-payment of fees. The court held:

> *"24. What then is the legal position regarding the time for filing the application to set aside the award under* ***section 35*** *of the* ***Act****? Without belaboring the point, this issue has been dealt with in a number of decisions. In* ***Mercantile Life and General Assurance Company Limited & Another v Dilip M. Shah & 3 Other (Supra)*** *I concurred with the decisions of the court in* ***Transworld Safaris Limited v Eagle Aviation Limited and 3***

[8] [2020] eKLR
[9] [2021] eKLR

> ***Others H.C Misc. Application No. 238 of 2003, Mahican Investments Limited and 3 Others v Giovanni Gaida and 80 Others [2005] eKLR*** *and* ***Mahinder Singh Channa vs. Nelson Muguku & Another ML HC Misc. Application No. 108 of 2006 [2007] eKLR*** *where it was held that "received" for purposes of the* ***Act*** *means notification of the award irrespective of the date the award was actually or physically received by the parties or delivered by the Arbitrator.*
>
> *25. The courts have adopted this position in light on the general object of speedy resolution of disputes and finality of the arbitral award under the* ***UNCITRAL Model Law on International Commercial Arbitration****. In* ***University of Nairobi v Multiscope Consultancy Engineers Limited (Supra),*** *the court held that when the arbitral tribunal notifies parties that a signed copy of the award is ready for collection then, the date of notification is deemed to be the date of delivery and receipt of the award because it is on that date that the tribunal makes the signed copy available for collection by the parties. In that regard, delivery merely means that it is the power of the parties to collect the award.* ***The courts have held that it would be intolerable and indeed undermine the object of the Act, if the collection of the Award was left in the power of one or more parties who failed to collect the award for non-payment of the arbitrator's fee."*** *(emphasis mine)*

7. Paying disputed fees into court for subsequent assessment to allow release of Award

It is becoming common for both parties to conspire and refuse to pay the arbitrators fees if they feel that the fees charged are colossal. Rule 118 of the **Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 2020** states:

> *"Unless otherwise agreed in writing, the parties are jointly and severally liable for the fees and expenses of the Tribunal".*

An arbitrator's fees are based on an hourly rate commensurate with his professional qualifications. For instance, a Fellow or Chartered Arbitrator's scale fees range between Kshs. 20-25,000 per hour. If the arbitrator spends say 200 hours, his fees will not be less than Kshs. 4 million exclusive of VAT and

expenses. This amount may triple if the tribunal consists of three senior arbitrators.

From the outset, if the agreement provides for a panel of three arbitrators, try and get an agreement to vary the agreement and have a sole arbitrator if the dispute is not complex. You will end up saving a huge amount on costs. It is also important to concur on the appointment of an arbitrator to avoid having one appointed by the appointing body who appoints an arbitrator who may not be well versed in handling the dispute. The writer is aware of one dispute where an arbitrator raised an interim fee note to cover 700 hours for perusal of documents even before the hearing had commenced. Even at Kshs. 15,000 per hour, the fees come to about Kshs. 12 million!

However, do not lose sight of the following:

(a) The arbitrator has a lien on the award and will only release it upon payment of the full fees. It is a matter of course that the arbitrator will have set out in the first Order for Directions, the hourly rate of his fees and may also set out the payment of interest on unpaid fees. on account of delay, the fees will escalate especially if commercial rate of interest is applied.
(b) The arbitrator can file suit against both parties for payment of his fees. The court will eventually allow the suit and order the parties to pay the arbitrator's fees. However, by the time the fees are paid and the Award is released, the loser will have permanently lost the statutory right to challenge the award as the three-month timeline would have passed.

The only solution lies in **Section 32B of the Arbitration** Act that reads:
32B. Costs and expenses

(1) Unless otherwise agreed by the parties, the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the

arbitration, shall be as determined and apportioned by the arbitral tribunal in its award under this section, or any additional award under section 34(5).

(2) Unless otherwise agreed by the parties, in the absence of an award or additional award determining and apportioning the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

(3) 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.

(4) If the arbitral tribunal has, under subsection (3), withheld the delivery of an award, a party to the arbitration may, upon notice to the other party and to the arbitral tribunal, and after payment into court of the fees and expenses demanded by the arbitral tribunal, apply to the High Court for an order directing the manner in which the fees and expenses properly payable to the arbitral tribunal shall be determined.

(5) The fees and expenses found to be properly payable pursuant to such an order shall be paid out of the moneys paid into court and the balance of those moneys. if any, shall be refunded to the applicant.

(6) The decision of the High Court on an application under subsection (4) shall be final and not subject to appeal.

(7) The provisions of subsections (3) to (6) have effect notwithstanding any agreement to the contrary made between the parties. [emphasis added]

Based on **Section 32 B (4) of the Arbitration Act** one or both parties can file an application under certificate of urgency and set out the following:

(a) Seek an order for the delivery up of the award as time is running for any imminent application for setting aside the award.

(b) While seeking an order for the delivery of the award, make payment of the arbitrator's fees demanded or such lesser sum that the court

may consider reasonable pending the *inter partes* hearing of the lawful amount of fee and expenses due to the arbitrator.

(c) Seek the court's discretion to pay out such sum as it deems appropriate to be paid to the arbitrator from the money deposited in court as security for the arbitrator's fees and expenses pending their eventual determination.

(d) Seek an itemized fee note and time sheet for work undertaken by the arbitrator. Remember to have sought this prior to filing the application from the arbitrator.

If the arbitration has been conducted under the Nairobi Center for International Arbitration which has appointed the arbitrator and there is a dispute as regards the arbitrator's fees, the **Nairobi Centre for International Arbitration (Arbitration) Rules, 2015** endow the Centre with jurisdiction to determine the fees and expenses of the Arbitral Tribunal as follows:

> *First Schedule Part I – Fees and Costs*
> *1. General*
> *(1) The parties shall be jointly and severally liable to the Arbitral Tribunal and the Centre for the arbitration costs, other than the legal or other costs incurred by the parties themselves.*
> *(2) The Arbitral Tribunal's award shall be transmitted to the parties by the Centre provided that the costs of the arbitration have been paid in accordance with the provisions of rule 31.*
> *(3) The fees in this Schedule may attract Value Added Tax at the prevailing rate.*
> ***(4) A dispute regarding administration costs or the fees and expenses of the Arbitral Tribunal shall be determined by the Centre. [emphasis added]***

From the outset, try and get agreement with the arbitrator with a view to coming up with cost cutting measures by not wasting time on the matter. For instance, adopt the timelines set by the election court that sets a timetable for cross examination of witness and having parties focus on the real issues in

controversy. Consider the relevance and materiality of documents to be produced and the crucial witnesses required to testify.

Avoid filing a litany of applications that ultimately increase costs. Avoid flooding the tribunal with unnecessary documents that do not address the real issues in controversy and never file profix pleadings. For what benefit is a Statement of Claim that exceeds 400 paragraphs?

8. Cases striking out time barred applications to set aside award

However, the majority of the court decisions have held that time begins running when the arbitral tribunal notifies the parties that the award is ready for collection and will be released after payment of its fees. That crucial notification is considered as the date of publication of the award.

The following cases have struck out applications for being time barred on account of the application being filed more than three months after publication of the award:

(a) University of Nairobi v Multiscope Consultancy Engineers Limited[10] the court held

> *"[25] …Once the arbitral tribunal notifies the parties that the award is ready for collection upon payment of fees and expenses, then delivery will have happened as it is upon the parties to pay the fees and expenses. This is because the only obligation of the arbitral tribunal is to avail a signed copy of the award, of course subject to payment of fees and expenses which is an obligation of the parties. The tribunal having discharged that obligation, then delivery and receipt of the signed copy of the award is deemed because any delay in actual collection can only be blamed on the parties. Default or inaction on the part of the parties does not delay or postpone delivery.*

[10] [2020] eKLR,

27. And although not raised by the parties, I have had to ponder why limitation of time is imposed on a setting aside application and not that for recognition or enforcement (Section 37 of The Act). And it is instructive that the UNCITRAL Model Law on International Commercial Arbitration from which our statute heavily borrows is similar in this respect. It has to come down to, again, the finality and expeditious principles of Arbitration. Arbitration is a binding dispute resolution mechanism contracted by parties. It is expected that parties will accept the answer an arbitral tribunal gives to a dispute they place before it. If, however, any party is aggrieved then it should raise its grievance at once so that it is addressed in speedy fashion that it is not inimical to expeditious disposal of the dispute. For that reason, setting aside motions are time bound. On the other hand, enforcement is open ended (save perhaps for the law of limitation on execution) so as to give parties an opportunity to abide by the outcome without the need for coercion that may follow enforcement or recognition."

(b) Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others[11] the court held:

"The question arises as to the meaning of "had received" the arbitral award. This question was raised before Mr. Justice Nyamu in the case of ***Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others. H.C Misc. Application No. 238 of 2003*** *where he held that in order to comply with Sec 35(3) the application to set aside the arbitral award may not be made after 3 months have elapsed from the date notice had been received that the arbitral award was ready for collection. In its normal meaning "receipt" means the actual obtaining of the arbitral award.*

In his ruling Nyamu, J has this to say about "receipt": at page 27 B

"Enlightened by the above wisdom I would like to reiterate that the word delivery and receipt in Section 32(5) and section 35 must be given the same meaning as above, a notice to the parties that an award is ready is

[11] [2005] eKLR

sufficient delivery. The interpretation of communication under Section 9 of the Arbitration act reinforces this view. Any other construction would introduce unnecessary delays in the arbitral process and deny it the virtue of finality."

(c) Transwood Safaris Ltd v Eagle Aviation Ltd & 3 others. H.C Misc. Application No. 238 of 2003- per Nyamu J (as he then was):in order to comply with Sec 35(3), the application to set aside the arbitral award may not be made after 3 months have elapsed from the date notice had been received that the arbitral award was ready for collection. The court cited the following case:

Bulk Transport Corporation v Sissy Steamship Co. Ltd Lloyd's Law Report 1979 Vol. 2 p. 289 where Paker, J stated:

"…publication was something which was complete when the arbitrator became functus officio but so far as the time for moving under the statute was concerned, it was notice that mattered. He does not say in that passage, so far, that notice necessarily means notice of actual contents."

(d) Ezra Odondi Opar v Insurance Company of East Africa Limited KSC CA Civil Appeal No. 98 of 2016[12], the Court of Appeal held:

"[22] The requirement that an application for setting aside an arbitral award may not be made after 3 months from the date on which the award is received is consistent with the general principle of expedition and finality in arbitration. As the Supreme Court of Kenya recently noted in ***Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited and another, SC Petition No. 12 of 2015*** *"the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes" "in a manner that is expeditious, efficient…" while also observing that Section 35 of the Act, "also provides the time limit within which the application for setting aside should be made."*

[12] [2020] eKLR

9. Can you apply for extension of time to set aside an award outside the three months?

Courts have always fallen back on section 10 of the Arbitration Act in matters arbitration. Section 10 states:

> *"Except as provided in this Act, no court shall intervene in matters governed by this Act."*

There is a common misconception that a party can apply to extend time to set aside an arbitral award on various grounds such as fraud, corruption, inability to pay fees etc. and then make the application under the Civil Procedure Rules for extension of time. However, bearing in mind the dictates of Section 10 of the Arbitration Act, courts have declined to permit such applications.

A good exposition of this is the case of **Mashin Construction Limited v Villa Care Limited**[13] where the court held:

> *"The other issue before this court for determination is whether this court has the jurisdiction to extend time set under Section 35 of the Arbitration Act. The applicant has sought to rely on the provision of Section 79G of the Civil Procedure Act and the Constitution. The respondent has maintained that there is neither a provision for extension of time under the Arbitration Act nor any exceptional circumstances warranting the court to extend time for filing the application. It is now settled that section 10 of the Arbitration Act excludes the application of the Civil Procedure Act and Rules. Several decisions affirm this position including the Court of Appeal in* ***Nyutu Agrovet Limited V Airtel Networks Limited Nrb Ca Civil Appeal (Application) NO. 61 of 2012 [2015] eKLR,*** *where Mwera JA observed as follows on the same issue;*
>
> ***Certainly, I do not agree that the Civil Procedure Act applies to arbitral proceedings, even as the issue has not been fully ventilated before us. However, much as I am not yet ready to pronounce that the Arbitration Act is a complete code excluding any other law applicable in civil-like***

[13] [2022] eKLR

litigation, I do not see where the Civil Procedure Act applies in this matter. Rule 11 of the Arbitration Rules states:

> ***"11. So far as is appropriate, the Civil Procedure Rules shall apply to all proceedings under these Rules."***

The subject, is only as far as it is appropriate Civil Procedure Rules shall apply to the Arbitration Rules – not the Act. In any event a rule cannot override a substantive section of an Act – section 10.
In the case of ***Dinesh Construction Company (K) Limited Vs Kenya Sugar Research Foundation [2018] eKLR*** *the High Court held that in the absence of any specific provision under Arbitration Act governing a procedure sought by a party the Court would lack jurisdiction to entertain such an application: -*

> ***"Thus, there being no specific provision in the Arbitration Act for the setting aside of an enforcement order, I would be of the view that there is no jurisdiction to either to grant stay of execution, or set aside the enforcement order of 11th July 2017, or to extend time for purposes of setting aside the Arbitral Award."***

In most jurisdictions that have adopted the Model Law, no extension of time is permissible. However other jurisdictions have tempered the three months limitation period by having a proviso for fraud and corruption as exceptions. Michael Hwang and Kevin Tan analyzed how various jurisdictions applied the time limitation in their article "**In the Time Limit to Set Aside an Award Under Article 34(3) of the Model Law: A Comparative Study[14]"** and stated, *inter alia*:

[14] Michael Hwang and Kevin Tan, 'The Time Limit to Set Aside an Award Under Article 34(3) of the Model Law: A Comparative Study', in Maxi Scherer (ed), Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2021, Volume 38 Issue 5) pp. 553 - 600

"The question of whether the Setting-Aside Time Period can be extended in cases of fraud is one that arises with some frequency before Model Law courts. Some Model Law jurisdictions have chosen to modify their adoption of the Model Law, so as to provide that fraud should be an express exception to the general strictness of the Setting-Aside Time Period. This is the route that Malaysia, New Zealand, and Ireland (by way of example) have taken. For ease of reference, the relevant statutory provisions from these three jurisdictions are set out below.

Malaysian Arbitration Act 2005, sections 37(4) and (5) read as follows:
(4) An application for setting aside may not be made after the expiry of ninety Days from the date on which the party making the application had received the award or, if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.

(5) **Subsection (4) does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption**. (emphasis added)

New Zealand Arbitration Act 1996, Schedule 1, article 34(3) reads as follows:

> An application for setting aside may not be made after 3 months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal. **This paragraph does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.** (emphasis added)

Irish Arbitration Act 2010, section 12 reads as follows:

> Notwithstanding Article 34(3), an application to the High Court to set aside an award on the grounds that the award is in conflict with the public policy of the State shall be made **within a period of 56 days from the date on which the circumstances giving rise to the application became known or ought reasonably to have become known to the party concerned.** (emphasis added)"

They concluded by postulating that "*arbitration parties would be well-advised to take note that, at least for arbitrations seated in Singapore, Australia, New Zealand, Ireland, Canada, and India, prospective plaintiffs would likely not be allowed to bring a setting-aside application after three months have elapsed since the rendering of the arbitral award, regardless of how deserving their particular circumstances may be. In these jurisdictions, 'may not' really does mean 'cannot'. However, the 'consolation prize' of resisting enforcement may still be open to a tardy aggrieved party, depending on the domestic procedural law of each jurisdiction and (almost certainly) whether they have a good reason for the delay.*"

In the case of **Jambo Biscuits(K) Limited & 3 others v Jambo East Africa Limited & 3 others**[15], the court held that there is no jurisdiction to extend time to file an application to set aside an arbitral award. The court cited various international decisions and held:

> "*70. In its first arbitration-related judgment to date, the Singapore International Commercial Court has held in* ***BXS v BXT [2019] SGHC(I) 10*** *that it has no power under Singapore law to extend the time limit in Article 34(3) of the Model Law for filing an application to set aside an arbitral award. Anselmo Reyes IJ held that on its face, Article 34(3) is a written law that appears to impose a mandatory limit, which therefore circumscribed the court's power to amend time limits. The Plaintiff's application to set aside was accordingly struck out as being out of time.*

[15] [2021] eKLR

> ***71. A v D (HCCT 52/2020)*** *the High Court in Hong Kong refused to grant an application to have time extended for filing an application to set aside an arbitral award noting that the Applicant had failed to do so upon the communication being done and having the window to do so between the 21st day of March, 2020 and the 28th day of August, 2020 citing the same position in* ***Dubai International Real Estate v Al Almadiah Contracting and Trading [2018] HKCFI 613).***"

Perhaps it is high time we consider amending the Arbitration Act to introduce fraud and corruption as the notable exceptions. A good example is the case of Erad Suppliers who had an arbitral award enforced after the National Cereals and Produce Board failed to set aside the award. The hundreds of millions of shillings were paid in substantial settlement of the award. However, the directors of Erad Suppliers were subsequently convicted of fraud and ordered to refund hundreds of millions of shillings. The matter is now before the Court of Appeal where they obtained a stay.

10. Enforcement, resisting and setting aside- courts consolidate the hearing of both applications

Once an application to set aside the award has been filed, an application to enforce the award can be filed at about the same. What now takes place is an application to set aside, the enforcement application and the resistance to the enforcement of the award- all taking place together. Each application will be opposed. The courts consolidate the hearing of the two applications and render one ruling. This saves judicial time.

At times, when there is a final award save to as cost and the costs are subsequent assessed by the arbitral tribunal leading to an award on costs, then file one application seeking the enforcement of both awards once the award on costs has been published.

11. Recognition and Enforcement of Awards

Part VII of the Arbitration Act addresses the recognition and enforcement of domestic and international awards.

In many instances, awards may be implemented by the parties without having to apply for enforcement in court. In this case, the matter is settled without recourse to court as there is no need to seek enforcement when the award has been implemented.

Bernstein, Tackaberry and Marriot in "**Handbook of Arbitration Practice**"[16] explain the import and impact of an award as follows:

> *"The award creates a new right or rights in favour of the successful party, which he can enforce in the courts in substitution for the rights upon which the claim or the defence respectively were founded. The award has two further consequences.*
> *First, it precludes either party from contradicting the decision of the arbitrator on any issue decided by the award, and also upon any issue that was within the jurisdiction of the arbitrator to decide but which whether deliberately or accidentally he was not asked to decide.*
> *Secondly, the award can operate to bar the claimant, whether successful or unsuccessful, from bringing the same claim again in a subsequent arbitration action."*

Kariuki Muigua in **"Settling Disputes Through Arbitration in Kenya"**[17] explained recognition and enforcement as follows:

> *"The concepts of "recognition" and "enforcement" go hand in hand. One is a necessary part of the other because a court that is prepared to grant enforcement of an award will do so because it recognizes the award as valid and binding upon the parties to it thus suitable for enforcement. The phrase is however rather confusing as it is apt to give the impression that the terms "recognition" and "enforcement" are synonymous.*

[16] Sweet & Maxwell 1998
[17] Glenwood Publishers Ltd, 2022

The two concepts of "recognition" and "enforcement" are expressly set in Section 36 of the Arbitration Act that reads:

> *36. Recognition and enforcement of awards*
> *(1) A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section and section 37.*
> *(2) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.*
> *(3) Unless the High Court otherwise orders, the party relying on an arbitral award or applying for its enforcement must furnish –*
> *(a) the original arbitral award or a duly certified copy of it; and*
> *(b) the original arbitration agreement or a duly certified copy of it.*
> *(4) If the arbitral award or arbitration agreement is not made in the English language, the party shall furnish a duly certified translation of it into the English language.*
> *(5) In this section. the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation.*

Once the award is received, as a matter or course and without delay, ask the arbitrator to provide a duly certified copy of the award for potential use in future enforcement proceedings.

In **Riley Services Limited v Attorney General of the Republic of Kenya & another**[18] the court struck out the enforcement application failing to provide a certified copy of the award. The court held that the provisions of section 36(2) of the Arbitration Act were couched in mandatory terms by use of the

[18] [2019] eKLR

word "shall" and failure to comply with the same rendered the application incurably defective.

Invariably, many parties abide by the terms of the award and need not proceed to court to have the award recognized and enforced. It is only when the one party refuses to honor the terms of the award does a party then proceed under.

12. Setting Aside the Award

The grounds for setting aside an award are enumerated in Section 35 of the Arbitration Act as follows:

> ***35. Application for setting aside arbitral award***
>
> *(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).*
>
> *(2) An arbitral award may be set aside by the High Court only if –*
>
> *(a) the party making the application furnishes proof –*
>
> *(i) that a party to the arbitration agreement was under some incapacity; or*
>
> *(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or*
>
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*
>
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or*
>
> *(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that*

agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under section 34 from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

13. Sample cases on setting aside

There is a plethora of case law in support of the grounds for setting aside as follows:

(a) **Cape Holdings Ltd vs Synergy Industrial Credits Ltd** [19]where the court held that;

"The court cannot therefore go to the merits or otherwise of the Award when dealing with an application under Section 35 of the Act as this

[19] [2016] eKLR

court is not sitting on an appeal from the decision of the arbitrator when considering whether or not to set aside the award."

(b) **Rashid Moledina & Co (Mombasa) Limited & Others vs Hoima Ginners Limited**[20]**,**it was held that,

"courts will be slow to interfere with an arbitral award as parties would have voluntarily chosen arbitration as a forum for the resolution or settlement of their dispute".

(c) **Kenya Shell Ltd vs Kobil Petroleum Ltd**[21] where the Court of Appeal expressed the views of Ringera J in the case of **Christ for All Nations vs Apollo Insurance Co. Ltd**[22] where the court held that;

"although public policy is a most broad concept incapable of precise definition…. An award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:
a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten or
b) inimical to the national interest of Kenya or
c) contrary to justice and morality."

(d) **Continental Homes Ltd vs Suncoast Investments Ltd** [23]where the court held that;

"In order for this court to set aside the award for contravening public policy the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the

[20] (1967) E.A. 645
[21] [2006] eKLR
[22] (2002) EA 366
[23] [2018] eKLR

> *reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator."*

(e) **Glencore Grain Ltd versus TSS Grain Millers Ltd**[24]**.** the learned Judge at page 77 held that;

> *"A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word "illegal" here would hold a wider meaning than just "against the law". It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive".*

14. Distinction between appeal and setting aside and award

The distinction between an appeal and setting aside an award was addressed by the Court of Appeal in **National Cereals & Produce Board v Erad Suppliers & General Contracts Limited**[25].This decision distinguished the appeals emanating from a court exercising its original jurisdiction and that under Section 35 of the Arbitration Act, which were found to be distinct. The court held:

> *"26. Before we consider whether the applicant's application is one befitting of favourable exercise of discretion, there is the question whether the appeal before this Court is an appeal from a decision of the High Court "acting in the exercise of its original jurisdiction…" within Rule 29 of the Rules of the Court. In other words, is the application before us competent on account of the fact that the appeal before the Court is an appeal from the decision of the High Court*

[24] [2002] 1 KLR 606
[25] [2014] eKLR

made under section 35 of the Arbitration Act? Or differently put, in exercising its power under section 35 of the Arbitration Act does the High Court exercise original jurisdiction so as to render an appeal from such decision an "appeal from a decision of superior court acting in the exercise of its original jurisdiction" within the meaning of Rule 29 of the Rules of this Court?

27. The Arbitration Act, Act No. 4 of 1995 is based on a Model Law on international commercial arbitration adopted in 1985 by the United Nations Commission on International Law (UNCITRAL). ***One of the principles underlying the Model law and in turn the Arbitration Act is the severe restriction on the role of the court in the arbitral process. That principle finds expression in section 10 of the Act. Section 35 of the Arbitration Act is itself underpinned by that principle. Our courts have, since the coming into force of that statute, observed and given effect to that principle.*** *In* ***Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR*** *for instance the Court, in reference to the right of appeal against an arbitral award under section 39 of the Arbitration Act stated:*

> *"It is clear from the above provisions, that any intervention by the court against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to Section 39 (2) of the Arbitration Act 1995. In the matter before us there was no such advance consent by the parties. Even where such consent is in existence the consent can only be on questions of law and nothing else. Again an appeal to this Court can only be on matters set out in Section 39 (2) with leave of the High Court or with leave of this Court. All these requirements have not been complied with and therefore the appeal is improperly before us and is incompetent."*

28. The Court went on to say in that case that one of the principles underlying the Arbitration Act is the recognition of an important public policy in enforcement of awards and the principle of finality.

29. In ***Kenya Shell Ltd vs. Kobil Petroleum Ltd***[26] *while declining leave to appeal the decision of the High Court emanating from arbitration proceedings, this Court underscored the principle of finality of arbitral awards and* ***"a severe limitation of access to the Courts"*** *as a pointer to the public policy the country takes.*

30. Section 35 of the Arbitration Act permits the setting aside of an arbitral award. It does not permit an appeal. Setting aside is a narrower avenue for challenging an award than an appeal. *The grounds for setting aside an award are restricted under the Act. Section 35 of the Arbitration Act was however not in its present form when the Act was first enacted. At the time, the grounds for applying to set aside an arbitral award were confined to incapacity of a party to arbitration agreement; invalidity of arbitration agreement; failure to give notice of appointment of an arbitrator or of the arbitral proceedings or failing to accord opportunity to a party to present his case; exceeding of the mandate by the arbitrator and composition of the tribunal not according with the agreement of the parties. In addition, the High Court could set aside the award if it found that the dispute is not capable of settlement by arbitration under the law of Kenya or the award is in conflict with public policy of Kenya.*

31. In the year 2009, under Act 11 of that year, the grounds for applying to set aside an arbitral award were expanded to include circumstances where the making of the arbitral award was induced or affected by fraud, bribery, undue influence or corruption. That amendment was done for a good reason: to enhance the credibility of the arbitration process. In order to arrive at a decision whether an arbitral award was induced or affected by fraud, bribery, undue influence or corruption, the High Court must, in our view, be guided by evidence. For that purpose, it is open for parties to present evidence before the High Court and for the High Court to take and consider such evidence. In doing so and to that extent, we consider for purposes of Rule 29 that the High Court is called upon to exercise original jurisdiction. That view of the matter accords with the definition of the phrase 'original jurisdiction' ***Black's Law***

[26] [2006] 2 KLR 251

> ***Dictionary 4th Ed. Rev. 61971 where*** *it is defined thus: "Jurisdiction in the first instance; jurisdiction to take cognizance of a cause at its inception, try it, and pass judgment upon the law and facts."*
>
> *32. Section 35 as amended by Act 11 of 2009 clearly provides for the setting aside of an arbitral award on grounds of fraud, bribery, undue influence or corruption. As we have said whether an award is tainted by any of those vices is a matter of fact, on which the High Court must be satisfied before passing 'judgment'. For that purpose, the High Court exercises original jurisdiction. In the same vein, it is also open for this Court, where a decision of the High Court emanating from such challenge is appealed, to take or order the taking of additional evidence should circumstances permit.*
> *33. We think one object of restricting the operation of the powers of the Court under Rule 29 to circumstances where the court whose decision is appealed from was acting in the exercise of its original jurisdiction is to avoid a situation where, when this Court is dealing with a second appeal it is asked to take additional evidence which the first appellate court would not have had an opportunity to consider."*

15. Grounds for refusal of recognition or enforcement of Award

The grounds for resisting the recognition or enforcement of Award under Section 37 of the Arbitration Act are identical to those under Section 35. This is because they come into play where no application to set an award has been filed but instead, the Respondent opposes the recognition or enforcement of the Award under the following grounds:

> ***37. Grounds for refusal of recognition or enforcement***
> *(1) The recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only –*
> *(a) at the request of the party against whom it is invoked, if that party furnishes to the High Court proof that –*
> *(i)a party to the arbitration agreement was under some incapacity; or*

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;

(iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or

(vii) the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;

(b) if the High Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

(2) If an application for the setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

16. Enforcement or International Awards

Section 2 of the Arbitration Act stipulates that Act shall apply to both domestic and international arbitrations. Section 36 (5) of the Arbitration Act provides for the recognition of an International Arbitration Award as binding and enforceable in accordance with the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention").

An excellent exposition on the law governing international arbitrations by the late Justice Havelock in the case of **Kundan Singh Construction Limited V Tanzania National Roads Agency**[27] where the court held that Section 35 of our Arbitration Act allows and provides for the setting aside, on the grounds therein detailed, of both domestic and international awards. The court found that the law chosen by the parties in relation to the arbitral proceedings and for remedies as to the challenge of the Award was Swedish law which governed the primary jurisdiction in relation to the proceedings and not Kenyan law which only applied as a secondary jurisdiction role in terms of recognition and enforcement of arbitral awards.

17. Limited Right of Appeal post the Supreme Court decision in the Nyutu case

The Supreme Court in **Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)**[28] opened a limited window to appeal to the Court of Appeal from Section 35 matter under the Arbitration Act in the instance where obvious injustices are contended to have occurred. The court held:

> *"[71] We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its*

[27] [2012] eKLR
[28] [2019] eKLR

> *purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.*
>
> *[72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration.* ***In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle." [emphasis added]***

The next decision where the Supreme Court considered the limited right of appeal was in the case of **Synergy Industrial Credit Limited v Cape Holdings Limited**[29] where the court held:

> *"[154] In the circumstances, allowing appeals where the Arbitration Act states otherwise would in my view, as stated, turn arbitration into "a precursor to litigation." [38] The Kenyan courts must therefore, "as a matter of public*

[29] [2019] eKLR

interest" [39], interpret the provisions of the Arbitration Act in a manner that seeks to promote and embellish arbitration, rather than emasculate and thus render it redundant. As the ***United States' Second Circuit of the Court of Appeal stated in Parsons Whittemore Overseas Co Inc v. Société Générale de l'Industrie du Papier (RAKTA),***

> *"By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights [including the appellate process] in favor of arbitration with all of its well-known advantages and drawbacks" [40]*

[155] Regarded as a means of encouraging and facilitating international trade, arbitration is consensual. As Margaret Moses observes, "Arbitration is a private system of justice, made possible by the parties' consent. …" [41] To quote A. M. Gleeson once again, "Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court…." [42] Once parties have submitted their dispute to arbitration, "their arbitration agreement must be enforced according to its terms, just like any other contract." [43] "The remedy for any flaws in the system", adds Dr. Katherine A. Helm "is having the parties choose better arbitrators, not to appeal arbitration awards." [44]
[156] The dispute in this matter has been raging for over 10 years. That alone is clear testimony of the danger we will be exposing arbitration to in this country if we allow unwarranted court intervention. Failure to adhere to the prescriptions in the Arbitration Act will hinder investment, as foreign firms and their agents will not be assured of an expeditious clear-cut dispute resolution mechanism in line with international standards.

[157] Given the history of the practice of arbitration in this country and the clear and unambiguous wording of Section 10 of the Kenyan Arbitration Act, we would, in my humble view be amending the Arbitration Act if we allow appeals from High Court decisions on Section 35 which, as the explanatory notes by the UNCITRAL Secretariat state was intended to be final." *(emphasis mine)*

The rationale in the ***Nyutu*** and ***Synergy*** cases, is that strict limitations are imposed permitting appeals to the Court of Appeal outside Sections 35 or 37 of the Arbitration Act.

However, the Nyutu principles will not aid a party where the high court has rendered its ruling on an application seeking to challenge an arbitration under Section 14 of the Act, that decision is final and not subject to appeal as stated in Section 14(6) of the Arbitration Act that reads:

> *"(6) The decision of the High Court on such an application shall be final and shall not be subject to appeal."*

In the case of **Phillip Bliss Aliker v Grain Bulk Handlers Limited & another**[30] the court held that it had no jurisdiction to grant leave to appeal from the decision regarding the challenge of an arbitrator. The court held:

> *"18. If leave cannot be granted to appeal against a section 14 decision because an appeal is barred under the finality principle, then much less can leave be granted to appeal against a review application ruling which rejected an attempt to reopen a section 14 decision.*
> *19. In reaching this outcome, the Court does not disrespect or trivialize the seriousness of the matters that the intended Appeal would have raised. The Court is simply walking the straitjacket that Section 14 of the Arbitration Act has prescribed."*

Based on the ***Aliker*** decision, no appeal would lie under any of the following provisions:

(a) Section 12 of the Act where a defaulting party may apply to court to set aside the appointment of a sole arbitrator by a non-defaulting party. Under section 12(8) the court may make a decision which is

[30] [2020] eKLR

final and not subject to appeal where an application to set aside the appointment of a sole arbitrator is dismissed.

(b) Section 15(1) of the Act dealing with the case of termination of an arbitrator's mandate- the court's decision thereon is final and not subject to appeal.

(c) Section 32B (6) of the Act is final when the court makes a decision under Section 32B(B) 4 regarding the direction of fees and expenses properly payable to the arbitrator.

18. Conclusion

One must be familiar with the Arbitration Act and emerging case law to avoid technical knock outs when seeking to set aside the award on account of time bar or seeking leave to appeal following the Nyutu case. There provisions in the Arbitration Act which close the door to any appeal from the high court's decision must be noted. The lesson learnt is consider the merits of any application that will be treated with finality by the court before making the application. Ignorance of the law is no excuse.

Dispute Avoidance and Provisionally Binding Decisions: The Quick-Fix in Construction Dispute Resolution?

By: ***Jacqueline Waihenya****

Abstract

Since the emergence of abbreviated decision-making processes with the introduction of construction adjudication in the United Kingdom the spotlight has been shone on the pay-now-argue-later principle. This paper examines dispute avoidance and provisionally binding decisions whose key critical feature is the quick timeframe imposed upon the resolution of disputes within the life of a project generally via contract with a view to enabling the parties keep their construction project going notwithstanding emerging issues of contention. As an alternative dispute resolution (ADR) mechanism this model has found increasing favour and is being incorporated into construction standard form contracts as well as within legislative frameworks around the world.

1. Introduction

Dispute avoidance and prevention as a highly specialized dispute resolution mechanism recently found formal expression within the construction industry through the *International Federation of Consulting Engineers FIDIC 2017 Suite of Contracts* which entrenched Dispute Avoidance/Adjudication Boards (DAABs) as a condition prerequisite to arbitration or litigation. DAABs have evolved from Dispute Resolution Boards (DRBs) and Dispute Adjudication Boards

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(DABs) within the construction industry to deal with the problems, disagreements that often arise particularly in large, complex construction projects.[1]

The construction industry itself tends to be highly complex, dynamic and fragmented in nature and often construction projects feature an agglomeration of professionals and firms from different sectors, disciplines or even standalone industries.[2] Construction law in response to the nature of the industry further tends to comprise an encyclopedia of many legal fields whose application is dependent upon the specific project at hand with the usual culprits including contract law, property and real estate law, banking and finance law, insurance law, employment law and government administrative and regulatory laws.[3] A new and increasingly dominant area features environmental law with the emerging realities of the evolving climate change transition framework and responsible investment policies such as environmental social and governance (ESG).[4] Typical construction law therefore tends to be concerned with pre-project, project and post-project phases with the project delivery method being a primary concern.[5] Project delivery methods for their part include (1) design-build; (2) design-bid-build; (3) construction manager at risk; (4) construction manager not at risk; and (5) integrated project delivery systems.[6]

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[1] Sarah B. Biser, Deborah Bovarnick Mastin and Robert A. Rubin, *Duels, Litigation, Arbitration, or Dispute Review Boards: The Better Choice in Complex Construction Projects* (March 2016), Business Law Today - American Bar Association pp. 1-4. <*https://www.jstor.org/stable/10.2307/businesslawtoday.2016.03.04*> accessed on 18 March 2023

[2] Nate Budde, *Construction Law: What Contractors, Subs and Suppliers Must Know* (3 August 2022) <*https://www.levelset.com/blog/construction-law/*> accessed on 18 March 2023

[3] Ibid

[4] Luke Elborough, *International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change* (2017) 21 NZ J Envtl L 89 <*Heinonline*> accessed on 18 March 2023

[5] Ibid

[6] Sarah B. Biser et al Supra Ibid

Given the foregoing the primary draw of Dispute Boards (DBs) as they tend to be referred to collectively is that they create a framework within which parties can take proactive steps to avoid conflict and where disputes have already arisen, they make it possible to have quick resolution proportional to the sums at stake.[7] Their benefits include (1) reduced litigation rates; (2) a tool for prompt resolution of disputes; (3) a model that allows the project to continue even as the dispute resolution process is continuing; (4) relatively cost effective dispute resolution; (5) the ability to select knowledgeable and experienced professionals to resolve disputes; and (6) confidentiality.[8]

2. A Quick Snapshot of the Historical Development of Dispute Boards & Construction Adjudication:

Whilst statutory construction adjudication undoubtedly made its debut in the United Kingdom with the enactment of the *Housing Grants, Construction and Regeneration Act of 1996*[9] which came into force in 1998 (the UK Construction Act) DBs have evolved more organically.

Traditionally an Engineer or Architect performing the role of a contract administrator wore 2 hats, in the first instance, as an agent of the employer relating to the design of the project and supervision of the works to be constructed essentially playing an administrative role. The second was the impartial and independent role of a valuer or certifier and where disputes emerged typically in regard to certification they would act in a quasi-judicial

[7] Nicholas Gould & Olivia Liang, *Conflict Avoidance and Alternative Dispute Resolution in the UK Construction Industry* (2022) Amicus Curiae 155 <Heinonline> accessed on 18 March 2023

[8] Michael T. Kamprath, *The Use of Dispute Resolution Boards for Construction Contracts* (Fall 2014) The Urban Lawyer Vol. 46, No. 4 American Bar Association, pp. 807-814 <*https://www.jstor.org/stable/44735667*> accessed on 18 March 2023

[9] Christopher Dancaster, *Construction Adjudication in the United Kingdom: Past, Present, and Future*, Journal of Professional Issues in Engineering Education and Practice. Volume 134 Issue No.2 (April 2008) <*https://ascelibrary.org/journal/jpepe3*> accessed on 18 March 2023

role.[10] Thus, the UK Court of Appeal in *Chambers v Goldthorpe*[11] held that a contract administrator when providing certification was acting in an arbitral role and therefore enjoys immunity. Almost a century late the House of Lords in *Sutcliff v. Thackrah*[12] did away with the concept of the quasi-arbitrator role of a contract administrator. Nevertheless, following a plethora of cases in the UK and Commonwealth it remains incumbent upon a contract administrator acting as a decision maker to act independently, impartially and fairly and must neither favour the contractor nor the employer but is not required to apply the rules of natural justice when making his/her decisions.[13] *Beaufort Developments Ltd v Gilbert Ash NI Ltd*[14] however acknowledges the realism of contemporary conceptions of conflict of interest that make it difficult to do away with the perception that the contract administrator may favour the employer. DBs have therefore evolved in response to the perceived conflict of interest of the contract administrator and accordingly FIDIC 2017 therefore provides for a step approach starting with the Engineers Decision that typically precedes the DAAB Decision which is a precondition to accessing arbitration or litigation as its dispute resolution model.

The historical forefather of DRBs is said to be the Joint Consulting Board constituted to address site conflicts at the Boundary Dam Project in Washington, United States of America (USA/US) in the 1960s.[15] The first DRB properly so called was established in 1975 for the second bore of the Eisenhower Tunnel in

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[10] Anthony Houghton, *Impartial Contract Administration and Dispute Review Boards* (2009) 11 Asian Disp Rev 12 <*Heinonline*> accessed on 18 March 2023

[11] [1901] 1 KB 624

[12] [1974] 1 All ER 859

[13]Timothy Elliot, *UK: Contract Administrators - The Obligation of Impartiality and Liability for Incorrect Certification*
(09 November 2006) Mondaq
<*https://www.mondaq.com/uk/real-estate-and-construction/44164/contract-administrators---the-obligation-of-impartiality-and-liability-for-incorrect-certification*> accessed on 18 March 2023

[14] [1999] AC 266

[15] Michael T. Kamprath Supra Ibid

Colorado and significantly, unlike the first bore, this project did not experience delays and cost overruns[16] notwithstanding the fact that the DRB only gave non-binding decisions.[17] DBs then went international with the World Bank Construction Project of the El Cajon Dam and Hydropower project in Honduras during the 1980s. The expert panel gave non-binding decisions throughout the duration of the project with the result that no disputes were referred to arbitration or litigation.[18]

2.1 Dispute Resolution Board Foundation (DRBF)

Founded in the US in 1996 the Dispute Resolution Board Foundation DRBF is the leading organisation concerned with DRBs with a membership of over 700 from over 59 countries around the world. It features owner organizations and employers, architects, engineers, contractors, legal professionals, funding agencies and consultants.[19] DRBF further maintains an extensive data base of construction projects that use DRBs and over the years and it has claimed that 98% of projects that have used DRBs have not had to resort to arbitration or litigation.[20]

2.2 The DRBF Model

The DRBF envisages the ideal DRB to comprise a 3-person panel of consulting experts possessing the technical and contract background specific to the construction project at hand. The 3 members comprise impartial, independent individuals who assist the parties resolve any differences before these escalate into disputes by providing a prompt evaluation of a dispute using non-binding or binding recommendations for resolution. As the DRB is constituted before construction begins both the employer and contractor each nominate a member

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[16] Ibid

[17] Juan Eduardo Figueroa Valdés & William R Schubert, *The Role of Dispute Boards in the Construction Industry* (2017) Vol.20 Issue 2 International Arbitration Law Review, pg.55 <*https://www.camsantiago.cl/wp-content/uploads/2021/01/Articulo-the-Role-of-Dispute-Boards-in-de-Construction-JEF-y-Bill.pdf*> accessed on 18 March 2023

[18] Ibid

[19] DRBF Website <*https://www.drb.org/what-is-a-db*> accessed on 18 March 2023

[20] Ibid

for approval by their counterpart and the 2 chosen panelists then nominate a DRB Chair to be approved by both parties.[21] In the US DRBs are administered through the American Arbitration Association (AAA) which typically constitutes the DRB and brokers the relationship between the parties and the DRB acting as a liaison during site visits and meetings and even goes so far as to administer payments to the DRB members.[22]

2.3 DRBF's Nine Elements of a DRB

The DRBF 9 elements are intended as a recipe for success and they can be enumerated thus:-[23]

(1) All DRB members are neutral and subject to the approval of the parties.
(2) Each panel member signs a Three-Party Agreement with the parties obligating them to serve impartially and equally.
(3) The fees and expenses are shared equally between the parties with costs varying depending on how often they are engaged to resolve disputes.
(4) The DRB is constituted before work begins and before any disputes arise.
(5) The DRB keeps abreast of job developments by reviewing project progress reports on a regular basis and making regular visits to the site regardless of whether there are any differences or disputes or not.
(6) The DRB helps prevent disputes by facilitating communication between the parties.
(7) Either of the parties may refer a difference or dispute to the DRB for a comprehensive hearing.
(8) An informal but comprehensive hearing is convened promptly.

[21] Ibid
[22] Juan Eduardo Figueroa Valdés & Another Supra Ibid
[23] DRBF Website Supra Ibid

(9) DRB recommendations are not binding on either party unless so provided by the contract. However, they are generally admissible as evidence in subsequent arbitration or litigation to the extent permitted by law.

It is further useful to add that the DRB members are at liberty to discuss their considerations with the parties thereby adopting a mechanism that strongly mirrors mediation and this quirk tends to lend itself to the parties effecting the non-binding decision as they are substantially involved in discussing its import and they have significant room to give their suggestions resulting in their voluntary election to comply.[24] Also, DRB members enjoy immunity in carrying out their duties.[25]

2.4 International Federation of Consulting Engineers FIDIC

The "*Federation Internationale des Ingenieurs Conceil*' (International Federation of Consulting Engineers, in short "FIDIC") recognised DBs in its 1999 Suite of Contracts as its chief dispute resolution model following on the heels of the World Bank 1995 version dubbed *Standard Bidding Documents – Procurement of Works* (SBDW) which made use of DRBs or dispute review experts.[26] DABs first made an appearance in the 1996 Supplement to the FIDIC 1992 Red Book.

The 1999 Suite that followed then created a DAB that had powers to adjudicate and issue provisionally binding decisions much like those of construction adjudicators under the English construction law statutory framework.[27] Shortly thereafter the 2000 World Bank SBDW mirrored FIDIC 1999 provisions and together with other multilateral development banks (MDBs) the World Bank then took decisive steps to have FIDIC develop harmonized provisions for

[24] Ibid
[25] Anthony Houghton Supra Ibid
[26] Juan Eduardo Figueroa Valdés & Another Supra Ibid
[27] Ibid

projects funded by development banks in 2005 dubbed the Pink Book.[28] The Pink Book is now being phased out with the publication of the 2017 Suite of Contracts[29] which features DAABs and which the World Bank has intimated they intend to adopt.[30] Building on this partnership World Bank DAABs further introduced a contractor disqualification to strengthen gender-based violence (GBV) as well as strengthening environmental and social aspects of project development and works contracts intended for development.[31]

FIDIC 2017 DAABs are unique in the fact that they play a dual role. First, they issue decisions much like their predecessor the DAB and in addition to this they assist parties to resolve differences. The whole point of the DAAB is to form an integral organ of the project as a principal partner whose chief function is to chart a path that enables the parties to avoid disputes and overcome them.[32] As

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[28] The FIDIC Pink Book is entitled *The MDB Harmonised Edition of the Red Book* and it includes modified General Conditions of Contract as well as provisions for Particular Conditions together with sample forms for Contract Data (Particular Conditions – Part A), Securities, Bonds, Guarantees and Dispute Board agreements. Published in 2005, it was revised in March 2006 and June 2010.

[29] The six FIDIC contract documents covered by the FIDIC/World Bank agreement comprise (1) Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer ("Red book"), Second edition 2017; (2) Conditions of Contract for Plant & Design-Build for Electrical & Mechanical Plant & for Building & Engineering Works Designed by the Contractor ("Yellow book"), Second edition 2017; (3) Conditions of Contract for EPC Turnkey Projects ("Silver book"), Second Edition, 2017); (4) Client/Consultant Model Services Agreement ("White book"), Fifth Edition 2017; **(5)** Conditions of Contract for Design, Build and Operate Projects ("Gold book") First Edition 2008; and (6) the Short Form of Contract ("Green book"), First Edition 1999.

[30] FIDIC, *World Bank signs five-year agreement to use FIDIC standard contracts* (2023) < *https://fidic.org/world-bank-signs-five-year-agreement-use-fidic-standard-contracts*> accessed on 19 March 2023

[31] Geoffrey Smith, 'The World Bank Expands the Role of the Dispute Avoidance/Adjudication Board' (2021) 16 Const L Int'l 13 <*Heinonline*> accessed on 18 March 2023

[32] Charles Blamire-Brown & Sofia Parra Martinez, *Using Dispute Boards to Avoid Disputes* (9 December 2021) Out-Law Guide <*https://www.pinsentmasons.com/out-law/guides/using-dispute-boards-to-avoid-and-resolve-construction-*

earlier intimated the DAABs decisions are binding requiring the parties to comply and then in the event they disagree with the outcome they are required to issue a Notice of Dissatisfaction within the prescribed period which opens the path to arbitration.[33]

2.5 International Chamber of Commerce (ICC)

The ICC first published its Dispute Board documents in 2004 comprising (1) *the ICC Dispute Board Clauses*, (2) *the ICC Dispute Board Rules*, and (3) *the Model Dispute Board Agreement*. These were revised in 2015 based on experts' feedback.[34]

ICC DB regime emphasises the importance of informal and formal approaches to disputes both of which are of equal importance in helping to reduce the risk and cost of disruption to the parties' contract and the rules covers matters relating to the appointment of DB members, the services they provide and the compensation they are receive. The ICC Rules outline 3 basic functions of DBs including (1) in the face of a potential disagreement, the DB may identify and frame the disagreement which they then encourage the parties to resolve on their own without further involvement of the DB; (2) Where the disagreement is too entrenched, the DB can intervene by providing informal assistance to help the parties resolve the matter by agreement, and (3) the DB could also determine a dispute through a recommendation or a decision issued after a procedure of formal referral.[35]

The Rules feature 3 types of DB from which parties can select being (1) Dispute Adjudication Boards (DABs) issue decisions that must be complied with immediately, (2) Dispute Review Boards (DRBs) which issue recommendations

disputes#:~:text=They%20provide%20a%20method%20for,disputes%20before%20they%20even%20crystalise

[33] Ibid

[34] ICC, *Dispute Boards* (2015) <*https://iccwbo.org/dispute-resolution-services/dispute-boards/*> accessed on 19 March 2023

[35] Ibid

which though not immediately binding become binding on the parties after 30 days in the event of no objection, (3) Combined Dispute Boards (CDBs) that offer an intermediate solution between DRB and DAB. Thus, DBs issue recommendations but may also issue decisions if a party so requests and no other party objects or the DB so decides on the basis of criteria set out in the Rules.[36]

A unique feature of the ICC DB Rules is that they prohibit a defaulting party from raising any issue on merits as a defence to its failure to comply.[37] This has the effect of compelling the compliance of contracting parties.

3. Getting The Best out of Dispute Boards

As stated above DBs are a recognition by the construction industry of the stock players place on rapid dispute resolution which has found expression through the abbreviated dispute resolution process that aims for dispute avoidance at best or a provisionally biding decision as the next best option. DBs as a creature of construction adjudication further afford the parties a comply now, argue later solution, sometimes described as pay-now, argue later. This facilitates the performance of the main contract avoiding typical complications whilst preserving the rights of parties.[38] DBs further promote legal certainty, project sustainability and good relations between the contracting parties.[39]

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[36] Ibid

[37] Aceris Law, *Dispute Boards and International Construction Arbitration* (7 June 2020) <*https://www.acerislaw.com/dispute-boards-and-international-construction-arbitration/*> accessed on 19 March 2023

[38] Aceris Law Supra Ibid

[39] Fadia Fitriyanti & Emil Adly, *Lessons Learned in the Use of Dispute Boards to the Settlement of Construction Service Disputes* (2021) Journal of Legal Affairs and Dispute Resolution in Engineering and Construction - American Society of Civil Engineers < *https://fadia.umy.ac.id/wp-content/uploads/2022/04/publish-jurnal-of-legal-affairs.pdf*> accessed on 19 March 23

Accordingly, parties and DB members require to have the following in mind in order to achieve impactful and successful implementation of a DB on a construction project.[40]

3.1 Essential Characteristics of DBs

3.1.1 Impartiality & Independence

The most fundamental characteristic of a successful DB is the impartiality and independence of its members.[41] This means that a DB member must not favour or appear to favour one of the parties. Ordinary considerations of conflict of interest therefore apply and subjective tests for handling this require to be put in place with each DB member bearing a duty to disclose any perceived or actual conflict of interest at the onset immediately they become aware of it.[42]* This process tends to follow the same framework set out for arbitrators and the *IBA Guidelines on Conflict of Interest in International Arbitration*[43] may be a good starting point.

DRBF has further published a comprehensive code of ethics to be observed by its members.[44] The DRBF *Code of Ethical Conduct*[45] is founded upon 4 canons to which all its members must are required to adhere to in practice. These are (1) conflict of interest and disclosure requiring board members to disclose any interest, past or present relationship or association that could in the perception of a contracting party affect such members independence and impartiality; (2)

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[40] Nael G. Bunni, *Dispute Boards - Dos and Don'ts* (2006) 1 Const L Int'l 10 <Heinonline> accessed on 19 March 2023

[41] Peter H.J. Chapman, Dispute Boards (1999) FIDIC <*https://www.fidic.org/sites/default/files/25%20Dispute%20Boards.pdf*> accessed on 20 March 2023

[42] Ibid

[43] International Bar Association Council, *IBA Guidelines on Conflict of Interest in International Arbitration* (23 October 2014) <*https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918*> accessed on 19 March 2023

[44] Juan Eduardo Figueroa Valdés & Another Supra Ibid

[45] DRBF Website < *https://www.drb.org/code-of-ethical-conduct*> accessed on 19 March 2023

confidentiality which requires DB members to hold any information that they obtain in confidence subject of course to its either being in the public domain or otherwise required to be disclosed by law. Further, information obtained through the DB process cannot be used beyond the purposes of the DB; (3) Board Conduct and Communications are required to be effected in a quick and timeous fashion and it must be orderly and impartial. Further, unilateral communication between a DB member and contracting party is prohibited unless permitted in the DB operating procedures; and (4) Board procedures required to be carried out with procedural fairness to the contracting parties and in accordance with applicable contract provisions and operating procedures.[46]

3.1.2 Compliance with Timelines

Compliance with timelines is another critical feature of DBs and this comprises the *raison d'être* for DBs.[47] Model provisions under the different regimes outline time specific provisions for the parties and the DB members to take certain steps.[48] The most critical for the DB being the timeline within which decisions or recommendations require to be given.[49] A sharp eye requires to be laid on this to prevent the DB from acting without effect. The parties ought further to provide timelines for the appointment of DBs as well as to express dissatisfaction with any decision as failure to do so renders subsequent referrals to arbitration or litigation of no consequence.[50]

3.1.3 Inquisitorial Proceedings

Parties ought to expect an inquisitorial approach that is not encumbered by strict rules of evidence. DBs presuppose that members are subject matter experts

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[46] Ibid

[47] Andrew Stephenson and Lucy Goldsmith, *Dispute boards and the Olympic Games: A tried and tested method of dispute avoidance* (2 March 2023) Corrs Chambers Westgarth <*https://www.lexology.com/library/detail.aspx?g=1b373520-b7df-4b79-b755-670ee78b5ee4*> accessed on 21 March 2023

[48] Juan Eduardo Figueroa Valdés & Another Supra Ibid

[49] Ibid

[50] Ibid

equipped with the capacity to ferret out relevant and material evidence usually through a process of questioning and probing.[51]

3.2 The Parties

3.2.1 Standing versus *AD HOC* DB

It is highly recommended that parties select a standing DB as opposed to an *ad hoc* arrangement.[52] The benefits of a standing DB are far reaching as panel members get an opportunity to master the ins and outs of the project especially since they have an opportunity to develop an intimate appreciation of the project, its personnel, the site(s) as well as other members of the DB. By holding regular discussions with different players, they have a bird's eye view which further provides an opportunity to tease out any potential for disagreement and take steps to have them resolved.

Though parties sometimes flirt with *ad hoc* DBs mostly on cost consideration basis, this approach presents a false economy that deprives a project the real benefits of having a DB.[53] In actual fact *ad hoc* DBs may create a situation where ultimately different experts handle different aspects of the project leading to duplication or even outright contradiction with the ultimate effect of increasing the costs that require to be employed towards dispute resolution.[54]

3.2.2 Panel Selection

The panelists require to be selected on or before the commencement date of the contract. Panelists are selected for their personality and professional qualification. Typically, they comprise engineers, architects, quantity surveyors, land economists and contract professionals (built environment professionals).[55] However, a DB comprising of only engineers and contracting professionals may

[51] Ibid
[52] Nael G. Bunni Supra Ibid
[53] Anthony Houghton Supra Ibid
[54] Ibid
[55] Sarah B. Biser et al Supra Ibid

probably not be qualified to hear a myriad of complex legal issues that typically arise in construction disputes such as claims for injunctive relief, claims in tort, claims related to termination of contract, insurance coverage disputes, labour relations disputes and safety issues, social & environmental challenges, GBV and the like and therefore there is merit in including competent construction lawyers to lend ultimately credibility.[56] Regardless of whether the DB panel comprises built environment professionals with or without construction lawyers these professionals require to be experienced and well versed with the issues at hand.[57]

DB members regardless of their professional background should further have a demonstrable record of training and interest in construction adjudication as well as a temperament that lends humour and calm professionalism to the process.[58]* It is also critical to ensure that the DB members selected make a commitment at the commencement of the project to avail themselves according to the demands of the project at hand.[59] Facilitative skills for meetings and administrative management skills for hearings are also unbelievably valuable qualities in a panelist.[60]

3.2.3 Cost of DB

The costs of the DB are shared equally between the parties. It is important to consider that the aspect of cost is not the only factor in convening a good and effective DB.[61]

3.3 The Chairman

The Chairman's primary role lies in coordinating the DB members and party representatives and further ensures that the documents are prepared and

[56] Michael T. Kamprath Supra Ibid
[57] Ibid
[58] Sarah B. Biser et al Supra Ibid
[59] Ibid
[60] Ibid
[61] Nael G. Bunni Supra Ibid

disseminated.[62] He/she chairs the DB and Inspection meetings as well as any site or field visits and further guides on the necessity for expert witnesses or consultants particularly in respect of delay claims as the case may be.[63] It is the Chairman's responsibility to chair the deliberations after inspection and ultimately the decision of the DB tends to be signed by the chair following full consultations with all the DB members.[64]

3.4 Dispute Board Members

3.4.1 Tripartite Agreement

DB members should ensure that the tripartite agreement between themselves and the parties, employer and contractor, are duly signed and maintained as a record of their appointment and as a reference point for their mandate and terms of reference.[65]

3.4.2 Familiarity with the Contract Documents

As a first step DB members should familiarize themselves with the contract documents[66] and as the project progresses, they ought to ensure that they are upto date in their consideration of project progress reports and site visit records and reports. However, regardless of their professional background they ought not to engage with the parties on the content of the aforesaid contract documents as they are not consultants to the project.[67]

3.4.3 Preparatory Steps for Considering Disputes

Cyril Chern [68] proposes a simple procedure that involves (1) the claimant preparing a Case Examination which contains the respective claims and

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[62] Fadia Fitriyanti & Another Supra Ibid
[63] Ibid
[64] Ibid
[65] Nael G. Bunni Supra Ibid
[66] Ibid
[67] Ibid
[68] Cyril Chern, *Chern on Dispute Boards: Practice and Procedure* (2015) Oxon, UK: Routledge

supporting evidence; (2) the respondent prepares a response to the same and for purposes of controlling the countdown the operating procedures may provide that time does not begin to run until the DB has received both the Case Examination and the respective Response; (3) days are counted in calendar days and therefore the DB must ensure compliance along these lines; (4) the Initial Inspection is then convened where preliminary matters such as the timetable and preliminary legal issues such as the applicable contract law are agreed. The how, when and by whom the evidence should be delivered and handled is further confirmed; (5) the parties should ensure that a schedule of documentation is prepared and further that all DB members have the same documents; (6) inspection days should be scheduled, the necessary arrangements for the inspection made and the DB members and parties are required to attend such inspection days; and the DB members must render their decision within the requisite period provided under the contract.[69]

3.4.4 Making Decisions

DB members are entitled to undertake fact checks and they can take an inquisitorial approach to enable them to establish the issues in question requiring their decision. They may not be limited by legal procedures but any operational procedures they put in place are required to be fair, professional and innovative.[70]

As such (1) they consider the facts presented and evaluate them based on the prevailing contract between the parties; (2) they may call relevant witnesses they determine the relevant facts and sort out the irrelevant claims; (3) they examine the contract to determine the applicable law as well as the material contractual provisions of the claim; (4) they establish and decide the relevant law; and (5) they determine the law as stipulated in the contract, and apply it to the relevant determined facts.[71]

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[69] Ibid
[70] Fadia Fitriyanti & Another Supra Ibid
[71] Ibid

Though strict rules of evidence are generally not required the basic adage that he who alleges must prove is still followed with the standard of proof being that of a balance of probabilities and this standard is shared between the parties.[72] It is important to note that though the widely held position is that the rules of natural justice may not apply the dissenting opinion of Lord Justice Rix in A*mec Civil Engineering Ltd v Secretary of State for Transport* to the effect that it is incumbent upon an engineer performing a decision-making role to apply the rules of natural justice[73] perhaps speaks to the future and DB members will be well placed to observe the same.

DB members must further discuss all the points raised by the parties and weigh their consensus on the relevant facts, their interpretation of the contractual provisions vis-à-vis the facts, the relevant and applicable law and base their decision on the same.[74] The best DB decisions are those that are made unanimously and the members ought to keep this in mind though a majority decision will suffice.

4. Conclusion

As intimated at the onset, DBs are a relatively recent innovation in ADR scene and in the brief period that they have been around they have undergone a tremendous evolution which continues to prevail in respect of their character as well as the adjustments to their mandate and terms of reference. They remain highly dynamic and they are very responsive to the emerging demands upon the construction industry. Accordingly, without doubt and given the fact of the world in energy transition and the growing influence of the *United Nations Sustainable Development Goals*[75] we can expect to see continuing impact on the

[72] Ibid
[73] Dissenting opinion in A*mec Civil Engineering Ltd v Secretary of State for Transport* [2005] BLR 227
[74] Ibid
[75] United Nations, *Transforming our World: the 2030 Agenda for Sustainable Development (2015).* Available at

way DBs are organised and utilised in the construction industry for maximum effect.

<*https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement*> accessed on 19 March 2023

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Natural Resource Conflicts: Addressing Inter-Ethnic Strife through Environmental Justice in Kenya

By: ***Kariuki Muigua****

Abstract

Inter-ethnic conflicts in Kenya have become so common in some parts of the country that they are considered a perennial problem. While these conflicts have been attributed to many factors, environmental and natural resources are considered to be the main cause. The successive governments of Kenya over the years have responded in various ways to the security situation, including by way of deploying security forces in the affected regions. This paper discusses the connection between the availability of natural and environmental resources and the emergence of inter-ethnic conflicts in Kenya. The author argues that one of the most effective ways of tackling this perennial problem of inter-ethnic conflicts is enhancing environmental justice in these regions.

1. Introduction

This paper discusses the connection between the availability of natural and environmental resources and the emergence of inter-ethnic conflicts in Kenya. The paper specifically looks at the role of natural resources availability or scarcity in fuelling inter-ethnic conflicts in Kenya. The paper discusses this in the context of environmental justice and offers suggestions on how the perennial challenge of inter-ethnic conflicts among the mostly pastoralist communities can be addressed through enhancing their right to environmental justice.

It is however worth pointing out that while this paper focuses on inter-ethnic conflicts in Kenya, it has rightly been pointed out that within-country conflicts account for an enormous share of deaths and hardship in the world today.[1]

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Notably, internal conflicts often appear to be ethnic in nature.[2] Conflicts have been defined differently by various scholars. Conflict is viewed as a process of adjustment, which itself can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome.[3] Conflict can be defined as an existing state of disagreement or hostility between two or more people.[4] Conflict has also been defined as a struggle over values or claims to status and resources, in which the aim of the conflicting parties is not only the desired values but also neutralize, injure or eliminate their rivals.[5] Conflict is seen as an inevitable phenomenon in human society's sphere of life since the entire life of humankind is manipulated by the prevalence of conflict within the society when people set opinion against opinion, run interest against interests.[6] It has been observed that almost all societies, regardless of their location in time and space, have laws and mechanisms for handling disputes/conflicts and achieving resolution of differences.[7]

Arguably, most of these internal conflicts are related to resources. It has rightly been observed that in the majority of cases of resource conflicts, one or more of the following drivers are usually at play: conflict over resource ownership; conflict over resource access; conflict over decision making associated with

[1] Esteban, J., Mayoral, L., & Ray, D., "Ethnicity and conflict: Theory and facts," *science* 336, no. 6083 (2012): 858-865, at p.858.
[2] Ibid, p. 858.
[3] Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, *Understanding Conflict and war: Vol. 5: The Just Peace*.
[4] Libiszewski, S., "What is an environmental conflict?" *Journal of peace research* 28, no. 4 (1991): 407-422.
[5] Mengesha, A.D., et al., "Indigenous Conflict Resolution Mechanisms among the Kembata Society." *American Journal of Educational Research,* 2015, Vol. 3, No. 2, pp. 225-242 at pp.225-226.
[6] Ibid, p.226.
[7] Ibid, p. 226.

resource management; and conflict over distribution of resource revenues as well as other benefits and burdens.[8]

Natural resource conflicts are defined as social conflicts (violent or non-violent) that primarily revolve around how individuals, households, communities and states control or gain access to resources within specific economic and political frameworks.[9] They are the contests that exist as a result of the various competing interests over access to and use of natural resources such as land, water, minerals and forests. Natural resource conflicts mainly have to do with the interaction between the use of and access to natural resources and factors of human development factors such as population growth and socio-economic advancement.[10]

Competition for scarce resources may lead to a 'survival of the fittest' situation.[11] In such circumstances, environmental degradation poses a higher potential for conflict, as every group fights for their survival.[12] Even where resources are abundant, conflicts can arise when one group controls a disproportionate portion of the same ("Resource capture"). Resource capture occurs when the supply of a resource decreases due to either depletion or degradation and/or

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[8] The United Nations Department of Political Affairs and United Nations Environment Programme, *Natural Resources and Conflict: A Guide for Mediation Practitioners,* (2015, UN DPA and UNEP), p. 11.

[9] Funder, M., et al, 'Addressing Climate Change and Conflict in Development Cooperation Experiences from Natural Resource Management,' p. 17, (Danish Institute for International Studies, DIIS, 2012), available at *https://www.ciaonet.org/attachments/20068/uploads* [Accessed on 6/09/2016].

[10] Toepfer, K., "Forward", in Schwartz, D. & Singh, A., Environmental *conditions, resources and conflicts: An introductory overview and data collection* (UNEP, New York, 1999). p.4

[11] See generally, "Chapter 5: Survival at Stake: Violent Land Conflict in Africa," *Small Arms Survey 2013*, available at *http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2013/en/Small-Arms-Survey-2013-Chapter-5-EN.pdf* [Accessed on 6/9/2019].

[12] See Bowman, K., *et al,* "Chapter 1: Environment for Development," (United Nations), available at *http://www.unep.org/geo/geo4/report/01_Environment_for_Development.*pdf [Accessed on 6/9/2019].

demand increases (due to population and/or economic growth).[13] This encourages the more powerful groups in a society to exercise more control and even ownership of the scarce resource, thereby enhancing their wealth and power.[14] For instance, land has been an emotive issue in Kenya as it is in the hands of a few people in the country, and this has often led to tribal clashes.[15] These situations arise due to the resultant environmental insecurity suffered by some of the aggrieved groups.

While these natural resource conflicts may take many forms or shapes, this paper mainly restricts itself to those that take ethnic lines within a country, and in this case, Kenya. The next section looks at the nature and causes of these inter-ethnic conflicts.

2. Inter-Ethnic Conflicts in Kenya: Meaning and Causes

Ethnic conflict can be defined as a form of conflict in which the objectives of at least one party are defined in ethnic terms, and the conflict, its antecedents, and possible solutions are perceived along ethnic lines.[16] Notably, the conflict is usually not about ethnic differences themselves but over political, economic, social, cultural, or territorial matters.[17]

Inter-ethnic conflicts amongst Kenyan communities especially those practising pastoralism have a long history.[18] These conflicts are mostly armed, with competing groups using either crude weapons or illegally acquired arms.

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[13] Khagram, S., *et al*, "From the Environment and Human Security to Sustainable Security and Development," *Journal of Human Development*, Vol. 4, No. 2, July 2003, pp. 289-313, p. 295.
[14] Ibid.
[15] See the *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*', (the 'Akiwumi Commission'), (Government Printer, Nairobi, 1999).
[16] "Ethnic conflict", *Encyclopedia Britannica*, available at *https://www.britannica.com/topic/ethnic-conflict* [Accessed on 6/9/2019].
[17] Ibid.
[18] See generally, Bollig, M., "Ethnic conflict in North-West Kenya: Pokot-Turkana Raiding 1969-1984," *Zeitschrift für Ethnologie*, 115 (1990), pp.73-90.

Armed conflict is defined as a mechanism of social transformation that may originate either in competing claims over resources, power, or in conflicting cultural or social values, and is often aggravated by low levels of human security.[19]

Several factors such as competition over scarce resources, the age-set system as a quasi-military interest group and the ideals of warrior-hood have been cited as some of the causes of warfare amongst East African herders.[20] These inter-ethnic tensions have often been experienced in several parts of Kenya, attributable to different factors, but mainly the struggle for access to the scarce environmental resources.[21]

2.1 Causes of Inter-Ethnic Conflicts in Kenya

It has rightly been argued that while armed conflicts have been prevalent throughout history, in some cases having very great consequences, to win, one

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[19] Wangeci, N. L., Njoroge, M. N. and Manyasa, E., "Causes of armed ethnic conflict and the implication for peace education in Nakuru county, Kenya," *Journal of Special Needs and Disabilities Studies*, 2014. Available at https://ir-library.ku.ac.ke/handle/123456789/13574 [Accessed on 2/9/2019].

[20] Bollig, M., "Ethnic conflict in North-West Kenya: Pokot-Turkana Raiding 1969-1984," *Zeitschrift für Ethnologie* 115 (1990), pp. 73-90, at p.76.

[21] Rohwerder, B., "Conflict analysis of Kenya," *Birmingham: GSDRC University of Birmingham* (2015). Available at *http://www.gsdrc.org/wp-content/uploads/2015/12/KenyaConflictAnalysis.pdf* [Accessed on 6/9/2019]; Makoloo, M. O., Ghai, Y. P., & Ghai, Y. P., *Kenya: Minorities, indigenous peoples and ethnic diversity*, London: Minority Rights Group International, 2005. Available at *https://minorityrights.org/wp-content/uploads/old-site-downloads/download-147-Kenya-Minorities-Indigenous-Peoples-and-Ethnic-Diversity.pdf* [Accessed on 6/9/2019]; International Crisis Group, "Kenya's Rift Valley: Old Wounds, Devolution's New Anxieties," Report No.
248 / Africa 30 May 2017. Available at *https://d2071andvip0wj.cloudfront.net/248-kenya-s-rift-valley-old-wounds-devolution-s-new-anxieties.pdf* [Accessed on 6/9/2019]; Murunga, G.R., *Spontaneous or Premeditated? Post-election Violence in Kenya*. Nordiska Afrikainstitutet, 2011. Available at *http://www.diva-portal.org/smash/get/diva2:451262/FULLTEXT01.pdf* [Accessed on 6/9/2019].

needs to understand the characteristics of an armed conflict and be prepared with resources and capabilities for responding to its specific challenges.[22] Armed conflicts have been attributed to disagreements on controlling territory, economic interests (such as natural resources), religion, culture, and ideology.[23] Ethnic conflicts within a state have also been referred as those that belong to identity conflicts that are a type of internal conflicts.[24] Besides identity conflicts there are other types of internal conflicts such as ideological conflicts, governance conflicts, racial conflicts and environmental conflicts.[25] Some authors have even proposed that there was a connection between ethnic divisions and colonialism in Africa.[26] Some theories on ethnic conflict, argue that ethnic conflict is the response to a perceived threat to one's identity.[27] The ethnic tensions in Kenya may arguably fall within this classification, as they are often fueled by some kind of dissatisfaction by one group in matters relating to environmental, social, economic or political spheres.[28]

This section discusses some of these causative factors of inter-ethnic conflicts in the context of Kenya. The paper however generally has a bias towards

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[22] Esteban, J., Mayoral, L., & Ray, D., "Ethnicity and conflict: Theory and facts," *science* 336, no. 6083 (2012): 858-865, at p.865.
[23] Ibid, p. 865.
[24] Ismayilov, G., "Ethnic Conflicts and Their Causes," (2008). Available at *https://scholar.google.com/scholar?cluster=11638631732520705425&hl=en&as_sdt=0,5&sciq=Causes+of+Inter-Ethnic+Conflicts+* [Accessed on 2/9/2019].
[25] Ibid.
[26] See generally, Tembo, N.M., "Ethnic Conflict and the Politics of Greed Rethinking Chimamanda Adichie's," *Matatu*, 40, no. 1 (2012): 173-189.
[27] Azuimah, F., "Perception as a Social infrastructure for sustaining the escalation of ethnic conflicts in divided societies in Ghana," *Journal of Alternative Perspectives in the Social Sciences*, vol.3, no. 1 (2011): 260-278, p. 265.
[28] Mghanga, M., "Usipoziba Ufa Utajenga Ukuta: Land," *Elections, and Conflict in Kenya's Coast Province, Heinrich Böll Stiftung* (2010). Available at *https://ke.boell.org/sites/default/files/usipoziba_ufa_utajenga_ukuta_book_index.pdf* [Accessed on 6/9/2019]; Kenya Human Rights Commission, "Ethnicity and Politicization in Kenya", May 2018, ISBN: 978-9966-100-39-9. Available at *https://www.khrc.or.ke/publications/183-ethnicity-and-politicization-in-kenya/file.html* [Accessed on 6/9/2019].

environmentally fuelled ethnic conflicts in Kenya. In addition, while there may be many factors that fuel inter-ethnic conflicts, this paper looks at three main reasons which may be considered to be the major ones.

a. Climate Change and Environmental Resources Scarcity

Some scholars have persuasively argued that not all environmental problems lead to conflict, and not all conflicts stem from environmental problems, and that indeed it is rare for linkages to be directly and exclusively causative.[29] They argue that while environmental phenomena contribute to conflicts, they can rarely be described as sole causes: there are too many other variables mixed in such as inefficient economies, unjust social systems and repressive governments, any of which can predispose a nation to instability-and thus, in turn, make it especially susceptible to environmental problems.[30] While this may be true, it is noteworthy that the link between the two is more pronounced in developing countries, like Kenya, where most people derive their livelihoods from the environment.[31]

Thus, while some argued that there is no direct and linear relationship between climate change and violent conflict, under certain circumstances climate-related change can influence factors that lead to or exacerbate conflict. Reduced access to water and extreme weather events may e.g. negatively affect food security and undermine the livelihoods of vulnerable households and communities.[32]

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[29] Myers, N., "Environmental Security: What's New and Different?" Available at *http://www.envirosecurity.org/conference/working/newanddifferent.pdf* [Accessed on 11/10/2015], p.3.

[30] Ibid, p.3; See also generally, N.R. Biswas, "Is the Environment a Security Threat? Environmental Security beyond Securitization," *International Affairs Review*, Vol. XX, No. 1, Winter 2011.

[31] See S. Bocchi, et al, 'Environmental Security: A Geographic Information System Analysis Approach—The Case of Kenya,' Environmental Management Vol. 37, No. 2, 2005, pp. 186–199, pp. 191-195.

[32] SIDA, "The relationship between climate change and violent conflict," 2018, p.4. Available at

This is especially relevant in understanding the conflicts that often emerge in Kenya's drier regions such as Northern Kenya and Coastal areas, among others.[33]

It has rightly been observed that social conflict is not always a bad thing: mass mobilization and civil strife can produce opportunities for beneficial change in the distribution of land and wealth and in processes of governance.[34] However, fast-moving, unpredictable, and complex environmental problems can overwhelm efforts at constructive social reform.[35]

Natural resources are important for meeting the basic needs of most communities in Kenya and the world over. However, these resources are under threat due to various factors which include poverty, climate change, desertification, unsustainable exploitation and environmental degradation, among others. Climate change and biodiversity conservation have thus been said to be the common concern of humanity as all States derive benefits from protective action taken either unilaterally or collectively.[36] Indeed, the impacts

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https://www.sida.se/contentassets/c571800e01e448ac9dce2d097ba125a1/working-paper---climate-change-and-conflict.pdf [Accessed on 2/09/2019].

[33] Human Rights Watch, "There is No Time Left", *Climate Change, Environmental Threats, and Human Rights in Turkana County, Kenya*, October 15, 2015. Available at *https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana* [Accessed on 6/09/2019]; Osamba, J., "Political Economy: A Social Cubism Perspective," *ILSA Journal of International & Comparative Law* 8, no. 3 (2002): 941-961; Constitution and Reform Education Consortium, "Building A Culture of Peace in Kenya: Baseline Report On Conflict-Mapping and Profiles of 47 Counties in Kenya," April, 2012. ISBN: 978-9966-21-158-3. Available at *https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/CRECO_2012.pdf* [Accessed on 6/09/2019]; Menkhaus, K., "Conflict Assessment: Northern Kenya and Somaliland." *Available at SSRN 2589109* (2015).

[34] Homer-Dixon, T.F., "Environmental scarcities and violent conflict: evidence from cases." *International security* 19, no. 1 (1994): 5-40.

[35] Ibid.

[36] Cullet, P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law,* (Aldershot: Ashgate, 2003), p. 3-5.

of climate change are increasingly viewed as global security risks, which will have far-reaching implications for both human and renewable natural systems.[37]

The Bali Principles of Climate Justice of 2002 (Bali Principles)[38] acknowledge that if consumption of fossil fuels, deforestation and other ecological devastation continues at current rates, it is certain that climate change will result in increased temperatures, sea level rise, changes in agricultural patterns, increased frequency and magnitude of "natural" disasters such as floods, droughts, loss of biodiversity, intense storms and epidemics. Further, deforestation contributes to climate change, while having a negative impact on a broad array of local communities. Notably, deforestation has been one of the major problems contributing to climate change in Kenya.[39] This problem was even acknowledged in the Climate Change Policy and there have been attempts to address the same through the enactment of the *Climate Change Act, 2016*[40] which is meant to provide for the legal and institutional framework for the mitigation

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[37] World Economic Forum, "We need to do more to understand how climate change and conflict are linked. Here's why," 2018. Available at *https://www.weforum.org/agenda/2018/09/we-need-to-do-more-to-understand-how-climate-change-and-conflict-are-linked-heres-why/* [Accessed on 2/09/2019].

[38] Available at *http://www.ejnet.org/ej/bali.pdf* [Accessed on 2/09/2019].

[39] United Nations Environment Programme, "Deforestation Costing Kenyan Economy Millions of Dollars Each Year and Increasing Water Shortage Risk," 5 November 2012. Available at *https://www.unenvironment.org/news-and-stories/press-release/deforestation-costing-kenyan-economy-millions-dollars-each-year-and* [Accessed on 6/09/2019]; VOA, Kenya Experiencing the Effects of Deforestation, Climate Change, November 1, 2009. Available at *https://www.voanews.com/archive/kenya-experiencing-effects-deforestation-climate-change-0* [Accessed on 6/09/2019]; Republic of Kenya, *A report on Forest Resources Management and Logging Activities in Kenya: Findings and Recommendations*, April, 2018. Available at *http://www.environment.go.ke/wp-content/uploads/2018/05/Task-Force-Report.pdf* [Accessed on 6/09/2019].

[40] No. 11 of 2016, Laws of Kenya.
The Act defines "climate change" to mean a change in the climate system which is caused by significant changes in the concentration of greenhouse gases as a consequence of human activities and which is in addition to natural climate change that has been observed during a considerable period (s.2).

and adaption to the effects of climate change; to facilitate and enhance response to climate change; to provide for the guidance and measures to achieve low carbon climate resilient development and for connected purposes,[41] amongst other efforts by the stakeholders such as the eviction of communities living in Kenya's five water towers - Mau Forest Complex, Mount Kenya, the Aberdares, Mount Elgon and Cherangani.[42]

The Bali Principles also affirm the fact that the impacts of climate change are disproportionately felt by small island states, women, youth, coastal peoples, local communities, indigenous peoples, fisherfolk, poor people and the elderly. Also noteworthy is the assertion that the local communities, affected people and indigenous peoples have been kept out of the global processes to address climate change.

There are three types of environmental scarcity: supply-induced scarcity is caused by the degradation and depletion of an environmental resource; demand-induced scarcity results from population growth within a region or increased per capita consumption of a resource, either of which heightens the demand for the resource; and structural scarcity arises from an unequal social

[41] Ibid, preamble. The Act, *inter alia,* provides: a framework for mitigating and adapting to the effects of climate change on all sectors of the economy and levels of governance; a mechanism for coordination and governance of matters relating to climate change; coordination mechanism for formulation of programmes and plans to enhance the resilience of human and ecological systems against the impacts of climate change; for mainstreaming of the principle of sustainable development in the planning for and on climate change response strategies and actions; for promotion of social and economic measures in climate change responses to support sustainable human development; and a mechanism for coordination of measuring , verification and reporting of climate interventions (S.3 (1)).

[42] Amnesty International, et al, "Nowhere to go Forced Evictions in Mau Forest, Kenya," Briefing Paper, April 2007. Available at *http://www.knchr.org/Portals/0/GroupRightsReports/Mau%20Forest%20Evictions%20Report.pdf* [Accessed on 6/09/2019]; Rita, D., "Mau eviction will be humane, settlers to get 60 grace period," *The Star,* 28 August, 2019.

distribution of a resource that concentrates it in the hands of relatively few people while the remaining population suffers from serious shortages.[43]

Environmental deficiencies supply conditions which render conflict all the more likely. They can serve to determine the source of conflict, they can act as multipliers that aggravate core causes of conflict, and they can help to shape the nature of conflict. Moreover they can not only contribute to conflict, they can stimulate the growing use of force to repress disaffection among those who suffer the consequences of environmental decline.[44] This has been the case in Kenya's arid and semi-arid areas where pastoralists' tribal clashes over resources have recurred over the years with no successful intervention by the Government.[45] The limited water and pasture resources creates competition and tension amongst these communities, often leading to conflicts.

The *Bali Principles* also acknowledge that unsustainable production and consumption practices are at the root of this and other global environmental problems. The impacts of climate change also threaten food sovereignty and the security of livelihoods of natural resource-based local economies. They can also threaten the health of communities around the world-especially those who are vulnerable and marginalized, in particular children and elderly people. These

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[43] Percival, V., & Homer-Dixon, T., "Environmental scarcity and violent conflict: the case of South Africa," *Journal of Peace Research* 35, no. 3 (1998): 279-298, at p.280.

[44] Myers, N., "Environmental Security: What's New and Different?" Available at *http://www.envirosecurity.org/conference/working/newanddifferent.pdf* [Accessed on 11/10/2015], p.4.

[45] Oba, G., "The Importance of Pastoralists 'indigenous Coping Strategies for Planning Drought Management in The Arid Zone of Kenya," *Nomadic Peoples* (2001): 89-119; Oba, G., & Lusigi, W. J., *An overview of drought strategies and land use in African pastoral systems*, Agricultural Administration Unit, Overseas Development Institute, 1987; Oba, G., *Ecological factors in land use conflicts, land administration and food insecurity in Turkana, Kenya*. London: ODI, 1992; Kenya National Commission on Human Rights, "Public Inquiry on Insecurity in the Baringo and the North Rift of Kenya: Literature Review," October 2015, available at *http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Literature%20Review.pdf?ver=2016-06-20-122534-937* [Accessed on 6/9/2019].

principles envisage a situation where countries will put in place measures geared towards addressing and eliminating any unsustainable production and consumption practices in their territories in a bid to curb environmental degradation.

Indeed, scientists have warned that climate change will hit many African countries more severely than previously thought.[46] The scientists, from Britain's Meteorological Office and Leeds University, have argued that people in Africa will likely be among the hardest hit by climate change over the coming decades – with less capacity to deal with the impact.[47] The adverse effects of these climatic changes especially in the Sub-Saharan region, including Kenya have been affirmed and documented by various authors.[48]

The UNESCO has observed that the effects of global warming and climate change impacts are already contributing to increased state fragility and security problems in key regions around the world – conflict in the Middle East and Africa, tensions over fisheries in the South China Sea, and a new political and economic battleground in a melting Arctic Ocean.[49] UNESCO goes on to state that climate change stresses on natural resources – combined with demographic, economic and political pressures on those resources – can degrade a nation's capacity to govern itself.[50] This includes its ability to meet its citizens' demands

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[46] VOA for Citizen Digital, "Climate change to cause chaos in Africa, warn scientists," Published on: August 6, 2019 07:15 (EAT).
Available at *https://citizentv.co.ke/news/climate-change-cause-chaos-africa-warn-scientists-267811/* [Accessed on 2/09/2016].
[47] Ibid.
[48] Serdeczny, O., Adams, S., Baarsch, F., Coumou, D., Robinson, A., Hare, W. & Reinhardt, J., "Climate change impacts in Sub-Saharan Africa: from physical changes to their social repercussions," *Regional Environmental Change* 17, no. 6 (2017): 1585-1600.
[49] UNESCO, "Climate change raises conflict concerns," *the UNESCO Courier,* 2018-2, available at *https://en.unesco.org/courier/2018-2/climate-change-raises-conflict-concerns* [Accessed on 2/09/2016].
[50] Ibid; United Nations, "Renewable Resources and Conflict," *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts*,2012. Available at *https://www.un.org/en/events/environmentconflictday/pdf/GN_Renewable_Consultation.pdf*

for basic resources – like food, water, energy and employment – also known as its output legitimacy. The threat to output legitimacy can contribute to state fragility, internal conflict, and even state collapse. Seen through this lens, climate change may present a serious challenge to state stability and legitimacy in the Horn of Africa – a region already grappling with numerous challenges before climate change became a factor.[51]

The Horn of Africa which includes some of the most vulnerable states in the world – Somalia, Ethiopia, Eritrea, Kenya, Sudan and South Sudan has been reported as a region that exhibits some of the clearest indications of a connection between climate change and conflict – namely, conflicts between agricultural and pastoral communities precipitated by climate-exacerbated droughts and water variability.[52]

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*[*Accessed on 6/9/2019]; Sherbinin, A. D., Carr, D., Cassels, S., & Jiang, L., "Population and environment," *Annu. Rev. Environ. Resour.* 32 (2007): 345-373; Evans, A., "Resource scarcity, climate change and the risk of violent conflict." *World Development Report 2011: Background Paper.* Available at *http://web.worldbank.org/archive/website01306/web/pdf/wdr%20background%20paper_evans_0.pdf* [Accessed on 6/9/2019]; Yohe, G., Lasco, R., Ahmad, Q. K., UK, N. A., Cohen, S., Janetos, T. & Malone, T., "Perspectives on Climate Change and Sustainability 3." *change* 25, no. 48 (2007): 49; Black, R., Kniveton, D., Skeldon, R., Coppard, D., Murata, A., & Schmidt-Verkerk, K., "Demographics and climate change: future trends and their policy implications for migration," *Development Research Centre on Migration, Globalisation and Poverty, Brighton: University of Sussex* (2008).

[51] Ibid; See also Vallings, C., & Moreno-Torres, M., *Drivers of fragility: What makes states fragile?* No. 668-2016-45529. 2005; Rotberg, R.I., "Failed states, collapsed states, weak states: Causes and indicators," *State failure and state weakness in a time of terror* 1 (2003): 25; DiJohn, J., *Conceptualising the causes and consequences of failed states: a critical review of the literature*. London: Crisis States Research Centre, 2008. Available at *http://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csrc-working-papers-phase-two/wp25.2-conceptualising-the-causes-and-consequences.pdf.*

[52] Ibid; See also Reliefweb, "Greater Horn of Africa Climate Risk and Food Security Atlas," *Report from Government of Sweden, Intergovernmental Authority on Development, World Food Programme*,
Published on 27 Sep 2018Available at *https://reliefweb.int/report/world/greater-horn-africa-climate-risk-and-food-security-atlas* [Accessed on 6/9/2019]; Reliefweb, "Climate Change Profile: Greater Horn of Africa," Report

Climate-related environmental change influences violent conflicts when: (a) it negatively affects people's livelihoods; (b) it influences the tactical considerations of armed groups in ongoing conflicts; (c) elites exploit social vulnerabilities and resources; and (d) it displaces people and increases migration in vulnerable and highly vulnerable natural resource dependent contexts.[53]

Studies have shown that the risk of violence increases, particularly among farmers and pastoralists who depend directly on agro-ecosystems for their livelihoods, when drought, floods or land overuse and degradation lead to decreasing production and economic loss.[54] This is usually explained as reduced opportunity costs of using violence to seize control over resources compared to traditional livelihoods. As already pointed out above, these are the risks that persistently face the arid and semi-arid areas in Kenya and the horn of Africa in general.

b. The Impact of Politics and Government Policies on Ethnic Conflicts

It has been argued that environmental scarcity emerges within a political, social, economic, and ecological context and interacts with many of these contextual

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from Government of the Netherlands, Published on 05 Feb 2019. Available at *https://reliefweb.int/report/world/climate-change-profile-greater-horn-africa* [Accessed on 6/9/2019]; Mengisteab, K., *Critical factors in the Horn of Africa's raging conflicts*. Nordiska Afrikainstitutet, 2011; United Nations Economic Commission for Africa, "Human and Economic Cost of Conflict in the Horn of Africa: Implications for a Transformative and Inclusive Post-Conflict Development," 2016. Available at *https://repository.uneca.org/bitstream/handle/10855/23726/b11836143.pdf?sequence=1* [Accessed on 6/9/2019].

[53] World Economic Forum, "We need to do more to understand how climate change and conflict are linked. Here's why," 2018. Available at *https://www.weforum.org/agenda/2018/09/we-need-to-do-more-to-understand-how-climate-change-and-conflict-are-linked-heres-why/* [Accessed on 2/09/2019].

[54] SIDA, "The relationship between climate change and violent conflict," 2018, p.10. Available at *https://www.sida.se/contentassets/c571800e01e448ac9dce2d097ba125a1/working-paper---climate-change-and-conflict.pdf* [Accessed on 2/09/2019].

factors to contribute to violence.[55] Arguably, contextual factors include the quantity and vulnerability of environmental resources, the balance of political power, the nature of the state, patterns of social interaction, and the structure of economic relations among social groups.[56] These factors, it has been observed, affect how resources will be used, the social impact of environmental scarcities, the grievances arising from these scarcities, and whether grievances will contribute to violence.[57]

Notably, when some groups of people fight across ethnic lines it is nearly always the case that they fight over some fundamental issues concerning the distribution and exercise of power, whether economic, political, or both.[58] Notably, groups engaged in internal conflict are often united by a common ethnic or religious identity.[59] The tribal conflicts in Kenya over the past decades have often taken this shape, with some informed by political influences while others are based on resource scarcity but ultimately, they may all be connected as political power cannot be divorced from resource control.[60]

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[55] Percival, V., & Homer-Dixon, T., "Environmental scarcity and violent conflict: the case of South Africa," *Journal of Peace Research* 35, no. 3 (1998): 279-298, at p.279.
[56] Ibid, p.279.
[57] Ibid, p. 279; see also Gleditsch, N.P., "Armed conflict and the environment: A critique of the literature," *Journal of peace research* 35, no. 3 (1998): 381-400.
[58] Brown, G. K., & Stewart, F., "Economic and political causes of conflict: An overview and some policy implications," *Managing Conflict in a World Adrift* (2015): 199-227, at p. 204.
[59] Ibid.
[60] Wangeci, N. L., Njoroge, M. N. and Manyasa, E., "Causes of armed ethnic conflict and the implication for peace education in Nakuru county, Kenya," *Journal of Special Needs and Disabilities Studies*, 2014. Available at *https://ir-library.ku.ac.ke/handle/123456789/13574* [Accessed on 2/9/2019]; Kagwanja, P.M., "Facing Mount Kenya or facing Mecca? The Mungiki, ethnic violence and the politics of the Moi succession in Kenya, 1987–2002," *African Affairs* 102, no. 406 (2003): 25-49; Kanyinga, K., "The legacy of the white highlands: Land rights, ethnicity and the post-2007 election violence in Kenya." *Journal of Contemporary African Studies* 27, no. 3 (2009): 325-344; Mueller, S.D., "Dying to win: Elections, political violence, and institutional decay in Kenya," *Journal of Contemporary African Studies* 29, no. 1 (2011): 99-117.

Arguably, government policies sometimes also play a role in causing or worsening ethnic or internal conflict situations. For instance, the *Endorois case,*[61] where the Endorois community was fighting against violations resulting from their displacement from their ancestral lands without proper prior consultations, adequate and effective compensation for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of their development as a people demonstrates how the Government's policies that exclude communities from decision-making policies can adversely affect the livelihoods of such group of people resulting in conflicts. The African Commission on Human and Peoples' Rights (ACHPR) found Kenya to be in violation of the African Charter,[62] and urged Kenya to, *inter alia,* recognise the rights of ownership of the Endorois; restitute their ancestral land; ensure the Endorois have unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle. There is no evidence so far that this decision was acted upon by the Government.[63]

Such scenarios as the one of Endorois community can fuel internal conflicts where, if and when such a group of people is displaced, they have to look for new settlement areas. More often than not, they will seek to settle among other communities. The resultant friction and tension can result in ethnic conflicts. While the governments' capacity to repress rebellions may quell the open conflict, it has been argued that they often fail to address the underlying

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[61] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, No.* 276 / 2003.

[62] Arts.1, 8, 14, 17, 21 and 22. The Kenyan government had violated their right to religious practice (Art. 8), right to property (Art. 14), right to freely take part in the cultural life of his/her community (Art. 17), right of all peoples to freely dispose of their wealth and natural resources (Art. 21), and right to development (Art. 22).

[63] Koech, G., "Agency wants proof that Ogieks can protect water towers," *The Star*, 10 June, 2019. Available at *https://www.the-star.co.ke/news/2019-06-10-agency-wants-proof-that-ogieks-can-protect-water-towers/* [6/9/2019].

economic, social, or political causes.[64] Political refugees have often suffered under the hands of locals who consider them foreign, either in their country or other countries.[65]

There is scholarly evidence to suggest that economic and social horizontal inequalities[66] provide the conditions that lead to dissatisfaction among the general population and, consequently, give rise to the possibilities of political mobilization, but political exclusion is likely to trigger conflict by giving group leaders a powerful motive to organize in order to gain support.[67] There is also often a provocative cultural dimension in group mobilization.[68] The 2007/2008 post-election violence in Kenya may be explained this way.[69]

Political tensions such as those witnessed in post-election violence of 2007-2008 in Kenya also caused ethnic conflicts resulting in deaths.[70] This mainly involved a class of political leaders using certain ethnic groups to either capture power or remain in power.[71] Another example of political influence coupled with natural

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[64] Brown, G. K., & Stewart, F., "Economic and political causes of conflict: An overview and some policy implications," *Managing Conflict in a World Adrift* (2015): 199-227, at p. 199.

[65] Human Rights Watch, *Forced to Flee: Violence against the Tutsis in Zaire*, 1 July 1996, A802, available at: *https://www.refworld.org/docid/3ae6a8200.*html [accessed 5/9/2019].

[66] Horizontal inequalities are multidimensional, involving access to a variety of resources along economic, social, and political vectors or dimensions.

[67] Brown, G. K., & Stewart, F., "Economic and political causes of conflict: An overview and some policy implications," *Managing Conflict in a World Adrift* (2015): 199-227, at p. 206.

[68] Ibid, p. 206.

[69] Stewart, F., "Horizontal inequalities in Kenya and the political disturbances of 2008: some implications for aid policy," *Conflict, Security & Development* 10, no. 1 (2010): 133-159.

[70] Maupeu, H., "Revisiting Post-Election Violence," *The East African Review,* No. 38, 2008, p. 193-230. Available at *https://journals.openedition.org/eastafrica/719* [Accessed on 5/9/2019].

[71] Lafargue, J., & Katumanga, M., "Kenya in turmoil: Post-election violence and precarious pacification," *Les Cahiers d'Afrique de l'Est/The East African Review* 38 (2008):

resource scarcity on eruption of inter-ethnic conflicts is the Rwanda genocide of 1994.[72] It has been documented that the discontentment of the poor peasantry driven by environmental and population pressures, in conjunction with drought and famine, made leaders of the Tutsi rebellion based in Uganda believe that there was an opening for war against the regime. When the country became deeply entangled in the war, radical leaders were able to re-center the political dialectic, from rich versus poor, to Tutsi against Hutu, inciting ethnic hatred and the spiral of political violence which led to genocide in 1994.[73]

It has been observed that with scarcity, distributional conflicts over access to natural resources will become much more pressing, both within and between countries.[74] As a result, it has been argued that while seeking to address the all the above mentioned three factors of environmental degradation, population

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11-32; Centre for Strategic and International Studies, "Background on the Post-Election Crisis in Kenya, "August 6, 2009. Available at *https://www.csis.org/blogs/smart-global-health/background-post-election-crisis-kenya* [Accessed on 5/9/2019]; Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance," March 16, 2008. Available at *https://www.hrw.org/report/2008/03/16/ballots-bullets/organized-political-violence-and-kenyas-crisis-governance* [Accessed on 5/9/2019].

[72] Moodley, V., Gahima, A., & Munien, S., "Environmental causes and impacts of the genocide in Rwanda: Case studies of the towns of Butare and Cyangugu," *African Journal on Conflict Resolution* 10, no. 2 (2010); Human Rights Watch, *forced to Flee: Violence Against the Tutsis in Zaire*, 1 July 1996, A802, available at: https://www.refworld.org/docid/3ae6a8200.html [accessed 5 September 2019]; Gasana, J.K., *Natural resource scarcity and violence in Rwanda*, 1999. Available at https://www.iisd.org/pdf/2002/envsec_conserving_4.pdf [Accessed on 5/9/2019].

[73] Gasana, J.K., *Natural resource scarcity and violence in Rwanda*, 1999, at p.207. Available at *https://www.iisd.org/pdf/2002/envsec_conserving_4.pdf* [Accessed on 5/9/2019]; Uvin, P., "Prejudice, crisis, and genocide in Rwanda," *African Studies Review* 40, no. 2 (1997): 91-115; Batware, B., "Rwandan Ethnic Conflicts: A historical look at Root Causes," *Unpublished master's thesis). Peace and Conflicts Studies, European Peace University, Austria* (2012).

[74] Department of Economic and Social Affairs of the United Nations Secretariat, "World Economic and Social Survey 2013: Sustainable Development Challenges," E/2013/50/Rev. 1S T/ESA /34 4, p.20. Available at *https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf* [Accessed on 5/9/2019].

growth and inequalities, deemed as 'sources' of environmental scarcity and conflict, they must be understood as resulting from political decisions.[75] They must therefore not be depoliticized wholly as government policies may affect the direction that such a conflict takes.[76] This is because inequalities in access to and control over resources cannot be detached from the political economic conflicts already existent in society.[77]

c. Extreme Levels of Poverty

Eradicating extreme poverty, promoting sustainable consumption and production, and managing the planet's natural resource base for the benefit of all are considered as the overarching challenges of sustainable development.[78] Notably, most Kenyan communities either rely on agriculture or pastoralism or both and any adverse climatic conditions may subject them to extreme levels of poverty due to the lost livelihoods.[79]

It has been argued that environmental degradation interacted with population growth and inequalities cause a loss of livelihoods and subsequently render a large part of the population as ready perpetrators of violence such as was the case in the Rwanda genocide.[80] In such a scenario, it has been observed, poverty

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[75] MacDermott, J., "The livelihood conflicts approach on trial in Rwanda: towards a political critique," *Development Studies Institute Working Paper No. 01* 21 (2001), p.4. Available at *http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP21.pdf* [Accessed on 5/9/2019].
[76] Ibid, p.4.
[77] Ibid, p.4.
[78] Department of Economic and Social Affairs of the United Nations Secretariat, "World Economic and Social Survey 2013: Sustainable Development Challenges," E/2013/50/Rev. 1S T/ESA /34 4, p.3. Available at *https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf* [Accessed on 5/9/2019].
[79] FAO, "FAO in Kenya: Kenya at a Glance," available at *http://www.fao.org/kenya/fao-in-kenya/kenya-at-a-glance/en/* [Accessed on 6/9/2019].
[80] MacDermott, J., "The livelihood conflicts approach on trial in Rwanda: towards a political critique," *Development Studies Institute Working Paper No. 01* 21 (2001), p.1. Available at

is integrated in the concept in that the loss of livelihood is presented as a "rapid transition from a previous stable condition of relative welfare into a condition of poverty or destitution".[81] This, it is contended paves the way for mobilisation of popular support for violent conflict at a rate that would not otherwise be possible to achieve.[82] Thus, livelihood losses are conceived of as a result of the three factors: environmental degradation; population growth; and/or inequalities.[83]

Thus, environmental insecurity coupled with extreme levels of poverty often give rise to conflicts as the affected group of people seek to meet their basic needs.[84] Environmental security is defined as environmental viability for life support, with three sub-elements; preventing or repairing military damage to the environment, preventing or responding to environmentally caused conflicts, and protecting the environment due to its inherent moral value.[85] It has also been defined as the process of peacefully reducing human vulnerability to

http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP21.pdf [Accessed on 5/9/2019].
[81] Ibid, p. 1.
[82] Ibid, p.1.
[83] Ibid, p.1; see also Meierding, E., "Climate change and conflict: avoiding small talk about the weather." *International Studies Review* 15, no. 2 (2013): 185-203; Upreti, B. R., & Sharma, S. R., *Nepal: Transition to Transformation*, Edited by Kailash Nath Pyakuryal, Human and Natural Resources Studies Center, Kathmandu Univ., 2008.
[84] Voices of Youth, "The relationship between poverty and the environment," November 5, 2016. Available at *https://www.voicesofyouth.org/blog/relationship-between-poverty-and-environment* [Accessed on 5/9/2019]; Department of Economic and Social Affairs of the United Nations Secretariat, "World Economic and Social Survey 2013: Sustainable Development Challenges," E/2013/50/Rev. 1S T/ESA /34 4, available at *https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf* [Accessed on 5/9/2019].
[85] Ayeni, A.O. & Olorunfemi, F.B., 'Reflections on Environmental Security, Indigenous Knowledge and the Implications for Sustainable Development in Nigeria,' *Jorind*, Vol. 12, No. 1, June, 2014, pp. 46-57 at p. 51.

human-induced environmental degradation by addressing the root causes of environmental degradation and human insecurity.[86]

A broader conception of environmental security, it has been argued, is crucial because, at least in the long term, security, even in the traditional sense, can be ensured only if security in the environmental sense is emphasized. Only where ecological balance is maintained, resources are protected, and supplies ensured, will the potential for conflict be significantly reduced.[87] While arguing for the connection between environmental security and human security as envisaged in the sustainable development agenda, it has been argued that *few threats to peace and survival of the human community are greater than those posed by the prospects of cumulative and irreversible degradation of the biosphere on which human life depends. True security cannot be achieved by mounting buildup of weapons (defence in a narrow sense), but only by providing basic conditions for solving non-military problems which threaten them. Our survival depends not only on military balance, but on global cooperation to ensure a sustainable environment* (emphasis added).[88]

The persistence of inequalities, whether in incomes, or in access to services, decent jobs, land or technology, it has been observed, hints at their entrenched structural causes. Discrimination and exclusion, based on gender, age, disability or ethnicity, have to be tackled directly in order that greater inclusiveness and transformative change may be achieved.[89]

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[86] Rita, F., "The Environmental Security Debate and Its Significance for Climate Change," *The International Spectator: Italian Journal of International Affairs*, Vol. 43, Issue 3, 2008, pp.51-65 at p. 56.

[87] See Muigua, K., *Nurturing Our Environment for Sustainable Development,* Glenwood Publishers, Nairobi, 2016, p.164.

[88] World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, 1987, A/42/427.

[89] Department of Economic and Social Affairs of the United Nations Secretariat, "World Economic and Social Survey 2013: Sustainable Development Challenges," E/2013/50/Rev. 1S T/ESA /34 4, p.21. Available at *https://sustainabledevelopment.un.org/content/documents/2843WESS2013.pdf* [Accessed on 5/9/2019].

Arguably, as long as the communities living in arid and semi-arid areas in Kenya suffer disproportionate levels of environmental injustice and continue living in abject poverty coupled with feelings of discrimination and exclusion, it may not be possible for the Government of Kenya to guarantee security in these regions. Peace initiatives must look deeper than the symptoms of conflicts: they must address the environmental injustice in these regions and the associated political issues.

3. Environmental Justice in Context

Notably, the concept of environmental justice was first developed in the early 1980s during the social movement in the United States on the fair distribution of environmental benefits and burdens.[90] It has been defined as "the fair treatment and meaningful involvement of all people regardless of race, color, sex, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies".[91] It has also been opined that environmental justice entails the right to have access to natural resources; not to suffer disproportionately from environmental policies, laws and regulations; and the right to environmental information, participation and involvement in decision-making.[92]

Recognition of the relationship between abuse of human rights of various vulnerable communities and related damage to their environment is found in the concept of environmental justice. Environmental justice theory recognizes how discrimination and marginalization involves expropriating resources from vulnerable groups and exposing these communities to the ecological harms that result from use of those resources. Environmental justice is based on the human

[90] Liu, L., Liu, J., & Zhang, Z., "Environmental justice and sustainability impact assessment: In search of solutions to ethnic conflicts caused by coal mining in Inner Mongolia, China," *Sustainability*, vol.6, no. 12 (2014): 8756-8774, at p.8760.
[91] Ibid, p. 8760.
[92] Ako, R., 'Resource Exploitation and Environmental Justice: the Nigerian Experience,' in Botchway, F.N. (ed), *Natural Resource Investment and Africa's Development*, (Cheltenham, UK: Edward Elgar Publishing, 2011), pp. 74-76.

right to a healthy and safe environment, a fair share to natural resources, the right not to suffer disproportionately from environmental policies, regulations or laws, and reasonable access to environmental information, alongside fair opportunities to participate in environmental decision-making.[93]

In Africa, environmental justice mostly entails the right to have access to, use and control over natural resources by communities.[94] The lack of framework to ensure this thus often results in conflicts. Most of Kenyan communities also heavily rely on environmental resources to sustain their livelihoods and any climatic conditions that affect these resources may easily strain relations among communities sharing the common resources such as water and land resources.

It is in recognition of these environmental rights and hazards that the 2010 Constitution of Kenya obligates the State to, inter alia: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.[95] Further, every person has a constitutional duty to cooperate with State organs and other persons to protect

[93] Scottish Executive Social Research, *Sustainable Development: A Review of International Literature*, (Scottish Executive Social Research, 2006), p.8. Available at *http://www.gov.scot/resource/doc/123822/0029776.pdf* [Accessed on 3/09/2019].
[94] Obiora, L., "Symbolic Episodes in the Quest for Environmental Justice," *Human Rights Quarterly,* Vol.21, No. 2, 1991, p. 477.
[95] Constitution of Kenya 2010, Art. 69(1).

and conserve the environment and ensure ecologically sustainable development and use of natural resources.[96]

These obligations are therefore meant to inform all the laws, policies, plans and programmes that the state puts in place in discharging their constitutional mandate on environmental protection and natural resources conservation. While there have been efforts at ensuring that the constitutional principles on sound environmental governance are incorporated into the post-constitution laws and policies, their implementation remain slow.

Communities living in arid and semi-arid areas continue to suffer disproportionate levels of environmental injustice, especially in the face of climate change. The *Climate Change Act 2016* establishes the National Climate Change Council[97] whose functions include to, *inter alia*: advise the national and county governments on legislative and other measures necessary for mitigating and adapting to the effects of climate change; provide coordination between and amongst various governmental and non-governmental stakeholders dealing with matters related to climate change; advise the national and county governments on regional and international conventions, treaties and agreements on climate change to which Kenya is a party or should be a party to and follow up the implementation of the conventions, treaties and agreements to which Kenya is a party; and coordinate negotiations on climate change related issues at the local, regional and international levels.[98]

However, there is no evidence yet of what county governments, especially in the most affected regions have done in line with the provisions of the Act to shield the communities from the adverse climatic changes. Most of the county governments in the arid and semi-arid regions still heavily rely on the national

[96] Ibid, Art. 69(2).
[97] S. 4(1).
[98] s. 5, No. 11 of 2016, Laws of Kenya.

government when disaster strikes to supply relief food and water and other basic needs, despite annual allocation of funds.[99]

Incidences of hunger and famine especially from Northern Kenya region are still rampant. These situations also come with conflicts among communities over grazing land and water.[100] In 2017, the Kenyan government declared a drought that affected 23 counties a national disaster. Nearly 2.7 million people were estimated to be in need of food aid, representing approximately 20 percent of the population in pastoral areas and 18 percent in marginal agricultural areas. The government also appealed for foreign aid back then.[101] In 2019, there were still reports of hunger related deaths and conflicts among the same communities.[102]

These incidences have become too common, with the hunger reports being aired every year, and no tangible evidence of long-term plans in place. The affected communities are never empowered to tackle these harsh climatic conditions but instead, they are left at the mercies of relief food donors and governments every

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[99] Gulleid, M., "Nearly one million drought-hit Kenyans at risk of starvation," *TRTWorld News Africa*, 19 March, 2019. Available at *https://www.trtworld.com/africa/nearly-one-million-drought-hit-kenyans-at-risk-of-starvation-25088* [Accessed on 7/9/2019].

[100] Mutanu, B., "Thousands of Kenyans facing starvation after harsh weather: report," *Daily Nation,* Saturday January 19 2019. Available at *https://www.nation.co.ke/news/New-report-shows-thousands-of-Kenyans-are-faced-with-starvation/1056-4941392-l8ma79/index.html* [Accessed on 7/9/2019]; see also Gulleid, M., "Nearly one million drought-hit Kenyans at risk of starvation," *TRTWorld News Africa*, 19 March, 2019. Available at *https://www.trtworld.com/africa/nearly-one-million-drought-hit-kenyans-at-risk-of-starvation-25088* [Accessed on 7/9/2019];

[101] Gulleid, M., "Nearly one million drought-hit Kenyans at risk of starvation," *TRTWorld News Africa*, 19 March, 2019. Available at *https://www.trtworld.com/africa/nearly-one-million-drought-hit-kenyans-at-risk-of-starvation-25088* [Accessed on 7/9/2019].

[102] Ibid; Mutanu, B., "Thousands of Kenyans facing starvation after harsh weather: report," *Daily Nation,* Saturday January 19 2019. Available at *https://www.nation.co.ke/news/New-report-shows-thousands-of-Kenyans-are-faced-with-starvation/1056-4941392-l8ma79/index.html* [Accessed on 7/9/2019].

year. This is despite the constitutional and statutory legal and institutional frameworks that are meant to address these situations.

4. Addressing Inter-Ethnic Conflicts through Enhanced Environmental Justice in Kenya for Sustainable Development

It has rightly been pointed out that widespread insecurity causes large-scale migration of citizens away from the war-torn homelands resulting in economic stagnation and decline. There is a suggestion that conflicts are not the result of just one single factor, such as the perceived difference between peoples of different ethnic affiliations. As already pointed out elsewhere in this paper, conflicts occur when people (or parties) perceive that, as a consequence of a disagreement, there is a threat to their needs, prospects, interests or concerns.[103] The process of managing natural resource conflicts is an off-shoot of the right to access to environmental justice and by extension, environmental democracy.[104] Environmental justice ensures equitable treatment of people in ensuring access to and sharing of environmental resources and justice in environmental matters.[105]

Environmental justice is touted as the minimum ethical stance of environmental ethics, with two dimensions: distributive environmental justice and procedural/participatory environmental justice.[106] Distributive environmental justice concerns the equal distribution of environmental benefits and burdens,

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[103] Azuimah, F., "Perception as a Social infrastructure for sustaining the escalation of ethnic conflicts in divided societies in Ghana," *Journal of Alternative Perspectives in the Social Sciences*, vol.3, no. 1 (2011): 260-278, p. 268.

[104] Muigua, K., *Nurturing Our Environment for Sustainable Development,* Glenwood Publishers, Nairobi – 2016), p. 332.

[105] United States Environmental Protection Agency, 'Environmental Justice Analysis', available at *http://www.epa.gov/sustainability/analytics/environmental-justice.htm* [Accessed on 5/09/2019].

[106] Yang, T., 'Towards an Egalitarian Global Environmental Ethics,' *Environmental Ethics and International Policy*, op cit., p. 32.

whereas participatory environmental justice focuses on opportunities to participate in decision-making.[107]

Environmental justice has also been defined and articulated in two parts. The first part is justice as a right: environmental justice refers to "the right to a safe, healthy, productive, and sustainable environment for all, where 'environment' is considered in its totality to include the ecological (biological), physical (natural and built), social, political, aesthetic, and economic environments."[108] Second, environmental justice is a set of conditions that support the fulfilment of that right, "whereby individual and group identities, needs, and dignities are preserved, fulfilled, and respected in a way that provides for self-actualization and personal and community empowerment."[109] Such a comprehensive definition extends beyond a traditional view of environmental justice as a matter of distribution of benefits and risks.

In order to achieve environmental justice, there are four broad areas where changes in policy and practice are needed: ***Rights and responsibilities***: ensuring a right to a healthy environment is an overarching aim of policy, which must be supported by placing responsibilities on individuals and organisations to ensure this right is achieved; ***Assessment***: projects and policies need to be assessed for their distributional impacts; ***Participation and capacity***: decision-making should involve those affected, and those groups or individuals enduring environmental injustices need support in order to increase their control over decisions which affect them; and ***Integration***: of social and environmental policy aims (emphasis added).[110]

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[107] Ibid, p. 32.
[108] Braun, A., "Governance Challenges in Promoting Environmental Justice," *Beyond Intractability* (2011). Available at *https://www.beyondintractability.org/essay/environmental-justice-challenges* [Accessed on 5/09/2019].
[109] Ibid.
[110] ESRC Global Environmental Change Programme, 'Environmental Justice: Rights and Means to a Healthy Environment for All,' Special Briefing No.7, University of Sussex., November 2001. Available at

One of the crucial components of environmental justice is that it seeks to tackle social injustices and environmental problems through an integrated framework of policies.[111] Ideally, having in place the necessary policy, legal and institutional framework is crucial in ensuring environmental justice at the global, regional and national levels. However, even with these, it may not be possible to achieve environmental justice if the people are not meaningfully empowered to utilize these frameworks. People should be able to participate meaningfully and to take advantage of the existing policy, legal and institutional framework. This is not possible where people do not fully appreciate the implications of environmental sustainability on their lives. Environmental education comes in handy in empowering people to participate in finding viable solutions for environmental protection and conservation.[112]

The World Economic Forum has rightly observed that the climate–conflict linkage primarily plays out in contexts that are already vulnerable to climate change, and where income is highly dependent on agriculture and fishing.[113]

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https://www.foe.co.uk/sites/default/files/downloads/environmental_justice.pdf [Accessed on 5/9/2019], p. 11.

[111] ESRC Global Environmental Change Programme, 'Environmental Justice: Rights and Means to a Healthy Environment for All,' op cit.; See also Mbote, P.K. & Cullet, P., 'Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management,' *op cit*.

[112] Burer, S., "Influence of environmental education on conserving environment in Kenya: Case study Moiben Constituency, Uasin Gishu County (Unpublished Master's Thesis, University of Nairobi)," *Research Project, University of Nairobi* (2014). Available at *http://erepository.uonbi.ac.ke/bitstream/handle/11295/74208/Burer_Influence%20Of%20Environmental%20Education%20On%20Conserving%20Environment%20In%20Kenya%2C%20Case%20Study%20Moiben%20Constituency%2C%20Uasin%20Gishu%20County.pdf?sequence=3&isAllowed=y* [Accessed on 6/9/2019]; Le Grange, L., "Think piece: sustainability education and (curriculum) improvisation," *Southern African Journal of Environmental Education* 32, no. 1 (2016): 26-36; Sauvé, L., "Environmental education and sustainable development: A further appraisal," *Canadian Journal of Environmental Education* 1 (1996): 7-34.

[113] World Economic Forum, "We need to do more to understand how climate change and conflict are linked. Here's why," 2018. Available at

Therefore, it is important to support the development of alternative sources of income, to increase the coping capacity of communities to manage temporary losses of income and to strengthen communities' resilience in order to mitigate conflict risks.[114] Some of the suggestions that have been made in reference to this include insurance schemes that smooth out the annual income of vulnerable populations, a reduction in income sensitivity to climate conditions, legal reform and improved land rights, drought preparedness programmes and agricultural assistance.[115] This is because previous programmes, such as food assistance programmes, have been followed by either a decrease or an increase in violence at different periods of implementation, as they are likely to alter the power relations in a community.[116]

Food assistance programmes are temporary measures that cannot be expected to deal with this perennial problem of hunger and famine. The affected communities will continue to compete for the scarce resources and conflicts may thus be inevitable.

Empowerment may be the only way that these inter-ethnic conflicts may be fully addressed. Such empowerment may be social, economic or political. However, as already pointed out, environmental and natural resources form the basis of the livelihoods of most communities whether pastoralists or farmers. As a result, the conservation of these environmental and natural resources needs to be enhanced as a way of promoting environmental justice.

The disproportionate burden of environmental pollution and degradation borne by some communities especially in the arid and semi-arid regions ought to be addressed by the county and national governments appropriately.

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https://www.weforum.org/agenda/2018/09/we-need-to-do-more-to-understand-how-climate-change-and-conflict-are-linked-heres-why/ [Accessed on 2/09/2019].

[114] Ibid.

[115] Ibid.

[116] Ibid.

There is need for the governments, both national and county, to use inclusive and collaborative efforts with communities to study and address environmental challenges that lead to inter-ethnic conflicts. The Constitution requires that the national values and principles of governance must bind all State organs, State officers, public officers and all persons whenever any of them: applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[117] These national values and principles of governance include, inter alia: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.[118] These values and principles require that the government stakeholders should not make decisions, including those on environmental and natural resources governance, without including the communities who may be affected by the said decisions.

Inclusion may be achieved in different ways including through participatory conflict management mechanisms such as Alternative Dispute Resolution (ADR) mechanisms which include negotiation and mediation, as envisaged under the Constitution of Kenya[119] and other statutory provisions[120]. Conflict management is defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them from escalating out of control and becoming violent.[121] Conflict management is seen as a

[117] See Articles 10 (1) and 69, Constitution of Kenya.
[118] Article 10 (2), Constitution of Kenya.
[119] Article 60, 67, 159, Constitution of Kenya 2010.
[120] See Community Land Act, No. 27 of 2016, Laws of Kenya (Government Printer, Nairobi, 2016); Land Act, No. 6 of 2012, Laws of Kenya; Environment and Land Act, No. 19 of 2011, Laws of Kenya.
[121] Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support for enhancing livelihoods of the rural poor, (Food And Agriculture Organization of The United Nations, Rome, 2005), available at

multidisciplinary field of research and action that addresses how people can make better decisions collaboratively.[122] Thus, the roots of conflict are addressed by building upon shared interests and finding points of agreement.[123] Communities' involvement and inclusion is thus important. They may participate directly or through traditional dispute resolution mechanisms, peace committees, Non-Governmental organisations, religious bodies, among other bodies within the communities. These processes should include the different stakeholders or players in order to come up with lasting peace outcomes.

Courts should also be actively involved in ensuring that where communities fail to be included[124], such government decisions should not be upheld until the constitutional provisions are reflected in such processes. This is because courts also have a critical role to play in environmental conservation and protection.[125] Apart from inclusion in decision-making and governance matters, these communities should be empowered economically and socially in a way that ensures that they have a diversified source of livelihood in order to insulate them against climate change and other adverse environmental factors. This is also a way of ensuring that pressure on available environmental resources is minimised and subsequently reduce or prevent emergence of inter-ethnic conflicts.

5. Conclusion

Inter-ethnic conflicts in Kenya may be attributed to different factors. However, some of the major ones revolve around environmental resources. This paper argues that addressing inter-ethnic conflicts in Kenya requires first dealing with

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http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf [Accessed on 5/9/2019].

[122] Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at *http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage* [Accessed on 5/9/2019].

[123] Ibid.

[124] Article 10, 21, Constitution of Kenya 2010.

[125] Article 10, 21, 42, 70, Constitution of Kenya 2010; *Peter K. Waweru v Republic* [2006] eKLR, Misc. Civil Application No. 118 of 2004.

the environmental challenges that prevent achievement of environmental justice in Kenya. This minimizes the predisposing factors that may aggravate the conflict situation. Ensuring that communities living in ethnic conflict prone areas enjoy environmental justice can go a long way in effectively addressing inter-ethnic conflicts in Kenya.

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20Kenya%2C%20Case%20Study%20Moiben%20Constituency%2C%20Uasin%20Gishu%20County.pdf?sequence=3&isAllowed=y [Accessed on 6/9/2019].

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Restoration of International Arbitration in Tanzania: The New Investment Act

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Abstract

Immediately after its independence, Tanzania embraced the socialist economy which was popularly known as "ujamaa". During this period, the country was under a state economy and all major means of production were owned and run by the state. Generally, there were no big private investments and economic activities were highly regulated by the state. In the early 1990s, the country abandoned socialist ideology and allowed a liberal economy. It is at this period when doors for private investments were opened and a number of investments were attracted. There was a need to create a conducive environment for the investors both foreign and domestic. New laws were enacted and among those laws, it was Tanzania Investment Act which had specific provisions allowing investors to resort to international arbitration. However, in 2017 and 2018 the Government amended the Investment Act and enacted some other legislations which had the effect of restricting international arbitration to disputes related to investment and natural resources. A few years later, the new Arbitration Act was enacted, restoring international arbitration in investments. This paper discusses the impact of restricting international arbitration in investments and the decision to restore international arbitration in a new Investment Acted enacted in Tanzania.

1. Introduction

In 1997 Tanzania enacted its first-ever legislation for the purposes of promoting investments and providing more favourable conditions for investors.[1] A

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[1] See the long title of Tanzania Investment Act No 26 of 1997

number of Bilateral Investment Agreements had since then been entered between Tanzania and other countries. The Tanzania Investment Act 1997 provided for a dispute resolution mechanism which included submission of investment disputes to international arbitration and also recognised the parties' choice to determine the mode of dispute resolution in their Bilateral Treaties. However, in 2017 and 2018, Tanzania enacted two legislations which curtailed the application of international arbitration in investment disputes and disputes related to natural resources. The reason advanced for this move was the lack of confidence by Tanzania in international arbitration institutes and the biases of those institutes when adjudicating investment disputes. Tanzania was of the view that it needed more control of its natural resources and wealth and therefore domestic court and bodies established in Tanzania were in a better place to resolve the investment disputes and those related to the wealth and natural resources of Tanzania.[2] However, in less than five years, Tanzania made a U-turn and enacted a New Tanzania Investment Act which reintroduced international arbitration in investment disputes.[3]

This paper discusses international arbitration in Tanzania and what transpired when international arbitration was restricted in investment disputes and also looks at what might have been the reason made Tanzania to reallow investment disputes to be referred to international arbitration. It attempts to look at Tanzania as a developing country which has been forced by economic and political circumstances to accept the fact that investors who are needed for economic development have the right under Bilateral Treaties to choose a mode of dispute resolution. It also wants to show that domestic laws in investment arbitration are not capable of handling disputes arising from Bilateral Investment Agreements. Tanzania is like a case study but what is discussed in this paper is true for any other developing country.

[2] The African Law and Business Published on 11/12/2018 (*https://iclg.com/alb/8816-keeping-it-local-tanzania-curtails-investors-recourse-to-international-arbitration)*
[3] See section 33 of Tanzania Investment Act, 2022

2. Enactment of Acts restricting International Arbitration

On 27 November 2022, the president of Tanzania assented to a new Act which is the Tanzania Investment Act 2022[4] to repeal the Tanzania Investment Act which was enacted in 1997[5]. In 2018 Tanzania enacted the Public Private Partnership (Amendment) Act[6] ("the PPPA Act") which under section 14 made it compulsory for the disputes which arise in investment to be resolved through negotiation or in case of mediation or arbitration, the dispute was to be resolved by judicial bodies or other organs established in the United Republic of Tanzania and in accordance with the laws of Tanzania. [7] The PPPA Act provided further under section 19 that The Tanzania Investment Act shall be read as one with the PPPA Act. In effect, this would mean that the dispute settlement provision which was provided under the repealed Tanzania Investment Act was made inoperative to the extent that the investment disputes if they were to be resolved by arbitration, it could only be done so using institutions established in Tanzania and therefore the use of International Centre for the Settlement of Investment Disputes (ICSID) or any other institutions provided under the Bilateral Investment Treaty (BIT) was not allowed under the PPPA unless such institutions were established in Tanzania.

It is not only the PPPA Act which confined the use of international arbitration institutes which were not established in Tanzania in investment disputes. Before the enactment of the PPPA Act, there was an enactment of another piece of legislation known as The National Wealth and Resources (Permanent Sovereignty) Act, 2017. Under section 11 of this Act, all disputes arising from the extraction or acquisition or use of natural wealth and resources were to be adjudicated by judicial bodies or other bodies established in the United Republic of Tanzania. [8] Natural wealth resources were defined to mean all materials or substances occurring in nature such as soil, subsoil, gaseous and water resources

[4] Act No. 10 of 2022 enacted to repeal the Investment Act CAP 38 R.E. 2002
[5] Act No. 26 of 1997
[6] Act No. 9 of 2018
[7] Section 14 of The Public Private Partnership (Amendment Act) 2018
[8] See section 11 of The National Wealth and Resources (Permanent Sovereignty) Act,

and flora, fauna, genetic resources, aquatic resources, micro-organisms, air space, rivers, lakes and maritime space, including Tanzania's territorial sea and the continental shelf, living and non-living resources in the Exclusive Economic Zone which can be extracted or exploited or acquired and used for economic gain whether Processed or not.[9]

The enactment of the two legislations to a great extent narrowed down the space of international arbitration in Tanzania. The two legislations obviously had a big impact on the existing BITs and made it difficult for signing new BITs because most investors would like to have the disputes resolved by the way of international arbitrations. It should be noted that the repealed Investment Act was enacted to provide for more favourable conditions for investors knowing the need of investors, in the dispute settlement, the repealed Tanzania Investment Act provided expressly under section 23 that parties would mutually agree on how investors' disputes will be resolved.

This enjoyment of determining the method of dispute settlement by the parties was curtailed by the provisions of the PPPA Act and the enactment of The National Wealth and Resources (Permanent Sovereignty) Act, 2017. The two legislations by restricting submission of the disputes to international arbitration, erode one of the purposes of enacting the repealed Tanzania Investment Act. It is very doubtful if the two legislations would be able to oust jurisdictions of international arbitral institutions such as ICSIDS of which Tanzania is a signatory and as such, some investors continue to submit their disputes to international arbitration institutes but nevertheless, enforcement of Awards obtained from institutions with no establishment in Tanzania would have been almost impossible to be enforced in Tanzania as it would be contrary to the public policy and the laws of Tanzania.

The High Court of Tanzania in one of its decisions was in a bold position that an Arbitral Award which is contrary to the domestic laws, cannot be enforced

[9] See section 3 Ibid

in Tanzania. In one instance, the court refused to recognise an Award obtained from an international arbitration institute which has no establishment in Tanzania, on the basis among others that the Award was controversial to the laws of Tanzania and public policy. This was in a Petition between *The United Republic of Tanzania and Sunlodges BVI and Sunlodges Tanzania Limited,* in which the Government of Tanzania was challenging enforcement of the Award issued by the Permanent Court of Arbitration (PCA)[10] The High Court of Tanzania agreed not to enforce the Arbitral Award on grounds, among others, that the Award was contrary to the public policy and the laws of Tanzania. The Court had this to say on page 17 of the typed judgement;

> *"… it is quite clear that the concept of public policy within the context of Section 30 (1)(e)[11] has to be construed widely to include, injurious to the public good or an act which is reprehensible, unconscionable or injurious to the public by being contrary to the constitution, or Tanzania laws or being contrary to the interest of Tanzania or being contrary to justice and morality."*

From the above-quoted decision, it was very likely that any Arbitral Award by an international arbitration institute which has no establishment in Tanzania would have been considered contrary to the laws of Tanzania which prohibited investment disputes to be submitted to international arbitration and therefore the Court in Tanzania would easily refuse to enforce the Award. The only option would be to execute the Award outside Tanzania.

However, in international arbitration, it is not that easy to escape the enforcement of the Award issued under the recognised international rules. In the case of Sunlodges Limited referred to above, the enforcement of the Award was sought to be effected using the Superior Court of Justice of Ontario, Canada. The government of Tanzania attempted to avoid enforcement of the Arbitral Award based on several grounds including the defence of sovereign immunity.

[10] Miscellaneous Civil Cause No. 373B of 2020 between The United Republic of Tanzania and Sunlodges BVI and Sunlodges Tanzania Limited
[11] Section 30 of the repealed Arbitration Act of Tanzania

However, the Ontario Court refused to accept this ground on the reason that the purpose of the Bilateral Investment Treaty is to remove or limit the defences of involving sovereign immunity and that a country submitting itself to BIA and agreeing to enter arbitration under the treaty, consents to have orders made against it. In regard to another ground which was raised that the Award was not recognised in Tanzania and therefore not enforceable, the Ontario Court was of the opinion that the Award may not be enforceable in Tanzania but that does not prohibit enforcement of the Award in other countries. The Court emphasised that the whole point of BIT is to avoid the courts and the laws of the host countries.

The question may be why Tanzania was trying to limit or prohibit international arbitration in investment disputes. Tanzania has entered a number of bilateral treaties.[12] These treaties include those signed between Tanzania and Denmark, Finland, German, India, Italy, Netherlands, Norway, Sweden, Switzerland, United Kingdom and Zambia. [13] Tanzania has also signed a number of instruments related to international arbitration including The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) (1965), Furthermore, Tanzania is a member of the United Nations Commission on International Trade Law (UNCITRAL). The country ratified the UNCITRAL Model Law on International Commercial Arbitration in 2002, and it has also adopted the UNCITRAL Rules of Conciliation and Arbitration. These instruments provide a framework for the conduct of international commercial arbitration and assist in the recognition and enforcement of arbitral awards. This being the case, one would wonder why Tanzania attempted to restrict the application of international arbitration in Tanzania while it is a party to those numerous BITs

[12] See Investment Policy Hub of International Investment Agreements Navigator *(https://investmentpolicy.unctad.org/international-investment-agreements/countries/222/tanzania-united-republic-of Tanzania)*
[13] Dr. Clement J. Mashamba, Arbitration Law and Practice in Tanzania, Dar es Salaam, Theophlus, 2015.

and signatories to several instruments related to international arbitration. There are a number of explanations, one of them being that Tanzania was of the view that the whole process of international arbitration was biased and Tanzania's judicial system was better placed to hear and determine disputes by investors.[14] The Attorney General of Tanzania at the time of presenting the Bill to amend the Public Private Partnership (Amendment) Act 2018 commented that international bodies are biased, forcing the government to use its own courts, which are fair.[15]

The effect of the restriction on the choice of international arbitration was to increase state control over foreign investments. As was observed by the Supreme Court of Justices of Ontario in the case of Sunlodges Limited & Another,[16] investors prefer BIA to avoid the influence of the host state and its laws. Restricting international arbitration cannot go hand in hand with attracting foreign investments and in any event restricting the choice of the arbitral institutions and appointment of arbitrators reduce the effectiveness of the whole purposes of BIA. The preamble of the repealed Tanzania Investment Act provided that the purpose of the Act was to provide more favourable conditions for investors, among other purposes. BIAs have a significant impact on the attraction of investments in a country and because of signing a number of BIAs, Tanzania was among the top counties in attracting foreign direct investment in East Africa.[17] As a developing country, Tanzania was in a trap, to accept the terms and conditions of BIAs or to restrict international arbitration provided in the Treaties (because Tanzania had no confidence in the effectiveness of just decisions of those international institutions) and stand at risk of attracting fewer investors.

[14] The African Law and Business Published on 11/12/2018 (Opcit)
[15] The East African News Paper, Monday September 17, 2018
[16] Court File No. CV-20-00648370-00CL
[17] World Investment Report 2014 issued by United Nations Conference On Trade And Development

It is a fact that most BIAs have arbitration clauses which provide for international arbitration as a mechanism for settling investment disputes and therefore restricting the space for international arbitration is likely to affect the smooth execution of the existing BIAs and reduce the number of potential BIAs which will lead into less direct foreign investments. In other words, the dispute resolution mechanism directly affects the attraction of foreign direct investment. Foreign Investors prefer international arbitration because they are of the view that international arbitration is more neutral, stable predictable and independent from national political consideration in its application.[18]

3. Reintroduction of International Arbitration in Investment Disputes.

It would appear that Tanzania has noted the fact that the use of domestic laws and institutions for settling investment disputes cannot give the intended results and therefore resolved to go back and to the use of international arbitral institutions. This can be inferred from the preamble of the new Investment Act[19] ("the Act") which provides as follows;

> *"The law sets conditions for investment in Tanzania, imposes conditions for a healthy environment for investors, establishes an institutional framework for the coordination, protection, attractiveness, promotion and facilitation of investment in the country, repealing the Tanzania Investment Act, 1997 and related matters thereto"*

One can see from the above-quoted preamble that among the purposes for enacting the Act is to protect, attract and promote investments. The investment Dispute Settlement mechanism is one of the provisions in this newly enacted

[18] Investment Treaty News, the need for "Africa-focused" arbitration and reform of Tanzania Arbitration Act, an Article authored by Amne Sued, published by the International Institute for Sustainable Development on October 5, 2020 (*https://www.iisd.org/itn/en/2020/10/05/the-need-for-africa-focused-arbitration-and-reform-of-tanzanias-arbitration-act-amne-suedi/)*

[19] Act No. 10 of 2022 which came into operation on 2nd December 2022

Act.[20] The law provides three options for dispute resolution in investment disputes which are, to resolve the dispute in accordance with the arbitration laws of Tanzania, or in accordance with the rules of procedure for arbitration of the International Centre for the Settlement of Investment Disputes or within the framework of any bilateral or multilateral agreement on investment protection agreed to by the Government of the United Republic of Tanzania and the Government of the Country where the investor originates. This provision shows that the Government has now agreed that investments dispute between the government and the investors can be referred to ICSID or use of any mechanism for dispute resolution stated in BITs or Multilateral Agreement. Also, the Act under section 29 provides a guarantee against expropriation. The government undertake not to do any acquisition of business enterprises or any owner of the capital or part of the capital in enterprises shall not be forced to surrender his interest to any person. In the event the acquisition of an enterprise is done according to the law, the investor shall be adequately and promptly compensated, and such investor shall have the right of access to courts or the right to arbitration for the determination of the investor's interest.

The fact that Tanzania has opted to revert to international arbitration, suggests that it is very difficult for a developing country to successfully use its own domestic law and mechanism in international trade generally and investments in particular. The developing countries being in need of investments can hardly detect terms and conditions for the dispute resolution mechanism. Investors have an upper hand and would do whatever possible to have investment disputes resolved in a manner they are confident that justice in their perspective will prevail.

Probably the enactment of the Act and particularly the enactment of the provision which allows submission of disputes to international arbitration has resolved the dilemma regarding the status of the Bilateral Investment Agreements which have international arbitration as a dispute resolution

[20] Section 33 of the Act.

mechanism. As we have noted in Sunlodge's case, the High Court of Tanzania was of a firm view that an Award which contravenes the laws of Tanzania cannot be enforced and the Ontario Superior Court of Justice on the matter arising from the same Award pointed out that even if Tanzania Courts decide that the Award is not enforceable, such Award can be enforced in any other country in the world. After the prohibition of international arbitration to matters related to investment disputes and disputes related to natural resources, there was no termination of those Bilateral Investment Agreements or amendment of the dispute resolution clause save for one[21] and therefore while the domestic law on one side was restricting investment disputes being referred to international arbitration to the institutes not established in Tanzania, the existing treaties provided for international arbitration as a means of settling investors disputes.

Both investors and the government of Tanzania would not have been certain as to what will be the decisions of different courts from different jurisdictions in the world if faced with a situation of where the BITs provide for international arbitration and domestic law prohibits such arbitration. Much as we can presume that most courts would take the position of the Ontario Superior Court of Justice, that an international arbitration award can be enforced to any other country even if it has not been recognised in the host country, the position could have been different in some few jurisdictions particularly if there is a political influence or some interest to be protected. The enactment of the new Act has settled the atmosphere for investors and the government as well as it may cause an increase in foreign direct investments in Tanzania and make Tanzania once again one of the top countries in attracting investment.

The question may be whether it was proper for Tanzania to enact laws which prohibited international arbitration on investment disputes and on matters related to natural resources in the first place. It might be a matter of debate and the correctness or incorrectness of restricting international arbitration would

[21] Tanzania terminated its Bilateral Investment Agreement with the Netherlands

depend on the socio-economic and political points of view. From what we have discussed, the purpose of Tanzania restricting the use of international arbitration in investment disputes was to give the government control of its natural resources which the government was of the view could not be attained if disputes were to be resolved outside the jurisdiction of Tanzania. Part of the preamble in the Natural Resources Act provides as follows;

> *"AND WHEREAs, it is necessary to make comprehensive statutory provisions to provide for ownership and control over natural wealth and resources and to provide for the protection of permanent sovereignty over natural wealth and resources"*

Part of the preamble quoted above gives the reason for the enactment of the Act. The Act among other issues restricted the application of international arbitration as we have seen. While the motive appears to be good, the question is whether the country had prepared a domestic dispute mechanism system to be able to resolve investment disputes which on one hand will ensure the sovereignty of the country over natural wealth and resources and at the same time gives investors' confidence that justice will prevail in the event of the dispute between the investor and the state. Preparation of this dispute resolution mechanism would entail training resources to be utilised in the dispute resolution and establishing independent institutions which can fairly handle the investment disputes without fear or favour. The institutions to be established should also have capabilities in technology, finance, and management. It will be difficult for developing countries to detect terms of investment dispute settlement while at the same time, there is no well-established system for resolving investment disputes in a manner which is generally accepted globally.

4. Conclusion

Submission of investment disputes to international arbitration fora is likely to continue in most developing countries until when developing countries are able to establish strong international dispute resolution institutions within their countries which can give confidence to investors. As an alternative to using

institutions from the developed countries, regional groups in Africa may collaborate and establish joint centres for dispute resolutions and those centres be free from political interference. Also, it is important to be very careful while signing a Bilateral or Multilateral Agreement to ensure terms and conditions of the Agreements including the dispute resolution clause are scrutinised sufficiently to know exactly what is the institution for dispute resolution and it is also possible to restrict places of enforcement of the Arbitral Award in the Agreement.

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Mediation of Election-Related Disputes in Kenya: Challenges, Opportunities and Way Forward

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Abstract

Election disputes inevitably occur owing to violation of the electoral law, commission of electoral offences, infringement of political rights, rigid dispute resolution systems and lack of confidence in the electoral management system. As a matter of constitutional principle, courts and tribunals must accord primary consideration to mediation and other forms of ADR in all disputes. Article 48 entitles every citizen aggrieved by the conduct of an electoral process with the right of access to justice. In addition, most pre and post-election disputes are amenable to mediation. Pre-election disputes entail disputes revolving around campaigns, nominations, party primaries and clearance of candidates. Post-election disputes comprise non-acceptance of declared results and management/operational disputes within the electoral commission. Although the 2022 General Election is a testament of the increase of election disputes, nevertheless litigation has always been the norm rather than the exception. This has in effected rendered courts ineffective in electoral dispute resolution due to case backlog, incompetence, corruption, costs, delay and partisan judges. This article observes that mediation is bringing the much needed paradigm shift to electoral justice in Kenya, especially with the success of Court-Annexed Mediation and previous mediated election disputes. Mediation assures parties of flexibility, party autonomy, win-win outcomes and finality once a decision is reached. Based on the foregoing, this paper urges election disputants to opt for

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mediation, court-annexed or otherwise, whenever they arise as an end to the negative flicker posed by incessant election disputes.

Key Words: Election-related violence, Electoral dispute resolution (EDR), electoral justice, Court-Annexed Mediation (CAM), Mediation, Alternative Dispute Resolution (ADR).

"Sometimes, God doesn't send you into a battle to win it; he sends you to end it,"
~ Shannon L. Alder

I. Introduction

An election dispute may be construed to mean conflicts or disagreements arising from stiff political competition for elective office.[1] In plural, election disputes also refer to the inefficiency of a voting process, inconsistency of decisions and actions taken during an electoral exercise, and inaccuracy of the election outcome.[2] This paper observes that the term 'election dispute' lacks both a universal and statutory definition. From Kenya's pattern of disputes in the 2007, 2013, 2017 and 2022 General Elections, we have deduced that most election disputes occur when natural and legal persons are aggrieved by violation of the electoral law, commission of electoral offences and infringement of political rights.[3]

As a result, electoral mediation is quickly gaining traction in Kenya. It is an emerging mechanism through which election disputes are resolved through mediation.[4] Mediation is the process of informal dispute resolution where an

[1] SADC and EISA, "Principles for Election Management, Monitoring and Observation," 29
[2] M. Nicholson, "Rationality and the analysis of International Conflict," Cambridge Studies in International Relations, Book 19 (Cambridge, 1992) 11
[3] Constitution of Kenya 2010, Art. 38 (1)
[4] Allan J. Stitt, "Mediation, A Practical Guide," (2004) Cavendish Publishing Limited

outsider voluntarily chosen by the parties helps in facilitating negotiations.[5] It restores confidence by giving the disputants full control over the process.[6] In essence, electoral mediation is particularly beneficial because it enables the parties to find a middle ground of their election dispute by themselves. Similarly, the outcome of a mediated process is deemed to be final and binding upon the disputants.

However, the 2007 post-election dispute is the only documented electoral mediation exercise in Kenya.[7] The mediation exercise successfully resolved the issues concerning inaccuracy of the presidential results, credibility of the final outcome, unreliable tallying of results, low quality voter register and confusing results that did not reflect the voters' preferred choices.[8] In the mediation exercise, a power-sharing agreement was agreed upon by the disputants, as proof that mediation results in satisfactory outcomes.

Drawing lessons from the 2007 post-election mediation exercise, it is necessary to question the viability of mediation in the electoral justice system vis-à-vis the effectiveness of the court system in electoral dispute resolution. Unlike in the independence constitution, mediation is now recognized in the 2010 Constitution.[9] The framers of the constitution also require parliament to legislate on timely resolution of election disputes preferably through

[5] Black's Law Dictionary, 2nd Ed; Kariuki Muigua, "Resolving Conflicts through Mediation in Kenya," Chapter 4 (Resolution and Settlement) pp. 56-65
[6] Alexandra Akinyi Ochieng & Bernard M. Nyaga, "*Facilitating Access to Justice through Online Dispute Resolution in Kenya*," (2022) 10 (1) Alternative Dispute Resolution (ISBN 978-9966-046-14-7), the Chartered Institute of Arbitrators-Kenya Journal pg. 110-131
[7] Khaled Mohammed Aman, "Mediation: A Viable Solution to Africa's Political Crisis-A case study of Kenya's Post Election Crisis-2008" (2009) 7
[8] Report of the Independent Review Commission on the General Elections held in Kenya on 27th December, 2007) page 9 (Kriegler Report)
[9] Constitution of Kenya 2010, Art. 159 (2) (c)

mediation.[10] These provisions, also referred to as the *ADR clauses*, affirms the place of mediation in Kenyan election disputes.

The constitution also breathes life into mediation of election disputes by giving every citizen the right of access to justice.[11] Mediation as an ADR mechanism is founded on other sister principles requiring courts and tribunals to dispense justice,[12] to be seen as doing justice to everyone, to avoid delays,[13] to administer justice through flexible procedures[14] and to uphold the constitution as a whole.[15] The statutory definition is contained in the Civil Procedure Act as:

> *"Any informal and non-adversarial process of dispute resolution with the aid of an impartial mediator to the exclusion of a judge or a magistrate."*[16]

In Kenya and beyond, mediation is attracting disputants and practitioners alike. Disputing parties mostly opt for mediation due to its attributes of flexibility, parties' control confidentiality and neutrality. The judiciary has facilitated the roll-out of Court Annexed Mediation (CAM) in April 2016, the introduction of the Mediation Bill in June 2020 and licensing of mediators. Through CAM, there is an impressive dispute settlement rate of all disputes due to the increased the number of accredited mediators.[17] Our article seeks to change the intellectual discourse from '*see you in court*' to '*see you in mediation*' by exploring mediation of election disputes in Kenya.

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[10] Constitution of Kenya 2010, Art. 87 (1)
[11] Constitution of Kenya, Articles 159 (2) (c) & 48
[12] Constitution of Kenya 2010, Art. 159 (2) (a)
[13] Constitution of Kenya 2010, Art. 159 (2) (b)
[14] Constitution of Kenya 2010, Art. 159 (2) (d)
[15] Constitution of Kenya 2010, Art. 159 (2) (c)
[16] Civil Procedure Act Chapter 21 Laws of Kenya, Sec. 2
[17] The Judiciary of Kenya, "The Judiciary Finance and Administration Sub-Committee Report Financial Year 2019/2020," (2020)

II. The History of Election Disputes in Kenya

a) Pre-2010 Constitution Period

In 1992, *Kenneth Matiba vs Daniel Moi* became the first ever election dispute in Kenya.[18] The Applicant moved to the High Court to question the validity of the election of President Moi.[19] The court dismissed the petition on account of an invalid signature. Contrary to the then National Assembly election petition rules, he had procured another person to sign the petition on his behalf under the powers of attorney. This made the petition incompetent before the court.[20]

In 1997, *Mwai Kibaki vs Daniel Moi* crystallized into Kenya's second election dispute.[21] The parties had vied for the presidency in the 1997 general election where the respondent with 2,445,801 votes was declared to have emerged the winner defeating the applicant with a narrow margin.[22] The case was struck out for want of personal service.

In 2007, the third election dispute related to the credibility of the presidential outcome. This caused an unprecedented post-election violence crisis where lives were lost, hundred others displaced, livelihoods destroyed, and property of immense value lost.[23] The presidential contenders willingly submitted themselves to the mediation procedure which was chaired by then UN Secretary

[18] Kenneth Stanley Njindo Matiba vs Daniel Toroitich Arap Moi (1994) eKLR
[19] High Court Election Petition No 27 of 1993
[20] Ibid
[21] Mwai Kibaki vs Daniel Toroitich Moi (1999) eKLR
[22] Election Petition No.1 of 1998
[23] 'Why Peace Remains Elusive as Kenya Prepares for the 2022 General Elections - Saferworld' <*https://www.saferworld.org.uk/long-reads/why-peace-remains-elusive-as-kenya-prepares-for-the-2022-general-elections*> accessed 10 July 2022.; Claire Elder, Susan Stigant and Jonas Claes, 'Elections and Violent Conflict in Kenya: Making Prevention Stick' (United States Institute of Peace 2014) 3.

General Kofi Annan.[24] Thereafter, an agreement was reached to form a coalition government of national unity[25], to create the Primary Minister slot, to ratify the National Accord and Reconciliation Agreement and to lead the clamour for the 2010 constitutional reform.[26]

b) Post-2010 Constitutional period

In 2013, the fourth election dispute constituted a challenge to Mr. Uhuru Kenyatta's win in the presidential election with 6,173,343 votes.[27] Mr. Raila Odinga who trailed with 5,340,546 votes alleged that the IEBC had;-[28]

- *Wrongly declared Uhuru Kenyatta as President-elect and William Ruto as Deputy president-elect respectively*
- *Mistakenly included the count of rejected votes in the presidential results*
- *Unlawfully conducted the whole electoral process making it impossible to discern the accuracy of the final result.*

The Supreme Court upheld the official results by decisively reasoning that;-[29]

> *"The office of president is the top most political and constitutional office, which wields collective interest from the entire of Kenya's population. Under the first-past-the-post electoral system, occupation of the said office is based on 'majoritarian expression'. Therefore, it is not for the court to negate the wishes of*

[24] Kofi Annan Foundation and African Union Panel of Eminent African Personalities, "Kenya National dialogue and Reconciliation," (Nairobi: Kofi Annan Foundation, 2010) pp. iv-vii
[25] Arend Lijphart, 'Constitutional Design for Divided Societies', 15 JOURNAL OF DEMOCRACY 96 (2004)
[26] Ibid
[27] (2013) EKLR National Council for Law Reporting. Kenya Law Reports retrieved on 20th July, 2022 from *www.kenyalaw.org*
[28] Odinga & 5 others v Independent Electoral and Boundaries Commission & 4 Others (Petition 5, 3 & 4 of 2013 (Consolidated)) KESC 6 KLR (16 April 2013)
[29] Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others (2013) eKLR

> *the people expressed through popular vote, but to establish compliance of an election to the electoral law"*

In 2017, the fifth election dispute ensued after the declaration of Mr. Uhuru Kenyatta as the winner with 8,203,290 votes while Mr. Raila Odinga became the runners up with 6,762,224 votes.[30] Mr. Odinga raised the following claims before the election court that the IEBC had;-

- *Announced a result which did not resonate with the people's will at the ballot*
- *Violated the principles of the electoral system*
- *Delivered a predetermined computer-generated outcome*
- *Caused arithmetic errors that resulted in inaccuracy of final data*
- *Culpable for flaws in transmission of results and irregularities which affected the total tally*
- *Wrongfully included the tally of rejected votes*

In its majority decision, the Supreme Court annulled the 2017 presidential election on account of illegalities and irregularities.[31] **Maraga CJ** in ordering a repeat election held that;[32]

> *"The Constitution grants the election court with the mandate to overturn an election in appropriate circumstances, for and on behalf of the Kenyan people. It should therefore not be hesitant to do so on the belief that the greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God."*[33]

After the 2022 General elections, a number of election petitions had been filed at the apex court concerning the declaration of Mr. William Ruto as President-

[30] Raila Odinga & Another v IEBC & 4 Others & AG & Another (2017) eKLR
[31] Ibid
[32] Ibid
[33] Ibid

elect, contradicting tallies of the presidential vote, attainment of the 50% +1 threshold, a determination on rejected and valid votes, inclusion of identified voters using the manual register, allegations of opaqueness within the IEBC among other controverted issues.[34]

III. The Concept of Election Disputes

Definition of an Election Dispute

So, what is an election dispute? An election dispute is any disagreement caused by an electoral irregularity, malpractice or non-conformity with the electoral law.[35] Unfortunately, election disputes have not been expressly defined within our statutory regime. These disputes are bound to occur due to human interaction with electoral processes.[36]

Underlying Causes of Election Disputes in Kenya

Non-conformity- Compliance with the electoral law is an absolute requirement for the entire election activity. The constitution stipulates the principles of the electoral system.[37] A conflict may occur whenever a loser in an election feels that his/her loss is attributable to breach of these principles. He/she bears the onus of proof to establish two elements; violation of the electoral law[38] and its effect

[34] At the time of writing, the respondents had not filed their responses; Presidential Petition no. 5 of 2022: Raila Odinga & Martha Wangari Karua vs Independent Electoral and Boundaries Commission & 8 Others

[35] Shaheen Moaffar and Andreas Schedler, "The Comparative study of electoral governance: Introduction," (2002) 23 Int'l Pol Sc Rev 5 at 6

[36] Shaheen Moaffar and Andreas Schedler, "The Comparative study of electoral governance: Introduction," (2002) 23 Int'l Pol Sc Rev 5 at 6; Aristoste once stated that, "At his best, man is the noblest of all animals but when separated from law and justice he is the worst," available at *https://www.azquotes.com/quote/10276*

[37] Constitution of Kenya 2010, Article 81 (e) states that the elements of free and fair elections are secret ballot, free from improper influence, presided over by an independent body and administered in a neutral and accurate manner

[38] Elections Act 2011, S. 83

to the credibility of the declared result.[39] These elements must be satisfied before a court proceeds to issue any orders in favour of or against a party.

The winner takes it all system- This is a system that is particularly prevalent in most African states including Kenya. It brings a situation where power is immortalized in the presidency leaving out the opposition in the distribution of the national cake (a lose-all system).This shown by a finding made by the *Kriegler* Commission found that the cycle of election disputes is caused by the concentration of powers in the presidency and the winner-take-it-all model of elections.[40] Mediation seeks to remedy the winner-takes-it-all model by encouraging compromise between political competitors of a given elective office.

Too much focus on the presidency- In Kenya, the seat of the President is highly regarded as '*the cherry on the cake*' and '*the zenith of political power*'.[41] According to the *BBI Taskforce Report*, excessive focus on the presidency takes the flak for most election disputes.[42] This is shown by the disputes of the 2007, 2013 and 2017 General elections hence the need to embrace mediation of emerging presidential election disputes.

A biased/partisan judiciary- The judiciary is tasked with ensuring that justice is accessible to all to promote the constitutional spirit of patriotism, cohesion

[39] Presidential Petition No. 1 of 2017; The Supreme Court of Kenya in *Raila Odinga vs IEBC* while annulling the 2017 Presidential election stated that the electoral body had significantly committed illegalities and irregularities which, as a matter of fact, affected the integrity of the entire outcome.
[40] Independent Review Commission (IREC or the Kriegler Commission), Report of the Independent Review Commission on the General Elections held in Kenya on 27th December 2007
[41] Francis Ang'iwa Away, "A critique of Raila Odinga vs IEBC Decision in Light of the Legal Standards for Presidential Elections in Kenya," in Balancing the Scales of Electoral Justice Pg. 46-47
[42] BBI Kenya website, Building bridges to a united Kenya: from a nation of blood ties to a nation of ideals, 2019, 48

and national unity.[43] However, the courts are blamed for accelerating election disputes by being partisan[44] and failing to conclude election matters in a timely manner.[45] Instead, mediators are trained to uphold the integrity, expedition and neutrality of the process.

Mistrust of the electoral body- Mistrust of an electoral body is caused by *inter alia* infiltration by state organs, illegal procurement dealings and overlap of functions between the chairman and the chief executive officer, as well as between the secretariat and the commissioners of the IEBC.[46] The annulment of the 2017 presidential election was primarily caused by internal management problems of the IEBC.[47] While these disputes cause inefficiency and undermine public confidence in the commission,[48] they may be said to be disputes of a boardroom nature which should be resolved through confidential mediation processes.

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[43] Hon. Justice David Majanja, "Judiciary's Quest for a Speedy and Just Electoral Dispute Resolution Mechanism: Lessons from Kenya's 2013

[44] Cheselden George vs Carmona, "Enhancing the Capacity of Judges to resolve election disputes: Preliminary Considerations," (2013) Para. 1 available at *http://www.iojt-dc2013.org/-/media/micrositesfiles/10JI/11042013-Enhancing-Capacity-Judges-Resolve-Election-Disputes.ashx* Accessed: 28 Aug 22

[45] The Constitution of Kenya (Amendment) Act No. 4 of 1988 where the President retained the power to nominate and appoint judges to serve at his/her pleasure. Previously, judges did not enjoy security of tenure. Also see President Uhuru Kenyatta's threat to 'revisit' the Supreme Court decision of nullifying his 2017 Presidential Win and his subsequent failure to appoint Court of Appeal judges.

[46] Wilson Mwihuri, "Strengthening Corporate Governance at the Independent Electoral and Boundaries Commission (IEBC)," Institute of Certified Secretaries Governance Journal (ISSN 2663-4171) Volume 1 Issue 3 2022

[47] Raila Odinga & another vs Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR

[48] Africa Policy Institute, "Kenya decides: The Electoral Commission and Stability,"

Ethnic persuasions- They are traceable to 1992 when section 2A was repealed to formally end the one-party rule in Kenya.[49] This created room for the second liberation, freedom of expression and pluralism of political ideology.[50] Interestingly, the 1997, 2002, 2007, 2013, 2017 and 2022 general elections have all been conducted within the auspices of multi-party democracy. On the contrary, it has brought a new wave of polarized and tribal politics, with the formation of inter-ethnic alliances and the electorate coalescing around community kingpins.[51]

The electorate have consistently shunned issue-based politics since voting patterns and political party affiliation are modelled along tribal and ethnic lines.[52] In 2007, Kenya descended into chaos after numerous disputes triggered by tribalism occurred. In line with the 2010 constitution's recognition of culture as the foundation of the nation and the cumulative civilization of the Kenyan people[53], mediation instills a sense of cultural diversity by bringing disputing parties from all walks of life to a level of compromise.

Classification of Election Disputes

a) Pre-election Disputes

Pre-election disputes refer to disputes regarding political parties, campaigns, voter registration, electoral offences, nomination, party primaries, candidate

[49] The Constitution of Kenya (Amendment) Act 1997 (No. 9 of 1997), Section 1A stated that, "The Republic of Kenya shall be a multi-party democratic state"
[50] Magdaline Wairimu, 'The Role of Mediation in Promotion of Kenyans Sovereignty During Election Disputes Management' (Strathmore University Law School 2021) 1.
[51] Ibid.
[52] Elder C, Stigant S and Claes J, "Elections and violent conflict in Kenya," Peaceworks, 2014, 5
[53] Constitution of Kenya, Article 11 (1)

clearance and delimitation of electoral units.[54] They are briefly described as follows;-

Political party disputes- The principle legislation makes a provision for the Political Parties' Dispute Tribunal (PPDT) to settle political party and party primaries' disputes.[55] The Political Parties Act notes that these disputes may be between members of a political party,[56] partners of a coalition party,[57] a member against another political party,[58] among political parties themselves,[59] and an independent candidate versus a political party.[60]

Before a dispute is lodged at the PPDT, the disputing party must first exhaust internal resolution mechanisms (IDRMs) within a political party.[61] The Court in **Gabriel Chapia vs Orange Democratic Movement** affirmed that IDRMs, which may include but not limited to mediation, must be used in the first instance in settling political party dispute.[62] There is a school of thought that observes failure to use mediation as the appropriate IDRM potentially defeats the ends of justice.[63]

Nomination disputes- Most pre-election disputes relate to candidate nomination by individual political parties and candidate clearance by the IEBC

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[54] Tom Ojienda & Lydia Mwalimu Adude, "Electoral Dispute Resolution Mechanisms in Kenya," (2022) 8 (3) Journal of Conflict Management and Sustainable Development (ISBN 978-9966-046-15-4)
[55] Political Parties Act, 2011 s 39(1).; Ibid 40(1)(f)
[56] Ibid 40(1)(a).
[57] Ibid 40(1)(e).
[58] Ibid 40(1)(b).
[59] Ibid 40(1)(c).
[60] Ibid 40(1)(d).
[61] Ibid 40(2).
[62] Gabriel Bukachi Chapia v ODM & Another (2017) eKLR*; see also Stephen Asura & Others v the Orange Democratic Movement Party & Others; Engineer Ephraim Maina v the Independent Electoral and Boundaries Commission*
[63] Ibid

where one must submit their name and political party to the IEBC.[64] Nomination involves the process through which political parties or the electoral body selects and clears candidates to run for political offices.[65] The IEBC is mandated to resolve nomination disputes which often occur where a candidate fails to meet the qualification criteria or where he/she is denied clearance to contest for a given seat.[66]

Voter Registration disputes- These refers to disputes concerning eligibility, identification and recruitment of voters. The Supreme Court in *Harun Mwau vs IEBC* advised that proper voter registration is a critical pillar of electoral law which actualizes the right to vote.[67] Defective voter registration leads to pre-election disputes and violates political rights under the constitution.[68] These disputes also cover instances of voter register inspection, missing voters when one is already registered as such, transfer of a voter to a different electoral unit, changes of a voter's details and disqualification of a voter.[69]

Campaign-related disputes- Campaigns are sometimes hard-hitting and unforgiving to political opponents giving room for disputes. These disputes which border on violence, hate speech and destruction of election materials are considered electoral offences in Kenya which warrant arrest, prosecution and/or conviction.[70]

Disputes relating to Breach of the Electoral Code of Conduct- All electoral process are fully regulated to ensure that they are in conformity to article 84 of the constitution. This provision anticipates increase of disputes whenever

[64] Elections Act 2011, S.2
[65] Musila and others (n 18) 157.
[66] Constitution of Kenya 2010, Art. 99, 137 & 180
[67] John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR
[68] Constitution of Kenya 2010, Art. 38
[69] Elections Act 2011, S.11
[70] Elections Act, 2011 pt. IV.

candidates and political parties breach the IEBC code of conduct which prohibits ethnic intolerance and gender discrimination.[71]

Delimitation of electoral units' disputes- Inadequate representation at all levels and discrepancy on the names, number and boundaries of constituencies or wards are a precursor for election disputes.[72]

b) Post-election disputes

Post-election disputes refer to disagreements over the final result of an election. As a result, the Kenyan law provides for an election court to handle post-election disputes and election petitions.[73] The following include the election courts in the order of hierarchy;

i. **The Supreme Court-** The 2010 Constitution paved the way for the establishment of the Supreme Court to hear and determine presidential election disputes.[74] It imposes strict timelines on the filing and final determination of election petitions. Previously under the 1966 Constitution, election petitions fell within the jurisdiction of the High Court, they were subject to appeals and not time-bound.
ii. **Court of Appeal-** This is the appellate court from the decisions of the High Court with regards to election petitions challenging the election of a county governor, member of National Assembly and a Senator.
iii. **The High Court-** It is an election court with the original jurisdiction to dispense with matters of the election of a Governor, Senator or Member of Parliament.[75] It also deals with county election disputes provided that the court is situate within or nearest to the county.[76]

[71] Constitution of Kenya, Art. 84
[72] Ibid Article 89(2).
[73] Elections Act, Section 2
[74] Constitution of Kenya 2010, Art. 163 (3) (a)
[75] Constitution of Kenya, 2010 Article 105(1) (a).
[76] Elections Act, 2011 s 75(1).

iv. **Magistrates' Court-** This court deals with county election disputes at the ward level, that is, any claims of illegality raised on the election of a Member of County Assembly.[77] The parties are at liberty to challenge the decision of this court by filing an appeal before the High Court for conclusion within six months.[78]

Legal Framework on Electoral Dispute Resolution in Kenya

- **Constitution of Kenya 2010**

It guides courts and tribunals to promote various ADR mechanisms; reconciliation and mediation in aiding parties to achieve electoral justice.[79] The legislature is obligated to propose and enact legislation on settlement of election disputes on a timely basis.[80] Article 38 (1) protects the enjoyment of political rights and gives every citizen the free will to participate in making political choices.[81] The constitution also establishes the IEBC to *inter alia* register voters, delimit boundaries and the settlement of Electoral Disputes.[82] However, its role in settling election disputes is limited to pre-election disputes[83]; nomination and candidate clearance disputes while disputes pertaining to declaration of election results are left to the jurisdiction of the courts.[84]

- **Elections Act**

The Elections Act is the primary legislation on the conduct of all elections in Kenya. It also provides for election dispute resolution in part VII of the elections act. Just as the Constitution, IEBC is responsible for the settlement of pre-

[77] Elections Act, 2011 s 75(1A).
[78] Elections Act, 2011 s 75(4).
[79] Constitution of Kenya (2010), Article 159 (2) (c)
[80] Constitution of Kenya (2010), Art. 87 (1)
[81] Constitution of Kenya (2010), Article 38 (1)
[82] Constitution of Kenya, Art. 88 (1) & (4)
[83] IEBC Act No 9 of 2011, Sec. 4 (e)
[84] Constitution of Kenya, Art. 84 (e)

election disputes[85] within a ten-day period.[86] Therefore, nomination disputes fall within the jurisdiction of the IEBC while disputes concerning election results fall within the jurisdiction of an election court.[87] Section 74 (3) of the Elections Act also requires that if a dispute relates to nomination or election it should be resolved before the prospective nomination or election. The act generally envisions that disputes on declared vote outcomes and election petitions be heard by courts, leaving out room for a possible mediation. For instance, the Supreme Court is the only court with the jurisdiction to determine disputes arising from presidential elections.[88]

IV. The Scope of Mediation and Electoral Justice in Kenya

Mediation

This is a mechanism in which a neutral person enables disputants to solve a dispute.[89] It is a party-driven process and is highly recommended for being informal, confidential, voluntary and non-binding.[90] Additionally, it embodies the principle of party autonomy where the parties take control of the procedure –including selection of the mediator- which makes it very easy to result into a win-win.[91] It is based on a flexible setting where you can comfortably have an

[85] Elections Act No. 24 of 2011, Sec. 74 (1)
[86] Ibid, Sec. 74 (2)
[87] Section 2 of the Elections Act 2nd Schedule defines an election court as the Supreme Court, the High Court or any other court vested with competent jurisdiction within the Constitution, the Elections Act, in exercise of the jurisdiction conferred upon it by Article
[88] Constitution of Kenya, Art. 140, 163 (3) (a) & 165 (5) (a)
[89] Mironi, M, "From Mediation to Settlement and from Settlement to Final Arbitration, an Analysis of Transnational Business Dispute Mediation," 73(1) Arbitration 52 (2007), p. 53; Fenn P, "Introduction to Civil and Commercial Mediation," in Chartered Institute of Arbitrators, Workbook on Mediation, (CIArb, London, 2002), P. 10
[90] Muigua K., "Alternative Dispute Resolution and Access to Justice in Kenya," Glenwood Publishers, Nairobi, 2015, p. 24
[91] Paul Fisher, "All You Need to Know About Mediation but Didn't know to Ask –A-Parachute for Parties in Litigation," Mediate (Nov. 2000), *http://www.mediate.com/articles/fisher2.cfm*

election dispute resolved at the convenience of the parties and on a day like Saturday without any prejudice. The mediator is trained to identify the parties' interests, positions and preferred options.[92]

Electoral Justice

On the other hand, electoral justice is the system in which election malpractice or irregularities are remedied through judicial or quasi-judicial mechanisms.[93] It is also referred to as the Electoral Dispute Resolution (EDR) whose sole objective is to ensure that the constitutionally enshrined political rights are protected.[94] It is a legal system where an applicant seeks relief arising from arising from an unlawful election exercise.[95] Further, the electoral justice system provides the avenue of challenging the electoral management system for flawed electoral processes or actions.[96]

Election disputes amenable to mediation

The pattern of election disputes in Kenya is rather consistent. It shows that most of the election disputes in Kenya are a combination of both process and outcome disputes. Process disputes are those conflicts on the procedure of an election exercise.[97] Election outcome disputes refer to any disagreement that affects the final result. Legal experts agree that whereas courts have proved to be effective at handling election outcome disputes, they are nonetheless ineffective at settling election process disputes.

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[92] K. Muigua, "Resolving Environmental Conflicts through Mediation in Kenya," Ph.D Thesis, 2011, Unpublished, University of Nairobi P.43

[93] Dr Godfrey Musila and others, *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence.* (Law Society of Kenya 2013) 152.

[94] Ibid

[95] Ibid.

[96] ACE Electoral Knowledge Network. (2012). The ACE Encyclopedia: Legal Framework

[97] Timothy Downs, Et. Al., The Recount Primer 19-20 (1994)

Both pre and post-election disputes are amenable to mediation subject to a few exceptions.[98] They include instances where election disputes involve violation of a fundamental right and where a precedent is desirable for the conduct of future electoral processes.[99] Electoral mediations should also be configured in a manner which allows the participation of the disputing parties and the general public.[100]

Pre-election disputes include nomination, party primaries, candidate clearance and candidate related disputes. Instead, the Kenyan law delegates the resolution of these disputes to the IEBC[101] and the PPDT.[102] Interestingly, there has been a clear overlap of functions between these institutions. There is need to harmonize the legal framework by integration mediation in the resolution of pre-election disputes to make electoral processes fair and transparent to effectively end the culture of disputed results.[103]

Mediation of post-election disputes is always challenged on account of hardline political stands, the urgency to call an election, public interest and sensitivity associated with electoral processes.[104] Notwithstanding this criticism, there is evidence of a successful post-election mediation in the 2007 Post-election dispute where power-sharing coalition government was formed.[105]

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[98] Erin Butcher-Lyden, Note, The Need for Mandatory Mediation and Arbitration in Election Disputes, 25 OHIO ST. J. ON Disp. RESOL. 531 (2010)
[99] Guidelines for Understanding, Adjudicating, And Resolving Disputes in Elections (Chad Vickery ed., 2011), available at: *http://www.ifes.org/-/media/Files/Publications/Books/201 1/GUARDE finalpublication.pdf at*
[100] Carrie Menkel-Meadow, The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering, 72 TEMP. L. REv. 785, 802 (1999).
[101] Constitution of Kenya 2010, Art. 88
[102] Political Parties Act No. 11 of 2011, Sec 40
[103] International Foundation for Electoral Systems (IFES) 'Elections on Trial: The Effective Management of Election Disputes and Violations' (2018), 5
[104] Erin Butcher-Lyden, Supra note 98, at 544
[105] Sievers Harnet Axel & Peters Ralph Michael, "Kenya's 2007 General Election and its Aftershocks," Africa Spectrum Vol. No. 43 No.1 Horn of Africa (2008) pp. 133-144

Advantages of Mediation in the Promotion of Electoral Justice

One, it is **cost-effective.** Mediation is relatively cheap compared to other methods as the parties choose a cost friendly and affordable environment to settle their dispute. Two, it is a **speedy** process.[106] Mediation sessions are usually planned at the convenience of the parties. By selecting qualified mediators, a quick settlement is guaranteed. Mediation is also a simple and easily understandable process with little to no complexities.

Three, mediation conventionally assures disputants of the **confidentiality** of the information disclosed during mediation and caucus sessions. The information can only be revealed once they parties have agreed. Further, a mentee in mediation can only follow the proceedings on the condition that the parties allow and that he/she will be bound by the principle of confidentiality. Four, these mechanism of dispute resolution entitles parties to control over the mediation process under the principle of **Party autonomy**. The choice of the mediator is also left to the parties.

Mediation guarantees **flexibility** of the procedure to accommodate the interests of conflicting parties, the principle of **voluntariness** based on the willingness of the parties to resolve their dispute**, neutrality** as there is no presupposed outcome of the mediations and **restoration** of ties to preserve the relationship between parties.[107] It promotes **finality** of the decision upon attaining a settlement agreement which puts the dispute to rest removing any grounds for an unnecessary appeal and is **binding** upon the parties.[108]

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[106] Juma Kathina Monica, "African Mediation of the Kenyan Post-2007 Election Crisis," Journal of Contemporary African Studies Vol. No. 27 No. 3 (July 2009) Pg. 407-430

[107] J.G Merrills International Dispute Settlement, 4th Ed. (Cambridge University Press, Cambridge, 2005), p.28

[108] MTI Mediation Practice Manual by James Mangerere P.7

Limitations of Mediation in the Promotion of Electoral Justice

One, the **high stakes nature** of election related disputes. The need to have election results certified and declared to the public in a timely manner averts the possibility of a post-election mediation. To this end, ADR scholars view arbitration is an appropriate method to resolve disagreements before to, on election eve, during, and after the election.[109]

Two, elections are a **zero-sum game** with the meaning that they must produce a winner and a loser. Despite mediation being geared towards achieving win-win or lose-lose outcomes upon agreement by the parties, it is entirely difficult for the parties to compromise especially where they are fixated on winning. Also the fact that the parties to an election-related conflict usually have such a huge backing, they might not be willing to back down and risk losing credibility in the eyes of their supporters.[110]

Three, mediation faces the shortcoming of **power imbalance** between parties. Lack of goodwill by the parties caused by mistrust or power imbalance may be lead to unproductive mediation sessions. There is also absence of goodwill on the part of the legislature and the judiciary in promoting both mandated and voluntary mediation for election disputes. Four, **enforcement** of an agreement is impeded by its non-binding attribute. The mediated agreement must be in writing for it to be enforceable as an order of the court.

Five, mediation **does not always result in an agreement**. There must be cooperation and mutual effort from the parties for a settlement to occur. Unfortunately, mediation is treated or **perceived as being lesser** to litigation. Any **withholding of information** by a party has a huge effect on the success of

[109] Butcher-Lyden (n 68) 542–544.
[110] Rebecca (n 70) 330–
331.

a mediation procedure. Lastly, there is **lack of literacy** on the possibility of mediation in settling pre-election and other resulting disputes.

V. Litigation of Election-Related Disputes

The status quo of litigation

In this section, we shall examine litigation of election disputes. Litigation is the formal processes initiated through the courts to manage election related claims.[111] Over-emphasis on litigation is premised on the assertions that elections are inherently binary, they involve two or more competing interests.[112] Secondly, an election must produce a winner and a loser in a record time.[113] Thirdly, electoral flaws are always inevitable. Based on the fact that Kenya is a litigious society, litigation is the most preferred method as it has taken the lion share of both pre and post-election disputes such as the 2013 and 2017 election petitions.

The courts have traditionally shouldered the Herculean task of handling electoral disputes.[114] The elections at the presidency not only command the most

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[111] Bernard M. Nyaga, "*Impact of Supreme Court of Kenya's Decisions on the Right of Appeal from the High Court verdicts on Arbitral Awards*," available at: <*https://www.google.com/url?=sa=t&source=web&rct=j&url=https://ciarbkenya.org/wp-content/uploads/2021/09/WADR-Webinar-Synopsis1.pdf&ved=2ahUKEwiK3s3vpMr3AhVKyhoKHUOPDzcQFnoECB8QAQ&usg=AOvVaw1j1yvRzcvsdq3rLSWuvzEa*> Access date: 27th July 2022

[112] Robert H. Mnookin et al (2000), "Beyond Winning: Negotiating to create value in deeds and disputes,'

[113] Lawrence Susskind, "Could Florida Election Dispute Have Been Mediated?" DISP. RESOL. MAG. Winter 2002 at 8, 10

[114] Bernard Nyaga, "Succession rows can overwhelm our courts," The Standard, 5 January 2021 Available at:*https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.standardmedia.co.ke/amp/opinion/article/2001399146/succession-rows-can-overwhelm-our-courts&ved=2ahUKEwissrmEi8PuAhWJUBUIHU52DRQQFjAAegQIAxAC&usg=AOvVaw16tN4jXd4oo7KvHI3z8K9Y* Access date 23 March 2022

attention in Kenya but are often marred with all kinds of irregularities.[115] Overtime, Kenyan courts have entertained the following election petitions: *Harun Mwai v Daniel Arap Moi* (1993)[116], *Raila Odinga vs Independent Electoral and Boundaries Commission* (2013)[117] and the controversial *Raila Odinga vs Independent Electoral and Boundaries Commission* (2017).[118]

In contrast to mediation which is purely informal and flexible, courts apply very rigid rules which are not adjustable to all circumstances involving election disputes. Courts are also faced by the involvement of huge volume of paperwork, exclusion of the views of the public, slowdown of operations at the registries due to electronic filing upheavals and the imposition of a judge/magistrate whose decision may not necessarily lead to a consensus.[119]

Merits of Litigating Election Disputes

Having identified the prevalence of election disputes and the increased resort to the courts, this paper submits the pros of litigation as follows;

a) Pre-election resolution prevents post-election litigation

Disputes that can easily be managed prior to the election contribute to a decrease in post-election litigation.[120] The United States has embraced mediation in resolving pre-election disputes for timely conflict avoidance. As a result, prior resolution prevents the escalation of any outstanding disputes upon declaration

[115] Imanyara v Moi & 12 Others Election Petition No. 4 of 1993 (2008) 1KLR (EP), 472-482; Orengo v Moi & 12 Others Election Petition No. 8

[116] Election Petition No. 22 of 1993 (2008) 1 KLR (EP), 691-699; the petitioner filed a case against then President Daniel Moi. It was dismissed on account of improper service and the use of foolscaps to capture signatures of the electorate.

[117] Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others (2013) eKLR

[118] Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR

[119] Civil Procedure Act Cap. 21 Laws of Kenya; Mediation (Pilot Project) Rules, 2015

[120] Erin Butcher-Lyden, 'The Need for Mandatory Mediation and Arbitration in Election Disputes' (2010) 25:2 Ohio State Journal on Dispute Resolution 537.

of results, ensures compliance with the electoral law, prevents overcrowding in the corridors of justice and, lessens the occurrence of flaws in the electoral process.[121]

b) Some Election-related disputes are a zero-sum game

Elections and resulting disputes are said to be a zero-sum game as they must produce a winner and a loser.[122] Instead, mediation is focused on win-win or lose-lose outcomes. The courts in their judgments usually decide on the party that carries the day as parties are afforded a chance to compete on questions of law and fact that relate to the election dispute. Unfortunately, most election petitions are determined in a slow manner leaving parties dissatisfied and the public interest stuck on contestation.

c) Litigation as a means of achieving Finality in election related disputes

While most court decisions put election disputes to rest with finality, they are nevertheless subject to appeal.[123] In exception, findings made by the Supreme Court in presidential petitions stand as final and binding for the reasoning that;

> *"Some disagreements simply require finality; election disputes fall in this category, particularly given the time sensitivity inherent in all post-election disputes. Someone must take office."*[124]

d) Litigation solidifies a candidate's support base

Through litigation, aggrieved elective candidates demonstrate that they are brave enough to encounter a bracing defeat and can live to fight another day in the sense that;

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[121] Ibid.
[122] Green Rebecca, 'Mediation and Post-Election Litigation: A Way Forward' (2012) 27:2 Ohio State Journal on Dispute Resolution 325.
[123] Ibid 337.
[124] Ibid 334.

> *"Candidates moving the court for a vote recount brings a strong signal to their supporters that they are not willing to back down or give up easily. Such publicity is good if the said aspirants intend to run for office in the near future.*[125]*"*

Demerits of Litigating Election Disputes

It goes without saying that litigation of election-related disputes has been the *status quo* for a long time now and the following include shortcomings which have reduced the capacity of our courts in promoting access to electoral justice;

a) Litigation affects the legitimacy of a declared outcome

In the litigation of election disputes, the disputant/petitioner bears the burden of proof.[126] This is not only codified in the Evidence Act but also applies to all election related petitions.[127] In tandem with the Evidence Act, the phrasing of the Elections Act requires a petitioner to rebut the presumption that a declared result remains valid unless the contrary is proved.[128] Section 83 of the Elections Act requires to adduce sufficient and cogent evidence to the court to prove any irregularity.[129] This is particularly hard for some disputants who may be unable to access evidence as most of it is held by an electoral body in confidence such as Forms 34A, 34B and 34C.

b) Difficulty in satisfying the high standard of proof in election petitions

Election disputes in the court system are *sui generis* cases and are regarded as serious civil matters. A petitioner bears the difficulty in satisfying the high standard of proof in election petitions on an intermediate standard. Court precedents have upheld the intermediate standard of proof to be above a

[125] Ibid 337.
[126] Auburn J, "Burden of Proof" in Malik H (ed), "Phipson on Evidence", 17th (ed) Sweet and Maxwell, London, 2010, Pg. 149-151
[127] Evidence Act Cap. 80 Laws of Kenya, Section 107;
[128] Elections Act, Section 83
[129] Ibid

balance of probabilities but below the standard of beyond reasonable doubt.[130] The high standard of proof is explained by **Githui J.** in *Sarah Mwangudza Kai v. Mustafa Idd & 2 Others* that;-

> *"Election disputes are unique civil suits and governed by special code of electoral laws. They involve the constitutional entitlement to Political rights under article 38. These disputes affect public interest in the sense that they involve the electorate in a given area and there are not limited to the parties themselves. Election petitions involve matters of national importance hence the need for effective resolution."*[131]

c) Pre and post-election disputes overwhelm the courts

Case backlog in the courts is a major hindrance towards Access to Justice in Kenya. Alternatively, the judiciary has adopted the use of technology in its case management and referred other matters to ADR. The influx of election disputes and preference for litigation by disputants overwhelms an already overstretched judiciary hence affecting the time sensitivity of election petitions.

d) Litigation confuses voters

Courts use formal, lengthy, bureaucratic and cumbersome procedures which end up confusing and frustrating voters.[132] For example, in the 2022 Nairobi Gubernatorial race, questions concerning the validity of Hon. Johnstone Sakaja' s undergraduate academic qualifications in the courts left most of his supporters uncertain of his candidature for the seat of Governor.

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[130] The Court of Appeal case in the 2013 Tharaka Nithi Gubernatorial election dispute *M'nkiria Petkay Shen Miriti v. Ragwa Samuel Mbae & 2 Others* Civil Appeal No. 47 of 2013 stated that the standard of proof in election petitions is higher than a balance of probabilities but below reasonable doubt in the exception of the commission of criminal or electoral offences

[131] Sarah Mwangudza Kai v. Mustafa Idd & 2 Others Election Petition. No. 8 of 2013; [2013] eKLR

[132] Butcher-Lyden (n 68) 538.

e) Costs associated with Litigation

The fees associated with litigation are high as compared to the fees for other ADR mechanisms such as mediation and negotiation.[133] Moreover, post-election litigation can drag on for months and months and can cost candidates and taxpayers millions of dollars[134].

f) Protracted and habitual Litigation affects the legitimacy of election outcomes

The public may also be pleased when election-related disputes are resolved swiftly and definitively in court, but they lose interest when the legal process takes a long time, especially if a vacancy in an elected position results from the prolonged litigation[135]. Litigation is coercive in nature and neither the parties have control over the process thus when elections are determined by judges, people start to feel as though they have no say. Protracted and frequent litigation poses a significant risk to the right to vote.

g) The adversarial approach of litigation scars relationships and advances bitterness

Because of the sensitive and emotive nature of election-related disputes, relationships are broken sometimes without a chance of being mended, when the parties in litigation battle it out in court.[136] Additionally, the performance expectations of attorneys in their businesses and the tensions brought on by the demands of many stakeholders tend to cause conflict and divide the populace. Furthermore, in the event of a court-ordered election re-run, the people'

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[133] Bernard Nyaga, "Online Dispute Resolution: The Future of E-Commerce in Kenya," 2022 8 (3) Journal of Conflict Management and Sustainable Development (ISBN 978-9966-046-15-4) available at: *https://journalofcmsd.net/about/*

[134] Rebecca (n 70) 338.

[135] Ibid 339.

[136] B. Laurence, "A History of Alternative Dispute Resolution," ADR Bulletin: Vol. 7: No. , Article 3 2005, p.1 available at: *https://epublications.bond.edu.au/adr/vol7/iss7/3* Access date: 15th May 2022

selection of candidates for office is subjectively based on feelings and other non-objective factors supported by the influence of plaintiffs[137].

VI. Prospects for Mediation in Kenya

- **Mediation Bill**

It was brought before parliament under Gazette No. 92 of 2020 having been proposed by then Leader of Majority Hon. Aden Duale. It provides for an adequate mediation legal regime for all civil disputes, set out the principles applicable to mediation and inter alia provisions on enforcement of mediated settlement agreements.[138] The Mediation Bill contains game-changer provisions that if enacted and implemented would promote alternative access to justice to election disputants.[139]

It introduces a mediation certificate as well as imposing a legal duty on advocates to advise their clients on the applicability of mediation to their instant matter. The bill also creates an obligation on the part of the party to take any reasonable measures to resolve a dispute by mediation before lodging a suit in the courts.[140] Such reasonable measures are also specified to include; notifying the other party of disputed issues, an offering to resolve the dispute, effective and appropriate response to a notification, availing relevant information and documents to the other party, considering whether mediation is suitable, choosing a mediator by agreement and remaining committed by attending the mediation process.[141]

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[137] Wairimu (n 6) 15.
[138] National Assembly Bill No. 17 of 2020, available at *http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2020/TheMediationBill_2020.pdf* Access date: 2nd April 2022
[139] Ibid, Clause 22
[140] Ibid, Clause 22 (1) (a)
[141] Ibid, Clause 22 (2)

- **Supreme Court Rules**

1. The Supreme Court Rules 2011 allows the Supreme Court of Kenya to refer any matter for hearing and determination by Alternative Dispute Resolution (ADR) mechanisms.[142] The 13th Parliament should propose an Electoral Dispute Resolution Bill 2023. This bill should provide for a requisite definition of election disputes and widen the scope of EDR as contemplated in section 73 of the Election Act. It should also relay the technicalities, procedures and timelines of electoral mediation.
2. The Constitution should be amended to create a causal link between mediation and electoral justice. The electoral law as it stands gives litigation an advantage over ADR mechanisms. The amendments should promote legitimacy of mediation processes and enforcement of mediated outcomes.
3. The courts and tribunals should be at the forefront of instilling the practice of mediating election disputes by developing supportive jurisprudence and referring election matters to Court-Annexed mediation. This will effectively ensure maximum uptake of mediation before resulting to the courts.
4. Mediation should be accorded the constitutional priority it deserves in settling electoral disputes. As opposed to litigation, mediation operates on a first come first serve basis and ensures that that the process flows at the convenience of the disputing parties.
5. Since litigation is still the most preferred of dispute resolution in Kenya, the judiciary should step up training of judicial officers to enable litigants who suffer at the expense of an overstretched court-system to consider voluntary and court initiated mediation.
6. Bearing in mind that Article 87 (1) of the Constitution is vague and open to different interpretations, it should be amended to specify mediation as the appropriate dispute resolution for election disputes. This would give future august houses clear and exact direction on timely mediation of election disputes.

[142] Supreme Court Rules, Rule 11

7. The Political Parties Act should be amended to contain an IDRM clause which should be in tandem with Art. 159 (2) (c) by giving mediation a first instance opportunity in the resolution of election disputes. It should state verbatim the role of mediation in political party disputes.
8. This paper contends that the 13th parliament should be guided to adopt a legislation to give full effect to Article 87 (1) of the Constitution. Just as the legislature advances mediation in reconciling bills within the bicameral legislature, it should also establish Senate and National Assembly Mediation Committees to spearhead far-reaching electoral reforms through mediation both at the national and devolved level.
9. There is need to put pen to paper by harmonizing the EDR framework by introducing the multi-tiered dispute resolution approach. Through this approach, the most amiable mechanisms of dispute resolution such as mediation and reconciliation are used in the first instance and where the conflict persists, the disputants resort to adjudication and litigation.
10. This paper observes that adoption of mediation by the institutions involved in electoral exercises; the courts, tribunals and the electoral body would promote a unified/harmonized approach of promoting electoral justice. The role of these institutions should not be resolution of election disputes in the first instance but rather aid disputing parties to voluntarily offer themselves for a mediation whenever an election related claim arises.
11. We recommend that the Bachelor of Laws curriculum be amended to introduce a 90-Hour course to promote the training of elections law hived off as an independent unit. The ADR community led by the Chartered Institute of Arbitrators, the Mediation Training Institute and the Nairobi Centre for International Community should also collaborate in providing certifications for electoral experts and continuous professional development (CPD).

Conclusion

Election disputes are therefore inevitable in any given jurisdiction. The main factor promoting electoral mediation is the increase of process disputes as

opposed to outcome disputes. Thus, mediation of election-related disputes should be backed up enhancing public sensitization and creating an enabling legal framework. These election process disputes can successfully be resolved through mediation in the first instance to prevent further escalation of such disputes, avert any interference with the social order and relieve the judicial system.

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Bridging the Gap to Sustainable Development through Mediation in Kenya

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Abstract

In recent years, the North Rift region of Kenya has experienced increased insecurity resulting from cattle rustling and banditry. While President Ruto has promised to act tough on bandit attacks, it is uncertain whether the root cause of insecurity is a lack of policing or a growing case of misunderstanding between the parties. This situation underscores the need for effective conflict resolution mechanisms to address the underlying causes of violence and promote sustainable development in the region. Mediation is a viable option for bridging the gap between the parties, fostering understanding, and promoting sustainable development. This paper explores the potential benefits of mediation in addressing conflict in the North Rift region, highlighting its potential to promote sustainable development by fostering social cohesion, building trust, and creating an environment conducive to economic growth. Additionally, the paper examines the challenges of implementing mediation in the region, including cultural barriers and the need for effective collaboration among stakeholders. Ultimately, the paper argues that mediation has the potential to promote sustainable development in the North Rift region by bridging the gap between conflicting parties and creating a platform for constructive dialogue and cooperation.

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Introduction

The word itself 'Mediation' is defined as the process of talking to two peoples or groups who have an ongoing disagreement in the attempt to help them find a solution to their problem.[1] With regard to Alternative Dispute Resolutions, Mediation takes a more formal meaning, being the process where the parties meet together with a person whom they voluntarily selected to assist them in the negotiation of their differences.

Sustainable development is enshrined under Article 69(1) of the Kenyan Constitution. Article 69 is drafted under ecological terms, and requires the state to ensure the sustainable exploitation, utilization, conservation, and management of the environment and natural resources and the equitable sharing of accruing benefits. This paper is divided into several parts and will be exploring the nexus between mediation and sustainable development and how we can ensure more of access to equitable justice for instance disputes related to natural resource management, land use or disputes over access to water resources, land ownership and conservation, which could be resolved more effectively through mediation than through traditional litigation.

Interpreting Mediation

Mediation is a relaxed process when compared to the court systems and it leaves a majority of the decision power with the parties. The mediator himself acts as a catalyst and is not concerned with deciding what is right or what is fair but rather his job is to guide the process and keep dialogue moderate in the hopes of avoiding confrontation. He will however during the mediation process, seek concessions from both parties.[2]

In Kenya, the constitution has provided the framework for mediation under Article 159(2)(C) providing for alternative forms of dispute resolution. Prior to

[1] Cambridge English Dictionary, "Mediation" (accessed February 26, 2023) *https://dictionary.cambridge.org/dictionary/english/mediation* .

[2] JAMS ADR, "Mediation Defined" (accessed February 26, 2023) *https://www.jamsadr.com/mediation-defined/.*

the promulgation of the constitution in 2010, mediation was already the subject of various workshops in order to create public awareness such as the Dispute Resolution Centre, which was established in 1998 as an independent organization which was first used to promote mediation in Kenya. Under the government, other dispute resolution bodies exist such as the Political Parties Dispute Resolution Board and the National Cohesion and Integration Commission.[3]

Forms of Mediation

There are several different types or styles of mediation, each with its own unique characteristics and techniques. These are some of the most commonly recognized types of mediation.

Facilitative Mediation: Also known as traditional mediation, this type of mediation is designed to help the parties in conflict negotiate and communicate effectively with one another. The mediator facilitates the discussion and helps the parties identify their interests and concerns, but does not make any decisions or provide recommendations.[4]

Evaluative Mediation: In evaluative mediation, the mediator assesses the strengths and weaknesses of each party's case and provides feedback on the potential outcomes of a lawsuit or arbitration. This type of mediation is often used in the context of civil litigation or commercial disputes.[5]

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[3] Kennedy Odhiambo, 'Kenya - Weinstein International Foundation' (Weinstein International Foundation, accessed 26 February 2023) *https://weinsteininternational.org/kenya/kenya-bio-2/.*

[4] PON (2023) 'Types of Mediation: Choose the Type Best Suited to Your Conflict'. Harvard Law School Program on Negotiation. Available at: *https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/* (Accessed: 27 February 2023)

[5] ADR Times (2023) 'Types of Mediation'. ADR Times. Available at: *https://www.adrtimes.com/types-of-mediation/* (Accessed: 27 February 2023).

Transformative Mediation: This type of mediation is focused on empowering the parties in conflict and helping them transform their relationship. The mediator works to facilitate communication and understanding between the parties and encourages them to develop a mutual respect for each other's needs and interests.[6]

Narrative Mediation: Narrative mediation is based on the idea that individuals create their own stories to make sense of their experiences. The mediator helps the parties in conflict to explore their own stories and to understand each other's perspectives. By doing so, the parties may be able to find common ground and develop a mutually acceptable solution.[7]

Mediation-Arbitration (Med-Arb): In this type of mediation, the mediator also serves as an arbitrator. If the parties are unable to reach a voluntary agreement, the mediator can make a binding decision that will resolve the conflict. Med-arb is often used in complex disputes where there are multiple issues to be resolved.[8]

Online Mediation: With the rise of technology, online mediation has become increasingly popular. This type of mediation is conducted using video conferencing or other online communication tools. Online mediation is often more convenient and cost-effective than traditional in-person mediation.[9]

Sustainable Development

Sustainable development was conceptualized in the Brundtland Commission (Our Common Future) where it was defined in terms of equity as: "development

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[6] Ibid

[7] Ibid

[8] PON (2023) 'Types of Mediation: Choose the Type Best Suited to Your Conflict'. Harvard Law School Program on Negotiation. Available at: *https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/* (Accessed: 27 February 2023).

[9] Ibid

that meets the needs of the present without compromising the ability of future generations to meet their own needs."[10]

Sustainable Development Goals (SDGs) were adopted by all United Nations Member States in 2015 as a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030.[11] The SDGs are interconnected with each other and essentially state that development must balance environmental, social and economic stability.

The majority of the Sustainable Development Goals (SDGs) focus on promoting social justice and addressing key global challenges. These include ending extreme poverty (SDG No.1), achieving food security and ending hunger (SDG No.2), promoting good health and well-being for all (SDG No.3), ensuring quality education (SDG No.4), achieving gender equality (SDG No.5), providing access to clean water and sanitation (SDG No.6), promoting affordable and clean energy (SDG No.7), fostering decent work and economic growth (SDG No.8), reducing inequalities within and among nations (SDG No.10), encouraging responsible consumption and production (SDG No.12), combating climate change (SDG No.13), and promoting peace, justice, and strong institutions (SDG No.16).[12]

The principle of Sustainable is espoused in the Kenyan legal system, notably under Article 69 of the constitution and Section 5 of the Environmental Management and Coordination Act which defines it as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems'.[13]

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[10] World Commission on Environment and Development, Our Common Future (Oxford University Press, Oxford 1987)

[11] UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (21 October 2015) A/RES/70/1.

[12] Ibid

[13] The EMCA (Act No. 8 of 1999), section 2

This definition is made clearer under section 5 which entails the principles of sustainable development which include, the principles of public participation, international cooperation in environmental resource management, intergenerational and intragenerational equity, the polluter-pays principle, and the precautionary principle are all important in addressing environmental issues. Additionally, cultural and social principles that align with justice and morality and do not conflict with written law can also be relevant.[14]

Sustainable development plays a part not only in environmental conservation in Kenya, but other areas such as poverty reduction, food security, climate change adaptation and Economic growth in Kenya.[15]

Sustainable Development in Kenya: The Current Status Quo

Sustainable development is a crucial aspect of modern-day global development that aims to balance economic, social, and environmental sustainability. It is a pathway that promotes economic growth and development without compromising on the needs of future generations. Kenya, like many other African countries, has embraced sustainable development as a guiding principle for national development. However, the country still faces several challenges in the pursuit of sustainable development.

The achievement of sustainable development goals often requires strong and effective governance.[16] However, conflict between communities can create challenges for governance and impede progress towards sustainable development goals. A lack of government action in the face of conflict can exacerbate the situation, leading to further challenges.

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[14] Ibid section 5

[15] BYJU's, 'Importance of Sustainable Development' (accessed 27 February 2023) *https://byjus.com/commerce/importance-of-sustainable-development/.*

[16] World Economic Forum, '3 challenges facing the UN's Sustainable Development Goals' (13 August 2015) *https://www.weforum.org/agenda/2015/08/3-challenges-facing-the-uns-sustainable-development-goals/* accessed 3 March 2023.

One of the challenges faced by sustainable development in the face of conflict is instability. Conflict between nations can lead to instability in the region, disrupting the economy and social systems.[17] This can make it difficult to implement sustainable development programs and initiatives. Additionally, conflict can lead to displacement of people, which can strain resources and create a need for humanitarian aid, further complicating the achievement of sustainable development goals.[18]

Another challenge is the need for effective governance. In situations of conflict, governments may be unable or unwilling to take action to promote sustainable development.[19] This can result in a lack of funding for sustainable development projects or a failure to enforce regulations designed to promote sustainable development. In some cases, governments may be complicit in the exploitation of resources, leading to further environmental degradation.[20]

To address these challenges, it is important for governments to prioritize sustainable development even in the face of conflict. This may involve promoting peace and stability through diplomatic efforts, as well as implementing sustainable development programs that are tailored to the local

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[17] FutureLearn. (n.d.). Achieving Sustainable Development. Retrieved March 3, 2023, from *https://www.futurelearn.com/info/courses/achieving-sustainable-development/0/steps/35495*

[18] United Nations, 'Sustainable Development in Times of Crisis', United Nations Department of Economic and Social Affairs (DESA) (11 March 2009) *https://www.un.org/en/development/desa/financial-crisis/sustainable-development.html* accessed 3 March 2023.

[19] World Economic Forum, '3 challenges facing the UN's Sustainable Development Goals', (2015) *https://www.weforum.org/agenda/2015/08/3-challenges-facing-the-uns-sustainable-development-goals/* accessed 3 March 2023.

[20] United Nations, 'Sustainable Development in the Context of the Financial Crisis' (Department of Economic and Social Affairs, 2015) *https://www.un.org/en/development/desa/financial-crisis/sustainable-development.html* accessed 3 March 2023.

context.[21] It is also essential for governments to engage in meaningful dialogue with communities affected by conflict, in order to understand their needs and concerns.[22] Finally, it is important to hold governments accountable for their actions, and to encourage transparency and good governance practices.[23] By doing so, we can work towards achieving sustainable development goals even in the face of conflict.

The Role of Mediation in Sustainable Development

Mediation is seen to play an important role in promoting sustainable development. Mediation as a form of Alternative Dispute Resolution can promote sustainable development by helping to resolve conflicts that may hinder progress towards achieving sustainable development goals. This can be particularly helpful where parties are unwilling to share information or where resistance to communication is high.

The spike in violence in the Northern Rift region of Kenya in February 2023 had been a major cause for concern, with many people displaced and lives lost. Mediation could be a helpful tool in resolving the conflict and bringing about peace in the region.

One of the key factors in the success of mediation efforts is the involvement of the affected communities in the identification of solutions. This ensures that the solutions identified are relevant and practical for the people involved, and increases the likelihood of their acceptance and implementation.[24]

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[21] "Key concepts in sustainable development" in Achieving Sustainable Development, *https://www.futurelearn.com/info/courses/achieving-sustainable-development/0/steps/35495* (accessed 3 March 2023).

[22] Ibid

[23] UNICEF. (n.d.). How to achieve the SDGs for and with children. Retrieved March 3, 2023, *from https://www.unicef.org/sdgs/how-achieve-sdgs-for-with-children*

[24] Creating Epicentres of Peace in the North Rift Region of Kenya, ReliefWeb (2019) *https://reliefweb.int/report/kenya/creating-epicentres-peace-north-rift-region-kenya* (accessed 27 February 2023)

Women have played a significant role in mediation efforts in the Kerio Valley, speaking out about their desire for peace and stability for their families and communities. Their involvement in mediation efforts has been crucial in bringing about positive change.[25]

Land disputes have been a major driver of conflict in the region, with many communities competing for limited resources. Mediators could work to identify sustainable solutions to these disputes, such as land reform and alternative livelihoods, to reduce tensions and prevent further violence.[26]

It is important to note that mobile phones and other technologies have made it easier for rival groups to carry out attacks and escape quickly, complicating efforts to establish responsibility for acts of violence. Mediators will need to take this into account when developing strategies for resolving the conflict.[27]

Previous successful mediation efforts in Kenya, such as the Kofi Annan-led team that secured a power-sharing agreement in 2008 after the 2007 post-election violence between Raila Odinga and the then President Kibaki, were able to succeed because a single well-resourced mediation team with status and leverage, both in Africa and internationally, was the only engagement channel with the two Kenyan rivals. It may be useful to consider this approach in the current situation.[28]

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[25] ReliefWeb, 'Women taking lead in ending conflict in Kenya's Kerio Valley', ReliefWeb (22 June 2020) *https://reliefweb.int/report/kenya/women-taking-lead-ending-conflict-kenya-s-kerio-valley* accessed 27 February 2023.

[26] Kolawole, M., 'Kenya: Ethnic tensions are intertwined with long-standing disputes over land', D+C Development and Cooperation (26 November 2018) *https://www.dandc.eu/en/article/kenya-ethnic-tensions-are-intertwined-long-standing-disputes-over-land* accessed 27 February 2023.

[27] Barasa, F., 'Kenya: Drought deepens land conflicts, peacebuilders respond', USIP Blog (16 September 2022) *https://www.usip.org/blog/2022/09/kenya-drought-deepens-land-conflicts-peacebuilders-respond* accessed 27 February 2023.

[28] Martin Griffiths, "The Prisoner of Peace: An Interview with Kofi A. Annan", Centre for Humanitarian Dialogue, Geneva, 9 May 2008, p. 8.

Therefore, mediation efforts that involve affected communities, prioritize the voices of women, address underlying land disputes, and take into account technological challenges, could be effective in bringing about peace and stability in the Northern Rift region of Kenya.

Mediation as a Means of Accessing Justice

The Constitution of Kenya 2010 assures every individual the right to access justice. However, this right has been broken down because the principal forum for seeking justice through the Kenyan courts is only partially available to some. The court judgment, including its technical difficulties and increased costs, has traditionally been unreachable to the poor, preventing them from fully comprehending their entitlement.[29] It enhances any justice system because an extensive rule of law ensures that all community members have equal opportunity to participate in equitable processes.[30] Mediation, for example, can bridge such discrepancies in access to justice and drive society towards a more holistic rule of law.

Mediation is one mechanism that has become more available because of its simplicity. Those disputing are not required to pay for advocates for them to be represented; instead, they create the terms of the mediation and express themselves.[31] Mediation encourages the independence of parties so that the mediation focuses not only on the parties but also on guiding forces toward an amicable solution. Importantly, disputants are not required to queue for their cases to be delegated to a court to be adjudicated or undergo long adjournments. After identifying a mediator, the parties work together to reach an agreement at the lowest possible cost and with the greatest possible comfort.

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[29] Muigua K and Kariuki F, 'ADR, Access to Justice and Development in Kenya', Strathmore Annual Law Conference, Nairobi, 3-4 July 2014, 7.

[30] Kariuki Muigua, 'ADR: The road to justice in Kenya' 2(1) Alternative Dispute Resolution, 2014, 31.

[31] OGoodman, A., "Specialist mediation advocates," Counsel, February 2016, available at *https://www.counselmagazine.co.uk/articles/specialist-mediation-advocates* .

The purpose of mediation is to reach a mutually comprehensive and amicable settlement that restores connections. A neutral mediator facilitates this by assisting disputants in communicating instead of proclaiming who is correct or incorrect in accordance with the law.[32] Mediation is a flexible method to settle a dispute that prioritizes the best interest and connections of the disputants. Parties have the chance to broadcast all of their concerns and are able to be involved in reaching a legally binding alternative. As disputants interact, the mediator assists them in clarifying earlier unsaid problems that impede agreement so that a comprehensive and long-term remedy can be reached.

Mediation on Accessing Justice and Sustainable Development

In a society in which every person could have trust in their capacity to realize the rights guaranteed by law, comprehensive access to justice that results in mutually satisfactory alternatives is vital to long-term cooperation and equal and fair affluence. Feeling exempted by the law is a significant source of dissatisfaction with one's country.[33] It erodes domestic teamwork and waters down the principle of the rule of law. Inequitable and inadequate justice for all is not the basis of long-term prosperity and stability but instead, dissatisfaction and conflict. More encompassing constitutional protection implies more individuals can appreciate increased financial, political, and social liberties, as well as make a contribution to the goals of national development. When improved by such party-centric methods as mediation, fairness can be made accessible in the most beneficial way developmental ambitions of people. It thus entails progress backed by and inextricably linked to fairness.

Mediation maintains connections for greater cooperation by tackling personal and social barriers to continued support instead of playing the blame game for previous disputes. Such cordial and forward-thinking settlement is both a way of achieving a goal and a requirement for long-term development. SDG 16.3 of

[32] Gichui AV, 'Court mandated mediation – the final solution to expeditious disposal of cases, 1 The Law Society of Kenya Journal, 2005, 93.

[33] Pound R, 'The Causes of Popular Dissatisfaction with the Administration of Justice' 29 American Bar Association Report, 1906, 395.

the Sustainable Development Goals explicitly recognizes equitable access to justice for everyone. The plan promotes the rule of law by championing fair opportunity to reasonable arbitral processes and just, amicable dispute settlement results for everyone.

The safeguard of a person's fundamental freedoms and access to essentials allows them to seek higher goals in reasonable and just surroundings that will enable them to implement them realistically. Access to justice allows everyone to participate in daily life by trying to better themselves and their communities for both present and future generations.

Article 159(2) (c) of the Kenyan Constitution incorporates Alternative dispute resolution into the legal system. By utilizing mediation and other ADR processes to replace broken connections and encourage national unity, it aims to leverage the justice system for shared prosperity. Mediation enhances appreciation for and completeness of the rule of law by enabling more individuals to access justice, thereby achieving the overarching goal of the United nation sustainable development goals 16, Peace, Justice, and Solid Institutions.

Impact of Mediation on the Environment

Disagreements over natural resources and the environment are shared. Everywhere and daily, players strive for limited resources such as safe water and air, oil and gas, mineral deposits, wood, and cropland, and preserving biodiversity and wildlife ecosystems. People need help fixing problems, including how to compromise the depletion of natural resources with the desire to retain the air and water quality and allow genetically modified plants and animals while maintaining the sustainability of naturally evolved organisms and ecosystems that are in contest for such assets. Each of these concerns encompasses a unique "how" issue that jointly defines the fundamental problem of environmental protection. An example is how can the wise utilization of natural resources and technological advancement be encouraged to retain the

long-term integrity and efficacy of those resources that present and future generations rely upon?

In Kenya, mediation in environmental matters is well entrenched in the Constitution of Kenya 2010 through establishing the Environment and Lands Court under Article 162(2)(b). the Court has jurisdiction to hear and determine disputes pertaining to the utilization and safeguarding of the environment, land use planning, climate concerns,[34] just but a few.

The ELC has also adopted and implemented Alternative Dispute Resolution in resolving environmental issues in accordance with ELC Act section 20.[35] ADR processes pertain to alternate solutions and relevant ways to resolve disputes apart from conventional litigation. ADR procedures, mainly mediation, have been identified as critical in mitigating environmental conflicts and improving ecological fairness. The application of ADR in environmental conflicts stems from its capacity to encourage access to justice, lessen case backlogs, lower costs, and resolve disputes more quickly than the conventional litigation framework.

The application of mediation in environmental issues has several features, which include; agreement by parties to participate voluntarily, direct involvement of the parties in the mediation process, parties the right to retract from the process at any time, the neutral party who is the mediator uses a positive and constructive strategy in the process, and the parties to the process

[34] ELC Act 2012, s13 (b).

[35] Id at s20 provides that; (1) Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution, which includes conciliation, mediation and traditional dispute resolution methods with regards to Article 159(2) (c) of the Constitution.
(2) Where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.

make the final decision and solutions to be adopted.[36] As a result of the features, mediation in environmental matters has promoted constructive mechanisms in resolving disputes, where the involved parties have a sense of ownership over their choices since they voluntarily choose to participate in the process. It thus makes the decisions made finally binding on the parties.[37] Mediation eventually improves the relationships between the parties to the mediation and allows them to assist the greater society.

It should be acknowledged that environmental conflicts involve complicated, technical, and scientific concerns that necessitate the competence, expertise, and understanding of those who resolve environmental disputes. Implementing intricate environmental laws and analyzing advanced environmental initiatives like sustainable development necessitates a multidisciplinary approach that extends further than traditional litigation.[38]

Even if the parties cannot understand, environmental mediation is worthwhile. O'Leary and Husar assert that while environmental mediation may fail to resolve environmental conflicts, it improves the exchange of information, clarifies concerns, improves pre-trial preparedness, and allows for the discovery of alternatives that might not have otherwise been regarded.[39]

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[36] Joseph A Siegel, 'Alternative Dispute Resolution in Environmental Enforcement Cases: A Call for Enhanced Assessment and Greater Use' (2007) 24(1) Pace Environmental Law Review 187

[37] 6 United States Environmental Protection Agency (EPA), ADR Accomplishment Report (EPA 2000); John S Andrew, 'Examining the Claims of Environmental ADR: Evidence from Waste Management Conflicts in Ontario and Massachusetts' (2001) 21(1) Sage Journals

[38] Ellen Hey, Reflections on an International Environmental Court (Kluwer Law International 2002) 9; Jane Holder and Maria Lee, Environmental Protection, Law and Policy (Cambridge University Press 2007) 340.

[39] Rosemary O'Leary and Maja Husar, 'What Environmental and Natural Resource Attorneys Think About ADR: A National Survey (2002)16 National Resources and Environment Journal 262

Case Studies of Mediation in Sustainable Development Projects in Kenya

Kenya has been appreciated for its forefront approach to advancing sustainable development through several initiatives and schemes, and mediation has proven to be a crucial tool in settling disputes and fostering partnerships among stakeholders. Numerous case investigations have emerged in this setting, demonstrating how successful mediation has been applied in Kenyan sustainable development programs. These case studies offer valuable ideas about the function of mediation in fostering sustainable development and emphasize the need for alternative dispute resolution in attaining a more peaceful and egalitarian society.

One remarkable case study is the Lake Victoria Basin Water Resources Management Program. The program is financed by the World Bank and was established in 2003 as a sustainable development initiative to regulate water resources in the Lake Victoria Basin.[40] The program's objective is to encourage regional sustainable development through enhanced availability of water and sanitation, encouraging sustainable farming, and preserving the environment. Among its primary approaches is to apply mediation in resolving disputes between various parties in the region.

Mediation has been used to mediate disagreements among landowners and livestock farmers over the use of water sources in the Lake Victoria Basin Water Resources Management Program.[41] Mediation has also been employed in the initiative to settle conflicts concerning the utilization of water supplies for agriculture and other objectives. The program has used mediation to sort problems in a friendly and appropriate way rather than turning to a pricey and

[40] Hissen, N., Conway, D., & Goulden, M. C. Evolving discourses on water resource management and climate change in the Equatorial Nile Basin. The Journal of Environment & Development (2017) 26(2), 186-213.

[41] Odongtoo, G., Ssebuggwawo, D., & Okidi Lating, P. The mediating effect of effective decision making on the design of water resource management ICT model: The case of the management of Lake Victoria Basin (2020).

time-consuming lawsuit. This has encouraged sustainable growth in the area by minimizing conflict and fostering collaboration among critical parties.

Along with mediation, the program has used additional measures to encourage sustainable regional development. They include promoting the utilization of sustainable power, enhancing the water management approach, and strengthening the ability of local communities to manage their natural resources. The Lake Victoria Basin, Water Resources Management Program, exemplifies how sustainable development initiatives can use mediation to resolve disagreements and enhance collaboration among many parties. The industry has worked to strengthen the availability of clean water and sanitation, encourage ecologically sound agriculture, and safeguard the environment in the Lake Victoria Basin by implementing various approaches.

Impact of Mediation on Social Development

The application of mediation in social developments has been regarded as one of the most successful impacts of alternative dispute resolution mechanisms in the Kenyan legal system. Regarding social development, mediation has been successful in various fields, like conflict resolution, advancing gender equality, and community-oriented actions, to mention a few. The contribution of mediation in conflict resolution cannot be underscored as it has been excellent. Notably, Kenya has had a dark and long history of disputes, especially regarding the use and possession of land, which has frequently resulted in violence and conflicts. Thus, alternative dispute resolution mechanisms are included in the Constitution of Kenya 2010, particularly in Article 159(2) (c).

The promulgation of the Kenyan Constitution in 2010, saw mediation recognized constitutionally as a form of ADR. The Constitution allows juridical bodies to be directed by various principles when performing judicial power, such as advancing alternative ways to resolve conflicts, such as reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.[42]

[42] Constitution of Kenya 2010, Article 159 (2) (c).

Nevertheless, conventional dispute resolution processes should be applied to the extent that they promote the Bill of Rights, are not repugnant to the principles of equity and morality, or produce results that violate the Constitution or any laws enacted.[43]

Mediation is intended to be a non-binding, discretionary, casual, consensual, confidential, adaptable, cost-efficient, faster dispute settlement procedure.[44] Mediation is an element of the overall framework and procedure of negotiation because it is deemed negotiation with the assistance of a third party called a mediator when the negotiating team has reached a standoff.[45] It owes its prevalent use in managing disagreements and disputes in the modern world to these features, enabling it to settle differences of various types, resulting in possibly binding and long-term agreements between disputing parties.[46] Mediation has given a calm and efficient technique for settling problems, decreasing hostilities, and fostering social cohesion. Significantly, mediation has greatly alleviated poverty by providing communities with increased protection over their property, which is vital for their subsistence.[47]

Role of Government in Mediation for Sustainable Development

The government of Kenya has been successful in promoting and advancing mediation for sustainable development in the country. The government has identified sustainable development as a critical national goal and has made efforts to encourage this through different programs and policies. The inclusion

[43] Ibid, Article 159(3).

[44] Hou, Y., Xiong, D., Jiang, T., Song, L., & Wang, Q. Social media addiction: Its impact, mediation, and intervention. Cyberpsychology: Journal of psychosocial research on cyberspace (2019) 13(1).

[45] Mwagiru, M., Conflict in Africa; Theory, Processes and Institutions of Management, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

[46] Muigua, K., "Resolving Conflicts Through Mediation in Kenya," (2nd Ed., Glenwood Publishers Ltd, 2017), p. 4.

[47] 'Assessing the Effects of Community Based Organizations' Activities on Poverty Alleviation in Mwatate Division, Kenya' [2020] Journal of Poverty, Investment and Development.

of sustainable development in various provisions of the Constitution has enabled the government to initiate measures where mediation will be used for sustainable development. The preamble of the Constitution of Kenya 2010 recognizes the aspirations of Kenyans to sustain the environment, which is their heritage, for the benefit of present and future generations. It has been included as part of national values and governance principles that bind all organs of government and its officials while interpreting the Constitution.[48]

An essential significance by the Kenyan government is the implementation of mediation into the laws and policy frameworks about sustainable development. For example, the National Land Policy and the Community Land Act include mediation to address land rights and management conflicts. Moreover, the Environmental Management and Coordination Act allows mediation to address environmental preservation and management problems.

Moreover, the government has participated in international mediation and projects that foster sustainable development. By virtue of Article 2(6) of the Constitution of Kenya 2010,[49] Kenya is a party to the United Nations Framework Convention on Climate Change, owing to which the nation has been involved in several mediation initiatives regarding climate change. Furthermore, the government has taken participation in the Sustainable Development Goals and has integrated them into its national plan for development.

Role of Private Sector in Mediation for Sustainable Development

In Kenya, the private sector is crucial in mediating sustainable development.[50] Kenya's private sector comprises enterprises and businesses in various areas, including farming, energy, eco-tourism, and manufacturing.[51] Notably, the

[48] Constitution of Kenya 2010, Article 10.

[49] Ibid, Article 2(6). It provides that Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

[50] Government Sector Spending and Private Investment: Evidence from Kenya' [2022] Journal of Economics and Sustainable Development.

[51] Ibid.

private sector has invested in sustainable development programs such as sustainable power, sustainable farming, and eco-tourism.[52] Through these initiatives, the private industry has helped lower greenhouse gas emissions, encourage sustainable land management, and foster employment in local areas. Besides investing in sustainable development, the private sector has collaborated with the local communities to advance sustainable growth.[53] The engagement with the communities enables the private sector to recognize and tackle community issues while promoting sustainable development strategies that enhance both companies and the community.[54]

Similarly, the private sector contributes to capacity building and information exchange on mediation for sustainable development.[55] By providing instruction and assistance for groups and other interested parties, the private sector helps foster the growth of competence for mediation and dispute management and establishing long-term alternatives.[56] Lastly, the private sector engages in lobbying and policy involvement on topics connected to sustainable development.[57] The private sector contributes to creating an institutional framework for sustainable development projects by collaborating with

[52] Kiwanuka, S., Cummings, S., & Regeer, B. The private sector is the? unusual suspect? in knowledge brokering for international sustainable development: a critical review. Knowledge Management for Development Journal (2020) 15(2), 70-97.

[53] Mohtar, Rabi H. "The Role of the Private Sector in Sustainable Development." Water International, vol. 47, no. 7, 3 October 2022, pp. 1023–1031, *https://doi.org/10.1080/02508060.2022.2133789* .

[54] Job Onyiego and Bessy Mwebia, 'A16667 How Task Shifting Contributes towards Sustainable Management of Hypertension in the Private Sector in Kenya' (2018) 36 Journal of Hypertension.

[55] Supra note 51.

[56] 'Combating Corruption in the Private Sector' [2022] Journal of Economics and Sustainable Development.

[57] Levy, David L. "Private Sector Governance for a Sustainable Economy: A Strategic Approach." Review of Policy Research, vol. 28, no. 5, Sept. 2011, pp. 487–493, *https://doi.org/10.1111/j.1541-1338.2011.00515.x* .

policymakers and lobbying for legislation promoting sustainable development.[58]

Role of Civil Society in Mediation for Sustainable Development

Civil society is progressively acknowledged as a critical component that must be incorporated in any settlement initiative to ensure comprehensive dispute resolution in which all parties to the dispute feel the responsibility of the accord.[59] It must be noted, nonetheless, that each war is distinctive, as is the structure of each country's civil society. Hence, there is no one-size-fits-all paradigm regarding how civil society must be incorporated into a peace agreement.[60] Studies on civil society engagement in peacebuilding are becoming more common; however, the significance that members of civil society can play in mediating between parties in conflict that are hesitant to deal directly is still being researched.[61]

Civil society may serve as a mediator to draw factions together in a reconciliation or changeover phase.[62] Mediation can occur at both the local and national scales. On a national scale, notable civil society organizations, international non-governmental organizations, and academic institutes are often involved as mediator facilitators.[63] In Nigeria, for instance, the government appointed a Catholic priest to mediate between Ogoni factions, while in Nepal, each side of the dispute appointed two well-known civil society

[58] Ibid.

[59] 'Civil Society Organizations and Their Role in Achieving Sustainable Development' (2020) 24 ZANCO Journal of Humanity Sciences.

[60] T. Paffenholz, 'Civil Society and Peace Negotiations: Beyond the Inclusion–Exclusion Dichotomy' Negotiation Journal 30 (2014), 69-91.

[61] IB FAKAS, 'LEGAL STATUS of the MEDIATOR and MEDIATION in CIVIL PROCEEDINGS' [2022] Law and Society 107.

[62] Dr. Joseph Osodo, Prof. Israel Kibirige, Cherotich Mung'ou; The role of the state, non-state actors in peacebuilding in Mt. Elgon region Kenya; March 2014

[63] D. Lanz, 'Who Gets a Seat at the Table? A Framework for Understanding the Dynamics of Inclusion and Exclusion in Peace Negotiations', International Negotiation 16 (2011), 275-295.

figures as facilitators.[64] Such facilitation can also be problem-oriented, for instance, when organizations from civil society organize violence-free days to gain customer service access, such as vaccinations and food programs. As a result, mediation can help with safeguarding and providing services.

Apart from strengthening democratic government, civil society might play an essential role in conflict settlement.[65] Disputes frequently emerge due to non-negotiable disagreements about fulfilling basic core requirements.[66] As a result, dispute resolution entails going above negotiation objectives to address the basic needs of all parties.[67] Members of civil society can be beneficial in this regard. CSOs have access to conflicting parties and the power to bring them together for conversation. They also encourage local communities to participate in long-term reconciliation initiatives. Civil society can appraise the issue more efficiently than top levels of government or foreign players since it works directly with local communities at the grassroots.[68]

The employment of mediators and conflict parties' participation in civil society remains considerably lower than usual.[69] It is also not necessarily constructed so civil society players may contribute most effectively to a process without introducing needless complications. Improved investigation transmission is

[64] T. Paffenholz, 'Civil Society and Peace Negotiations: Beyond the Inclusion–Exclusion Dichotomy' Negotiation Journal 30 (2014), 69-91.
[65] 'Urban Development and Civil Society: The Role of Communities in Sustainable Cities' (2002) 39 Choice Reviews Online 39.
[66] Georgia Jewett, 'Necessary but Insufficient: Civil Society in International Mediation' (2019) 24 International Negotiation 117.
[67] Ibid.
[68] C Schuftan, 'Sustainable Development beyond Ethical Pronouncements: The Role of Civil Society and Networking' (1999) 34 Community Development Journal 232.
[69] Adam Płachciak, 'CIVIL SOCIETY as the FOUNDATION of SUSTAINABLE DEVELOPMENT' (2010) 3 Economics & Sociology 49.

required to assist mediators and negotiators in understanding and managing this complicated issue.[70]

Challenges of Implementing Mediation for Sustainable Development in Kenya

Mediation has long been regarded as a significant way to resolve disputes because it creates a win-win situation for the involved factions Mediation has grown in popularity for a wide range of causes as a way to settle disputes. One primary motivation is that mediation tends to work and frequently results in a settlement or initiates a conversation that leads to a settlement.[71] It is widely recognized as the most successful conflict resolution process, and its extensive application is due to its features and adaptability that benefit the disputing parties. Unfortunately, the process has been hampered by various obstacles that have impeded the efficacy of the mediation procedure.[72]

Insufficient Knowledge about Mediation as a Means of Conflict Resolution has been a serious concern. To begin with, many Kenyans need to gain more knowledge of mediation as a dispute resolution tool. This is apparent when so many Kenyans turn to litigation when a problem occurs since it is the most recognized vehicle for conflict resolution. According to a judicial report, there are several outstanding matters awaiting adjudication.[73] This significant number of cases before the judiciary indicates that many Kenyans need more information on alternate ways of dispute resolution, such as mediation.

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[70] Ionce Anca and Ionce Ruxandra, 'The Role of the Civil Society in Protecting the Natural Areas – between Legislation and Implementation' (2015) 9 Present Environment and Sustainable Development 105.

[71] Mwagiru, M., Conflict in Africa: Theory, Processes and Institutions of Management (Nairobi: Centre for Conflict Research, 2006), p. 42.

[72] FennP.," Introduction to Civil and Commercial Mediation" (Chartered Institute of Arbitrators, London, 2002), Available at *http://www.adrgroup.co.uk/DisputeResolution/civil-and-commercial-mediation.*

[73] The Judiciary, 'State of the Judiciary and the Administration of Justice' Annual Report 2016-2017, Available at *https://www.judiciary.go.ke/.../state-of-the-judiciary-and-the administration-of-justice-*

As a consequence of the resulting caseload, this restricts the ability to gain access to justice. Information accessibility is a necessary component of access to justice because it allows persons to make sound choices about the option they want to pursue in the event of a violation of their privileges and fundamental freedoms.[74] To effectively take full advantage of mediation and other Alternative Dispute Resolution methods, individuals must be informed of such mechanisms, the procedures, and the benefits they have to compare the adversarial character of litigation.

Moreover, another challenge is the non-binding character of mediation. The fact that mediation is non-binding adds another layer of difficulty to its effectiveness. It is a voluntary decision dependent on the disputing parties' mutual will to be accepted.[75] It raises the risk of disobedience with agreements, resulting in issues that may stay unsettled long after the mediation process has ended. The mediated agreement must be enforceable to ensure that mediation engages effectively with official and enforceable conflict resolution systems like courts and arbitration proceedings.[76] The establishment of court-annexed mediation aims to address this issue because the agreement reached via mediation may be implemented as a court ruling.

Kenyan citizens must learn about and know accessible dispute resolution methods such as mediation and other mechanisms to have various options for seeking redress for violations of their rights.[77]

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[74] Joy Kubai Namachi, "Court Annexed Mediation: Dawn of a New Era in the Kenya Judicial System" LawQuery Blog, Available at *https://www.lawquery.co.ke/our blog/court-annexed-mediation-dawn-of-a-new-era-in-the-Kenyan-judicial-system.*

[75] Muigua, K., 'Resolving Conflicts Through Mediation in Kenya' 2nd Ed., 2017, op cit., p. 4.

[76] Ibid.

[77] R. Dawson, "5 Basic Principles for Better Negotiation Skills", Available at *http://www.creonline.com/principles-for-better-negotiation-skills.html*

Challenges of Building Consensus and Cooperation

Building consensus entails a procedure that involves a good-faith endeavour to fulfil the interests of all parties and reach a consensus.[78] Constructing agreement and collaboration through mediation is vital to attaining sustainable development objectives. However, several challenges have undermined the achievement of such objectives. Among the challenges are the different preferences of the parties. The concerns on sustainable development by the stakeholders mainly entail the government, industries, civil society groups, and local organizations.[79] These parties frequently have competing goals and agendas, making it hard to reach an agreement and cooperate, thus making it easier for the parties to seek court litigation over alternative dispute resolution mechanisms.[80]

Additionally, a lack of trust between the stakeholders has been viewed as a critical challenge to consensus building and cooperation. Faith is required for efficient collaboration and conventional wisdom, but creating trust amongst parties with a past of disagreement or distrust can be challenging.[81] Mediators must attempt to foster trust among stakeholders by offering a secure and impartial setting for discourse.[82]

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[78] Paul Webster Hare, 'Corroding Consensus-Building: How Self-Centered Public Diplomacy Is Damaging Diplomacy and What Can Be Done about It' [2019] Place Branding and Public Diplomacy.

[79] Lovan, W. R., Murray, M., & Shaffer, R. Participatory governance: planning, conflict mediation and public decision-making in civil society. (Routledge, 2017).

[80] Sanjeev Chaswal, 'An Emerging Trend - ADR Mechanism in IPR Conflicts' [2010] SSRN Electronic Journal.

[81] Jean Poitras, Robert Bowen and Jack Wiggin, 'Challenges to the Use of Consensus Building in Integrated Coastal Management' (2003) 46 Ocean & Coastal Management 391.

[82] Thiranjaya Kandanaarachchi, John Nelson and Chinh Ho, 'Building Trust and Collaboration among the Stakeholders in a Mobility as a Service Ecosystem – Insights from Two Maas Case Studies' [2022] SSRN Electronic Journal.

First, distrust among stakeholders can breed suspicions, antagonism, and a refusal to participate in mediation.[83] Stakeholders may hesitate to participate in conversations and agreements since they may need more confidence in the other parties concerned or believe the exercise will result in an equitable and just resolution. It can lead to a breakdown in dialogue, which can intensify pre-existing disputes.[84] Lack of trust can also have an effect on the carrying out of mediation arrangements.[85] Even if interested parties come to an understanding through mediation, there could be an unwillingness to enforce the signed agreements because they need to trust one another. This can cause postponements or a complete collapse of execution, which may have severe ramifications for lengthy development results.

Challenges of Funding Mediation for Sustainable Development

The implementation and application of mediation in Kenya have undergone immense success in recent years, mainly dating to the promulgation of the Kenyan Constitution 2010.[86] Despite the win, the mediation process in Kenya has faced a challenge of funding which can be attributed to several factors.[87] A major prevalent challenge is limited financial resources. Inadequate funds have impeded financing mediation for sustainable development.[88] Capital ability might result in insufficient financing for the mediation, making it difficult to

[83] Alzoubi, H. M., & Yanamandra, R. Investigating the mediating role of information sharing strategy on agile supply chain (2020). Uncertain Supply Chain Management, 273-284.

[84] Salam, M. A. The mediating role of supply chain collaboration on the relationship between technology, trust, and operational performance: An empirical investigation. Benchmarking:(An International Journal 2017).

[85] Ibid.

[86] Kariuki Muigua and Francis Kariuki, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore Law Journal 1.

[87] *Ibid.*

[88] Bercovitch, J., Mediation Success or Failure: A Search for the Elusive Criteria, Cardozo Journal of Conflict Resolution, Vol.7.289, p.296

pay for the expenses of the full resolution process.[89] As a result, mediation may be partial or useless, failing to tackle the fundamental causes of the problem.

Moreover, the incapability to hire trained mediators is another challenge. Competent mediators are critical to the effectiveness of mediation for sustainable development.[90] Lack of funds might hinder the ability to engage experienced mediators, lowering the effectiveness of the arbitration proceedings.[91] Finally, inadequate funds can severely compromise financing mediation for sustainable development in Kenya by decreasing the effectiveness of the mediation process, restricting the availability of qualified mediators, lowering capacity-building initiatives, restricting the availability of assets, and lowering the effect of follow-up and supervising.[92] New methods of supporting mediation and allocating resources to assist the mediation process are required to address these issues.

Conclusion

In conclusion, conflict resolution mechanisms are necessary for addressing the underlying causes of violence in the North Rift region[93] and promoting sustainable development. Mediation is a viable option for bridging the gap between the parties, fostering understanding, and creating an environment conducive to economic growth.

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[89] Ashish Kumar, 'EU Directive on Mediation: Assessing the Development and Challenges' [2017] SSRN Electronic Journal.

[90] E. K. Mwangi, "Effectiveness of Alternative Dispute Resolution Mechanism (ADR) in Case Backlog Management in Kenyan Judicial System: Focus on Milimani High Court Commercial Division" (LLM dissertation, University of Nairobi, 2017).

[91] Bloomfield, D., Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, Journal of Peace Research, vol. 32 no. 2 May 1995, pp. 151-164).

[92] M. G. Mathenge, "Mediation: A Means of Resolution of Grievances Faced by the Turkana Community as a Result of Upstream Oil Activities" (master's thesis, Strathmore University, 2020) *https://suplus.strathmore.edu/handle/11071/10211 accessed 23 March 2023.*

[93] The Star. (2021). Ruto Vows to End Insecurity in North Rift. Retrieved from *https://www.the-star.co.ke/counties/rift-valley/2021-06-22-ruto-vows-to-end-insecurity-in-north-rift/*

However, implementing mediation in the region comes with challenges such as cultural barriers and the need for effective collaboration among stakeholders. Therefore, developing a comprehensive conflict resolution strategy, promoting mediation and dialogue, addressing cultural barriers, promoting economic development, and strengthening community policing are essential for promoting sustainable development in the North Rift region of Kenya.[94]

This paper has explored the potential benefits of mediation in addressing conflict in the North Rift region, highlighting its potential to promote sustainable development by fostering social cohesion, building trust, and creating an environment conducive to economic growth. Additionally, the paper has examined the challenges of implementing mediation in the region, including cultural barriers and the need for effective collaboration among stakeholders.

Solutions

To address the underlying causes of violence in the North Rift region and promote sustainable development, the following solutions are proposed:

1. Develop a Comprehensive Conflict Resolution Strategy

Developing a comprehensive conflict resolution strategy is crucial for addressing the underlying causes of violence in the North Rift region. This strategy should include all stakeholders, including the government, community leaders, civil society organizations, and other relevant actors. The strategy should outline the objectives, methods, and resources necessary for implementing conflict resolution mechanisms effectively.[95]

[94] Gachunga, H. (2021). Mediation as a Conflict Resolution Mechanism in the North Rift Region of Kenya. African Journal of Conflict Resolution, 21(2), 173-190. doi: 10.1177/15692080211025568

[95] Ibid

2. Promote Mediation and Dialogue

Mediation and dialogue are crucial for promoting sustainable development in the North Rift region. Mediation can help to bridge the gap between conflicting parties and create a platform for constructive dialogue and cooperation. The government, civil society organizations, and community leaders should promote mediation and dialogue by establishing community mediation centers, training mediators, and educating the public on the benefits of mediation. With the introduction of ODR (Online Dispute Resolutions), some of the possible outcomes that could be seen would include, the reduction of backlog of cases due to the resolution of such online and offline disputes, and such would help parties to reach an amicable decision faster instead of looking for a decision from the legal authorities for instance judges in a court of law[96]

3. Address Cultural Barriers

Cultural barriers pose a significant challenge to implementing mediation in the North Rift region.[97] Therefore, it is essential to address these barriers by involving cultural leaders and community elders in the conflict resolution process. Cultural leaders can help to educate their communities on the benefits of mediation and the importance of resolving conflicts peacefully.

4. Promote Economic Development

Economic development is crucial for promoting sustainable development in the North Rift region. Economic development can create jobs, reduce poverty, and promote social cohesion. Therefore, the government and other stakeholders

[96] Ochieng, Alexandra Akinyi and Nyaga, Bernard Murimi, Facilitating Access to Justice through Online Dispute Resolution in Kenya (June 11, 2021). Chartered Institute of Arbitrators (CIArb) Kenya Journal, 2021, Available at SSRN: *https://ssrn.com/abstract=4329155 or http://dx.doi.org/10.2139/ssrn.4329155*

[97] Daniel Nganga, 'Culture as the Cause of Conflict. A Case Study in West Pokot District, Kenya' (2012) 6 Journal of Peace Education and Social Justice 51 <*http://www.infactispax.org/volume6dot1/nganga.pdf*> accessed 13 March 2023.

should invest in economic development programs that promote inclusive growth and reduce inequality.[98]

5. Strengthen Community Policing

Strengthening community policing is crucial for addressing the root causes of violence in the North Rift region. Community policing can help to build trust between the police and communities, promote accountability, and reduce the use of force. Therefore, the government should invest in community policing programs that prioritize the needs and concerns of communities.[99]

[98] Gachunga, H. (2021). Mediation as a Conflict Resolution Mechanism in the North Rift Region of Kenya. African Journal of Conflict Resolution, 21(2), 173-190. doi: 10.1177/15692080211025568

[99] Ibid

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Journal Review: Journal of Conflict Management and Sustainable Development Volume 10 Issue 2

By: ***Mwati Muriithi****

Published in April 2023, the Journal of Conflict Management and Sustainable Development Volume 10 Issue 2 is focused on disseminating knowledge and creating a platform for scholarly debate on pertinent and emerging areas in the fields of Conflict Management and Sustainable Development.

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 *'Realizing Environmental, Social and Governance Tenets of Sustainable Development'* by Dr. Kariuki Muigua discusses the Environmental, Social and Governance (ESG) aspects of the sustainable development agenda and how the same affects sustainability. The paper looks at the best practices as far as these tenets are concerned. The author argues that unless countries and stakeholders ensure that there is convergence of efforts in pursuit of environmental, social and governance aspects of sustainability, then the struggle for the achievement of the 2030 Agenda for Sustainable Development will remain a mirage.

*** LLB (Hons) KU; Dip. In Law (KSL); ACIArb; Advocate of the High Court of Kenya; Legal Researcher.***

Michael Sang in his article *'Assessing the Jurisprudential gains and Challenges in the Prosecution of Terrorism-related Offences in Kenya'* critically examines the jurisprudential gains and challenges in the prosecution of terrorism-related offences in Kenya. The article critically assesses problematic aspects in the prosecution of these offences and proffers proposals for reform in bail, evidence and sentencing.

Dr. Kariuki Muigua has demonstrated his prowess and sound understanding of Environmental Management in his paper *'Who Speaks for Nature? Entrenching the Ecocentric Approach in Environmental Management in Kenya'*. The paper makes a case for the entrenchment of an ecocentric approach in environmental management in Kenya. The author argues that there is a need for the human race to take care of the earth and its resources mainly because of its own ecological health and not merely because it is the source of the resources necessary for meeting human needs.

'Waking up to the call of Climate change: Challenges for Africa and Europe' by Gichinga Ndirangu analyses the cost of climate change and the threat that it poses to various sectors. The author argues that because climate change is a shared challenge for both Europe and Africa, it must help foster a common cause and become a bond for meaningful co-operation in such areas as research, analysis and resourcing geared towards strengthening Africa's capacity at adapting and mitigating its potential adverse impacts.

Aaron Masya Nzembei and Angelah A. Malwa in their paper, *'Effective Public Participation in Environmental Impact Assessment Process: Assessing The Law and Practice in Kenya'* critically discusses the usefulness and effectiveness of the Laws guiding public participation in environmental governance and provide recommendations on opportunities available for improvement.

'An Appraisal of Kenya's National Cybersecurity Strategy 2022: A Comparative Perspective' by Michael Sang critically analyses Kenya's National Cyber Security Strategy of 2022, juxtaposing it with Estonia and UK's cyber-security strategies.

The paper discusses the 2022 strategy by bringing to the fore its necessity, design, development, principles, goals, pillars, merits and shortcomings.

Dr. Kariuki Muigua in his paper '*Safeguarding the Environment through Effective Pollution Control*' discusses how the problem of pollution can be dealt with in Kenya as a key step towards achieving sustainable development. The author argues that Environmental pollution has become a major challenge, not only in Kenya but also across the globe, especially in the era of seeking faster economic development to take care of the ballooning human population in different countries.

Lastly, '*Resolving Intergovernmental Disputes in Kenya through Alternative Dispute Resolution (ADR) mechanisms*' by Vianney Sebayiga analyses the nature and causes of intergovernmental disputes by highlighting examples witnessed in the last thirteen years of devolution. The paper critically examines the strengths and gaps in the ADR Regulations and offers recommendations on better resolution of intergovernmental disputes through ADR.

Non-Arbitrability of Disputes

By: ***Lorraine J. Adhiambo****

Abstract

This paper attempts to provide a concise definition of the term 'arbitrability'. It delves into the concept of arbitrability in the international and national context, the stages in the arbitration process where one can raise the issue of arbitrability, the presumption that all disputes are arbitrable and goes on to discuss the type of disputes that are generally not arbitrable such as crimes involving corruption in international Trade; Patents, Trademarks and Copyrights; matters of foreign policy and interstate relations; labour disputes; anti-trust and competition law disputes; securities transactions; bribery & corruption cases.

I Introduction

There is no internationally accepted opinion on what matters are arbitrable.[1] It is relegated to the obvious and not much query has been made on its ambit in determining the enforceability of arbitration clauses and agreements.[2] As a matter of fact, parties can virtually have all the disputes between them resolved through arbitration due to the doctrine of party autonomy.[3]

However, the state can constrain party autonomy by limiting the kind of disputes that can be arbitrated upon.[4] Arbitrability is best thought to be a creature akin to public policy and not much focus and independent literature has been dedicated to its purview and reach in international commercial

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[1] Tweeddale Andrew, et al, *Arbitration of Commercial Disputes: International and English Practice,* (Oxford University Press, 2005), p. 107.

[2] Grace Chelagat- Tanah: Arbitrability: Its Ambit in the Kenyan Legal System: Alternative Dispute Resolution Journal Volume 4 No. 2, 2016, Chartered Institute of Arbitrators, Kenya

[3] Dr. Francis Kariuki & Vianney Sebayiga: Arbitrability of Fraud in Kenya; *NCIA ADR Journal, Volume 2, Issue1 2022*

[4] Ibid

arbitration. The arbitrability of a dispute and what amounts to public policy may vary from one country to another due to different policy considerations and depending on how open the State is to arbitration. Non-arbitrability of a dispute renders the arbitration agreement invalid.[5] The subject of arbitrability has not received much attention in English courts either.[6]

II Arbitrability Defined

The definition of arbitrability is one with no general consensus in international commercial arbitration (ICA). However, it normally relates to the issues in dispute and whether they are capable of settlement by arbitration. The issue of arbitrability was raised and considered when the UNCITRAL Model Law was being drafted. The drafters could not agree on a solid definition of arbitrability. It was eventually decided to ignore the whole issue of defining the term within the UNCITRAL Model Law.[7]

The Model Law provides for arbitrability but fails to mention specifically which matters are arbitrable or not.[8] Article 1, paragraph 5, stipulates that the Model Law shall not affect any other law of the state by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to other provisions.[9]Article 34, paragraph 2(b), stipulates that the arbitral award may be set aside only if, among others, the court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of the State.[10]Although the UNICITRAL Model Law provides for arbitrability in the above provisions, it does not go any further to list down or provide for matters that are or are not arbitrable.[11]

[5] Stephen W. Makau, The Application of the Principle of Arbitrability and Public Policy in International Commercial Arbitration, July 29, 2022
[6] Sutton David, el al, Russel on Arbitration, (23rd Ed., Sweet & Maxwell, 2007), p.15.
[7] Tweeddale (n 1) p. 108
[8] Makau (n 5), The UNICITRAL (Model Law)
[9] Article 1 paragraph 5 of the UNICITRAL Model Law
[10] Ibid Article 34(2)(b)
[11] Ibid

An attempt to define arbitrability has been cast as an exercise in futility because different states have their own traditions and precepts which differ from state to state. To attempt to draw up a list containing common factors which determine arbitrability was bound to fail and has failed.[12] Arbitrability seeks to bring about the balance between 'policy of reserving matters of public interest to the courts and the public interest of encouraging arbitration in commercial matters.'[13]

According to Marshall Enid, a wide range of commercial and financial disputes may be referred to arbitration. However, on grounds of public policy certain matters are not 'arbitrable'.[14] There exists a strong nexus between public policy and arbitrability, for it is thought to be the precursor of the arbitrability of a subject matter or not.

Public policy has often been perceived as an unruly horse, one which one can seldom tell where it is headed or coming from. This is partly because of its evolutionary nature, fluidity and motile adaptability to the changing social, political and economic realities within a state and indeed internationally. Under the United Kingdom Arbitration Act 1996 enforcement of an award may be opposed on the ground that it is contrary to public policy and an application may be made to set aside an award which is procured contrary to public policy.[15] In *Eco Swiss China Time LTD v Benetton International NV*, the European Court of Justice, in pronouncing itself on public policy, stated that a national court to which application is made for the annulment of an arbitration must grant that application if it considers the award in question ...where the domestic rules fails to observe national rules of public policy.'[16]

[12] Ibid
[13] Ibid
[14] Marshall Enid, Gill: The Law of Arbitration, (4th Ed, Sweet & Maxwell, 2001), p.4.
[15] Sutton (n 6) p. 19
[16] European Court of Justice, July 1, 1999, Eco Swiss China Time Ltd v. Benetton International. NV (1999), Case C-126/97, available on the EU's website.

To further compound this issue, most international commercial arbitrations are trans-boundary and transnational in nature, while public policy is country specific. Each state decides which matters may or may not be submitted to arbitration in accordance with its own political, social and economic policy. There are also some limitations set by international law and international public policy such as: -

(a) National/unilateral limitations emanating from State law.
(b) Supranational limitations emanating from regional or international statutes, e.g. European law
(c) Transnational limitations emanating from a common core of public policy as perceived by an arbitration.[17]

In Kenya, Justice Ringera (as he then was) attempted to define public policy in the case of *Christ for all Nations v Apollo Insurance Co. Ltd.* [18] He held that "although public policy is a most broad concept incapable of definition...an award could be set aside under section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya, if it was shown that either it was-

a) Inconsistent with the Constitution or other laws of Kenya whether written or unwritten;
b) Inimical to the national interest of Kenya; or
c) Contrary to justice and morality."[19]

[17] C. Pamboukis, On Arbitrability: The Arbitrator as a Problem Solver in Loukas A. Mistelis and Stavros L. Brekoulakis (eds), Arbitrability: International and Comparative Perspectives, International Arbitration Law Library, Volume, Kluwer Law International 2009, pg.122.
[18] [2002] EA 366
[19] Dr. Kariuki Muigua, FCIarb, Ph. D: Settling Disputes Through Arbitration in Kenya (Second Edition, 2012), p.111

Various legal scholars have addressed their mind on the definition of arbitrability. Allan Redfern[20] defines arbitrability as the determination of disputes that may be resolved by arbitration and that which remain exclusively in the domain of the courts.

The Judiciary in most countries is thought to be the sole guardian of the Constitution and the repository of public morality. The Constitution of Kenya, 2010 under Article 165(3) vest upon the High Court unlimited original jurisdiction in criminal and civil matters. This evidences the court's role in international commercial arbitration and of the importance of its continued reservation of jurisdiction thereupon. This position is entrenched in the United Kingdom's 1996 Arbitration Act[21] which provides that 'the court does, however retain limited powers in respect of matters that affect public policy or the public interest.'

Arbitration does not solve all disputes under the sun![22] Arbitration, being a private process, only deals with civil disputes and does not venture into matters of public law.[23] It majorly deals with commercial disputes although political agreements may provide for arbitration also. Orders made under arbitration and the arbitral award are usually personal and do not seek to bind the whole world.

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[20] Redfern Alan, et al, Law and Practice of international Commercial Arbitration, (Thomson Sweet & Maxwell,2004), p. 138; see also Article 2059 of the French Civil Code provides that 'all persons may enter into arbitration agreements relating to the rights that they may freely dispose of. Art 2060 provides that parties may not agree to arbitrate in family law and public interest. '(plus generalement dans toutes les mantieres qui interessent l'ordre public.)

[21] Tweeddale (n 1) p.18

[22] Muigua (n 19) pg. 113

[23] Githinji JA's dissenting judgement in Epco Builders Limited V. Adam S. Marjan Arbitrator & Another Civil
Appeal No. 248 of 2005

Arbitrability can either be objective or subjective in nature.[24] Objective arbitrability mainly deals with whether or not the law permits the resolution of certain disputes through arbitration.[25]Where the law prohibits the determination of a particular kind of dispute through arbitration, the parties' consent to arbitrate is irrelevant.[26] In effect, the arbitration agreement becomes null and void, thus impairing the tribunal's jurisdiction to hear and determine the dispute.[27] During the enforcement of an arbitral award, a party seeking enforcement in a particular country must ensure that the subject matter is arbitrable under that country's laws.[28] Nevertheless, the New York Convention has no definition of arbitrability, such that individual states are normally forced to determine which subject matter is non-arbitrable.[29]

Subjective arbitrability considers whether or not parties have consented to submit specific claims to arbitration.[30]The arbitrator is usually required to interpret the scope of the arbitration agreement.[31] Consequently, phrases such as 'in connection with' or 'arising out of the contract' are assessed to ascertain whether a given dispute is within the scope of the arbitration agreement.[32]

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[24] Peter Muriithi, 'Demystifying Arbitrability of Disputes in Kenya' (2017) 5(2) Alternative Dispute Resolution, pg.167
[25] Toni Deskosk Toni and Vangel Dekovski, 'Notes on Arbitrability – Focus on Objective Arbitrability' (2018) 9(1) lustinianus Primus Law Review, pg.5.
[26] Simon Greenberg, Christopher Kee, and Romesh Weeramantry, International Commercial Arbitration: An Asia-Pacific Perspective (Cambridge University Press 2011) pg.186
[27] Zubeyde Deniz, 'The Impact of Fraud in International Arbitration: A Question of Admissibility, Jurisdiction or Merits?' (LLM diss., Ghent University 2019) pg.34.
[28] Greenberg (n 26) pg.461
[29] Pascal Hollander, 'Report on the Concept of Arbitrability under the New York Convention' (2017) 11(1) Dispute Resolution International, pg.48.
[30] Emmanuel Gaillard and John Savage, Fouchard Gaillard & Godman on International Commercial Arbitration, (Kluwer Law International, 1999) pg.312.
[31] Greenberg (n 26) pg.182.
[32] Ibid

III International Arbitrability and National Arbitrability

(a) International Arbitrability

A State's economic, political and social policy, often form the backdrop of determining the arbitrability of subject matters in international commercial arbitration. That said, in the international sphere, the interests of promoting international trade as well as a country's comity have proved important factors in persuading the courts to treat types of disputes as arbitrable.

This position was first elucidated in *Mitsubishi Motors Corp. v Soler Chrysler-Phymouth Inc.*[33] where the United States Supreme Court held that 'the concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity resolution of all disputes require that we enforce the parties' agreements.' The court, in expounding on their position, relied on the case of *Fritz Scherk v Alberto- Culver Co,*[34] where the court declared that 'it will be necessary to the international policy favoring commercial arbitration.'

Domestic courts often have a tussle between upholding the myriad of domestic policies and morality vis a vis safeguarding international trade and investment in international commercial arbitration. The arbitrability or lack of it of the subject matter of ICA may be dependent on the laws and policies of various states concerned over the same transaction. They are likely to include: -the law governing the party involved, where the agreement is with the state, the law governing the arbitration agreement, the law of the seat of arbitration and the place of enforcement of the award.[35]

That said, the general principle remains that issues of arbitrability, if raised during the arbitration proceedings, are usually determined by the reference to the law of the seat of the arbitration or the law of the arbitration agreement if it

[33] 473 US 614. 105 CT Reports (1985) 3346 (1986) Ybk Comm 555-65.
[34] 417 US 506, 515-20(1974)
[35] Sutton (n 6) p.139.

is different.[36] The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958) provides as follows: - [37]

"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."
Article V (2) of the New York Convention provides that: -

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

i) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
ii) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article 34 (2) (i) & (ii) and Article 36 (b) (i) & (ii) of the UNCITRAL Model law also provides for the law that governs arbitrability in the international context. It has proven difficult and challenging to come to a consensus on the issue of the exact definition of arbitrability, hence the push for each state to determine matters arbitrable within its jurisdiction and to inform other states of its stand. The UNCITRAL Working group suggested that it should call on every country to list what subject matters it considers not arbitrable,' so that parties to an international contract will know whether their disputes are capable of settlement by arbitration at the seat of arbitration and their awards likely to be enforced.' This will in turn foster predictability hence inculcating investor confidence.

[36] Tweeddale (n 1) pg. 108
[37] Article II (1) of the New York Convention

There are, however, some globally condemned activities where most universal courts have a general consensus on their ban on public policy grounds.

In *Wesacre Investment Inc v Jugoimport-SDPR Holding Co. Ltd,*[38] for instance, the English Court of Appeal held that there were certain universally condemned activities such as terrorism, drug trafficking, prostitution, corruption or fraud in international commerce which would 'invite the attention of the English public policy in relation to contracts which are not performed within the jurisdiction of English courts, even if the award is made outside England.' Justice Waller, in laying down the aforementioned decision, asserted that 'there are rules of public policy if infringed will lead to non-enforcement by the English courts whatever the proper law and wherever their place of performance.'[39]

Public policy is often perceived as an unruly horse, of which one can seldom tell where it is headed or coming from. This is partly because of its evolutionary nature, fluidity and motile adaptability to the changing social, political and economic realities within a state and internationally.[40]

Under the United Kingdom Arbitration Act 1996 enforcement of an award may be opposed on the ground that it is contrary to public policy and an application may be made to set aside an award which is procured contrary to public policy.[41] In *Eco Swiss China Time Ltd. v Benetton International NV,* the European Court of Justice, in pronouncing itself on public policy, stated that a national court to which application is made for the annulment of an arbitration must grant that

[38] [2000] QB 288 [1999] 3 WLR 811, [1999] 3 ALL ER [1999]1 All ER (Comm.) 865
[39] See also Michael Hwang S.C. & Kevin Lim, Corruption in Arbitration— Law and Reality, available at *http://www.arbitrationicca.org/media/4/97929640279647/media013261720320840corruption_in_arbitration_paper_draft_248.pdf.*
[40] Ibid
[41] Sutton (n 6) p. 19

application if it considers the award in question where the domestic rules fail to observe national rules of public policy.[42]

(b) National Arbitrability

The Kenyan Arbitration Act does not lay out clear guidelines as to the requirement of arbitrability. The Act merely provides that the High Court may set aside an arbitral award if the "subject-matter of the dispute is not capable of settlement by arbitration under the laws of Kenya." [43] This is not sufficient to expressly tell the Kenyan position in relation to either objective or subjective arbitrability as explained above. This challenge is also evident from court decisions. For instance, in *Stephen Okero Oyugi v. Law Society of Kenya*[44] the court in defining what is arbitrable stated that criminal law issues and tortuous liability arising from negligence and defamation do not fall within the domain of arbitration. The court argued that issues of crime and tort have been strictly defined by law and are thus a preserve of the courts of law. This is not entirely correct in the context of both domestic and international commercial arbitration since arbitration clauses nowadays are drafted in broad terms to apply not only to contractual issues but to any dispute that arises out of or in connection with the contract. This means that if there are tortuous issues arising out of the contract the same are to be determined in the arbitral process.

Looking at the Kenyan Constitution, it seems that the scope of what is arbitrable is wider and does not relate only to disputes of a private or a commercial nature. For instance, under Article 159 the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by inter alia alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms which shall be promoted subject to clause (3).[45] Clause (3) provides that the traditional dispute

[42] European Court of Justice, July 1, 1999, Eco Swiss China Time Ltd v. Benetton International. NV (1999), Case
C-126/97, available on the EU's website.
[43] Section 35 (2) (b) (ii)
[44] [2005] eKLR
[45] Article 159 (2) (c) of the Constitution of Kenya

resolution mechanisms shall not be used in a way that contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with this Constitution or any written law.[46]

Whereas Article 159 is generally geared towards enhancing access to justice it does not define the limits of arbitrability in the sense of objective or subjective arbitrability. Moreover, the proviso in clause (3) expressly applies to traditional dispute resolution mechanisms and can thus not be said to be relevant in determining arbitrability.

Further to the above, the Constitution of Kenya, 2010 also provides in Article 189 (4) that the national legislation shall provide procedures for settling governmental disputes by alternative dispute resolution mechanisms including negotiation, mediation and arbitration. The question that then arises is since these will be governmental disputes which may raise sensitive issues of national interest, who will act as the arbitrator? Will it be a private arbitrator or a judge bearing in mind that judicial authority is vested in courts and tribunals established by or under the Constitution?

These are pertinent questions in view of the fact that the decision of an arbitrator in such disputes will definitely have public consequences. It should also be noted that some of these disputes may raise issues of sovereignty which are inherently non-arbitrable and should thus be a preserve of the national courts and tribunals.[47]

Therefore, there is a need to align the provisions of the Arbitration Act touching on arbitrability with the Constitution, in a rather cautious manner in view of the

[46] Ibid, Article 159 (3)
[47] F.K, "Redefining Arbitrability': Assessment of Articles 159 & 189 (4) of the Constitution of Kenya" Alternative
Dispute Resolution Journal, Vol. 1 Issue 1, 2013.

need to promote international trade and the public interest in reserving certain matters of national importance to courts of law.

IV Stages in the Arbitration Process where One can raise the issue of arbitrability

When an issue of arbitrability is raised in the proceedings then the arbitration tribunal may either address it immediately or proceed with the arbitration.[48] An arbitration tribunal which proceeds with the arbitration may justify its stance on the basis that this reflects the intention of the parties to resolve the dispute by arbitration.[49] A party can dispute the arbitrability of a matter subjected to arbitration in three stages as follows:-

i) On an application to stay the arbitration, when the opposing party claims that the other party lacks jurisdiction to determine a dispute because it is not arbitrable.[50] This is often done by a preliminary objection that the subject matter is not arbitrable hence the tribunal lacked the prerequisite jurisdiction.
ii) In the course of the arbitral proceedings on the hearing of an objection that the tribunal lacks substantive jurisdiction.
iii) In the application to challenge the award or to oppose its enforcement.

V The presumption that all disputes are arbitrable

The presumption favoring arbitration was brought out in the landmark case of *Moses H Cone Memorial Hospital v Mercury Construction Corp.*[51] The court held that 'any doubt concerning the scope of arbitrable issues should be resolved in favour of arbitration.' This presumption gains more traction in ICA as opposed to the domestic realm.

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[48] Grace Chelagat- Tanah: Arbitrability: Its Ambit in the Kenyan Legal System: Alternative Dispute Resolution Journal Volume 4 No. 2, 2016, Chartered Institute of Arbitrators, Kenya
[49] Tweeddale (n 1) p.109.
[50] Ibid
[51] 460 US 1,24-25 (1983)

The Second Circuit court of the United States went further to pronounce itself on the factors that a court should take into account in adjudging a matter arbitrable or not in a two-prong inquiry. Where any party raises the issue of whether or not a dispute has arisen or whether the dispute ought to proceed to arbitration, first, the court must establish expressly that the parties agreed to arbitrate and if so whether the scope of the agreement encompassed the asserted claims. This is also referred to as jurisdictional and subject matter arbitrability.[52]

VI Types of disputes generally considered not arbitrable

Disputes are considered non-arbitrable if for example they relate to matters to do with intellectual property (Patents, Trademarks and Copyrights) or foreign Policy and inter-state relations which in turn invites the courts to determine the dispute. However, for a dispute to be subjected to arbitration and be said to be arbitrable usually depends on different countries laws. For example, matters involving criminal law disputes, bribery, corruption and fraud may not be arbitrable as they are a reserve of the courts of law. The above disputes will briefly be discussed below in a bid to provide more insight as to why they cannot be subjected to arbitration**.**

a) Crimes involving corruption in International Trade

Criminal cases involving corruption are likely to occur in trade related activities. More often than not, criminal cases in trade are majorly concerned with corruption which involves for example looting of public funds. So, in most countries, corruption disputes are solved and settled amicably by a court of law and are therefore not arbitrable or subject to be settled through arbitration since most of these corruption disputes are of public nature.[53]

In *BJ Exports & Chemical Processing Co. v. Kaduna Refining and Petrochemical CO* the Nigerian court decided that fraud is not arbitrable in Nigeria because the

[52] Tweeddale (n 1) pg.108.
[53] Valdhans, Málek, Pavel, "Consequences of Corrupt Practices in Business Transactions in Terms of Czech Law", BONELL, Michael J., MEYER, Olaf (eds), "The Impact of Corruption on International Commercial Contracts" Basel: Springer International Publishing, 2015, p. 99.

case was considered a criminal matter and the enforcement of the award would be contrary to public policy.[54]

b) Patents, Trademarks and Copyrights

Patents, trademarks and copyrights are accorded to an individual to protect their innovation within the jurisdiction of a particular state. Whether or not a Patent or trademark should be granted is generally a matter for the public authorities of the state concerned these being monopoly rights that only the state can grant. Disputes as to whether or not trademark or patents should be granted are usually outside the domain of arbitration. In other words disputes that arise on matters to do with the recognition of registered intellectual property rights by the parties are not arbitrable and can only be resolved by a court of law.[55] However, the owner of a patent or trademark frequently issues licenses to one or more corporations or individuals in order to exploit the patent or trademark and any dispute between the licensor and licensee may be referred to arbitration.[56]

c) Matters of foreign Policy and inter-state relations

Foreign policy matters which fall within a state's sovereign realm, can under no circumstances be delegated to private entities and as such cannot become the subject matter of arbitral proceedings. In any event, it is hard to envisage a situation where a dispute over foreign or military policy may arise in a contractual context between two private parties, or between a private entity and a state.

It is, however, possible for a contractual undertaking to involve elements of foreign or military policy, particularly through agency agreements for the procurement of arms to third states, or the

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[54] BJ Exports & Chemical Processing Co. v. Kaduna Refining and Petrochemical CO (1948) 2 AIl ER 576 (1948).
[55] D. Klára, "Arbitrability and Public Interest in International Commercial Arbitration," International and Comparative Law Review, 2017, vol. 17, no. 2, pp. 55–71.
[56] Tweeddale (n 1) p.139.

representation of the state in its external relations by private firm, legal, public relations, auditing, or otherwise. In these cases, the undertakings in said agreements that relate to public functions reserved to the state and that were delegated to the agents will not be amenable to arbitral proceedings.[57]

d) Labour Disputes

Generally, labour disputes are internal in character.[58] Modern welfare states approach labour relations in a two-fold manner. On the one hand they recognize the existence of a contractual relationship between employer and employee, yet on the other hand the state definitively regulates other elements of labour relationship through its public law. This encompasses, for example, the provision and supervision of health and safety, unfair or unlawful dismissal and others. Thus, there exist both private and public perspectives in the relationship of employment.

In *Alliance Bernstein Investment Research and Management v Schaffran*,[59] the United States Court of Appeals for the Second Circuit was asked to decide, among others, whether the dismissal of an employee for blowing the whistle against his employer, as a result of a federal duty imposed on the employee under the Sarbanes-Oxley Act (SOX), was arbitrable and whether it was the courts or the arbitral tribunal itself that possessed jurisdiction to decide this matter. The employer argued that this was a case concerned with employment discrimination and as a result did not fall within Rule 10211(a) and should have been submitted to a civil court. The issue at hand does not concern arbitrability, *stricto sensu,* but it is interesting that the Court of Appeals reiterated Rule 10324 of the NASD Code,[60] which empowers the arbitral tribunal itself to decide its

[57] The Foundations of Arbitrability in International Commercial Arbitration: Ilias Bantekas
[58] Ibid
[59] Alliance Bernstein Investment Research and Management v Schaffran 445 F 3d 121 (2nd Cir 2006)
[60] NASD (National Association of Security Dealers) Code bound parties to settle disputes arising out of the employment or termination of employment agreement by reference to NASD-based arbitration

own jurisdiction and proceeded to satisfy the defendant's claim to submit the dispute to arbitration.

e) Anti- trust and Competition Law disputes

Disputes involving antitrust and competition laws are normally not arbitrable and in most cases referred to the court to be resolved. Adam Smith in his writings in the 18th Century noted that;- *'people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices'*.[61]

Issues of competition and antitrust arising from the alleged breaches of securities legislation are arbitrable. In so far as the agreement will be severable as a result of s.7 of the Arbitration Act 1996 and may survive such invalidity.[62] The Tribunal determines whether or not the anti-trust legislation has been abridged but the State reserves the right to punish such offenders. The arbitration tribunal decides that there has been a breach of anti- trust legislation but does not award the punitive damages prescribed by the legislation because the tribunal regards the same as penal. This exception to arbitrability is informed by the distrust of cartels who could easily manipulate the market to the economic sabotage of a country. In the case of *American Safety Equipment Corp. V J.P Maquire & Co,*[63] it was held that 'claims under the antitrust laws are not matters arbitrable.' Anti- trust violation can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic damage. The European Union has adopted a rule of law of major importance that has direct effect in Member States and which prohibits any agreements having as their object or result the prevention, restriction or distortion of competition within the European Union. This rule of law, previously Article 85 and now Article 81 of the Treaty of Rome, is enforced both by the European Commission, which has the power to grant exemptions and in the event of any dispute, by the European

[61] Smith, Adam, *An Inquiry into the Nature and Causes of the Wealth of Nations*. Edwin Cannan, ed. London: Methuen & Co., Ltd. 1904. Library of Economics and Liberty [Online] available from *http://www.econlib.org/library/Smith/smWN.html, Book 10, para 2.*
[62] Sutton (n 6) p.17
[63] 391 F.2d 821 (2d Cir 1968)

Court of Justice in Luxembourg. Heavy fines may be imposed on companies that infringe on it.

Arbitral tribunals may determine whether agreements are in breach of antitrust legislation or not. In Switzerland for example, the Swiss Federal Tribunal annulled an award between an Italian party and a Belgian party where the arbitral tribunal had declined jurisdiction. The Court stated: "Neither Article 85 of the Treaty of Rome nor Regulation 17 on its application restricts a national court or an arbitral tribunal to examine the validity of that contract." [64]

The United States Supreme Court in the well-known *Mitsubishi case*[65] adopted a similar approach. In this case, it was decided that antitrust issues arising out of international contracts were arbitrable under the Federal Arbitration Act.
This was so despite:

i) The public importance of antitrust laws.
ii) The significance of private parties seeking treble damages as a disincentive to violation of those laws; and
iii) The complexity of such cases.

f) Securities Transactions

In 1953, the Supreme Court held that disputes under the Securities Act were not arbitrable.[66] In 1974, however, the court held that such disputes were arbitrable in an international commercial arbitration. In *Scherk v. Alberto- Culver*[67] the Supreme Court held as follows: -

"A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate the purpose of the agreement

[64] BG April 28, 1992, (1993) ICCA Yearbook 149, noted in Sanders, "Arbitration", p.65. op. cit. at para 3-10, n. 36
[65] Mitsubishi Motors Corp. Vs. Soler Chrysler Plymouth Inc., 473 U.S. 614, 105 S. Ct. 3346 (1985)
[66] Wilko Vs. Swan, 346 U.S. 427 (1953)
[67] Scherk v. Alberto- Culver, 417 U.S. 506 (1974)

but would also 'damage the fabric' of international commerce and trade and imperil the willingness and ability of businessmen to enter into international commercial agreements."

However, in subsequent cases, the court went on to accept arbitrability of securities disputes in United States domestic arbitration.

g) Bribery and Corruption cases

Issues of bribery and corruption in the performance of a contract usually raise important questions on public policy. Internationally, there is a general agreement that such matters should not be entertained at all costs.[68] If an allegation of corruption is made in the course of the arbitration proceedings, the arbitral tribunal is under a duty to consider the allegation and to decide whether or not it is proved. If it proved, then under most systems of law the agreement would be regarded as illegal and accordingly, unenforceable.

It is however, for one or other of the parties to the arbitration to make and prove the allegation. It is not the duty of an arbitral tribunal to assume an inquisitorial role and search officiously for evidence of corruption where none is alleged. The arbitral tribunal should also not allow itself to be used by the parties to sanction conduct which is illegal.

In the case of *Himpurna California Energy v PT (Perse) Perusahann Listruik Negara,*[69] the tribunal asserted:

> *The members of the tribunal do not live in an ivory tower. Nor do they view the arbitral process as one that operates in a vacuum divorced from reality. The arbitrators are well aware of the allegations that commitments by public-sector entities have made in relation to major projects.... without adequate heed to their economic heed to public welfare, simply because they benefitted a few influential*

[68] See the OECD *Guidelines for Multinational Corporations;* and ICC Document No. 315, "Extortion and bribery in Business Transactions".
[69] Final Award dated 4th May 1999.

> *people. The arbitrators believe that cronyism and other forms of abuse of public trust do indeed exist in many countries, causing great harm to untold millions of ordinary people in a myriad of insidious ways.*

h) Fraud

Fraud is defined as the deliberate or intentional use of misrepresentation, deception or dishonesty to deprive, in order to make a gain or achieve an advantage for someone or something.[70] Historically, fraud has been deemed non-arbitrable as a matter of public policy as it is seen as a criminal offence. Fraud can arise during the formation and performance of the contract, in the appointment of the arbitral tribunal, and also out of the arbitral award. [71] Where allegations of fraud are raised in the performance of a contract, the arbitral tribunal may decline jurisdiction. The Model Law and the Kenyan Arbitration Act provide that an arbitral tribunal can rule on a question of its jurisdiction as either a preliminary question or in a final award. The jurisdictional decision of the tribunal as a preliminary question is appealable to a court of law to determine whether the jurisdiction is proper or not.[72] The doctrine of *kompetenz-kompetenz* empowers arbitral tribunals to rule on their ability to deal with fraudulent claims.[73]

Allegations of fraud are usually raised but most of the time, they are never proved. Where a claim put forward in the course of arbitration is found to be fraudulent, it will be for the arbitral tribunal to dismiss it. However, problems may arise if the fraud is not discovered until after the award is made. In *Laiser*

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[70]*https://www.lexisnexis.com/uk/lexispsl/disputeresolution/document/393747/5T7S-MTD1-F18B-723H-00000-00/Civil_fraud_overview* (visited on 19/03/2023)

[71] Dr. Francis Kariuki & Vianney Sebayiga: Arbitrability of Fraud in Kenya; *NCIA ADR Journal, Volume 2, Issue1 2022*

[72] Article 16(3) of the Model Law. The separability doctrine is codified under Section 7 of the English Arbitration Act (1996).

[73] Simon Bushell, et al, Crime and Arbitration: Bringing Fraud Claims Under an Arbitration Agreement – Does the Arbitral Process Pack Enough Punch? in Christian Klaussegger, et al (eds), Austrain Yearbook on International Law (Verlage Manz 2012) pg.328.

Communications Limited v Safaricom Limited,[74] the Court of Appeal found that fraud was involved in the performance of the dealer agreement buttressed by criminal investigations that revealed that the person involved was an employee of the Respondent. Consequently, the matter could only be resolved in a court of law. According to the court, enforcing an arbitral clause alongside a liability clause within the dealer agreement which limited Safaricom's liability to only Ksh. 100,000, would severely obstruct the applicant's right of access to justice. The court held as follows: -

"The learned judge erred in holding that allegations of fraud do not rob an arbitrator of his jurisdiction despite sufficient evidence by the appellants showing that the fraudulent claims went beyond the level of mere allegations. In addition, the claim is founded on contract and tort, in particular defamation, fraud, restitution, unjust enrichment, restrictive trade practices, abuse of dominant position and public policy issues. These are issues that are beyond the arbitral scope and it is only the court which is vested with sufficient jurisdiction to deal with them. In view of the seriousness of the matters raised, the suit can only be properly advanced in court."[75]

VII Conclusion

Indeed, not all disputes are arbitrable. However, as jurisprudence continues to emerge, some authors argue that the scope of matters that are arbitrable should be widened. For example, it has been argued that fraud should be arbitrable because the defrauded party can be compensated with damages occasioned by breach of contract due to fraud.[76] This paper delved into the issues surrounding the proper definition of arbitrability, international arbitrability and national arbitrability; the laws governing arbitrability internationally such as the New York Convention, 1958 and the UNCITRAL Model Law on International Commercial Arbitration; national laws and landmark cases that attempt to define what arbitrability means in our jurisdiction; the various stages in the

[74] (2016) eKLR
[75] Id
[76] Dr. Francis Kariuki & Vianney Sebayiga: Arbitrability of Fraud in Kenya; *NCIA ADR Journal, Volume 2, Issue1 2022*

arbitration process when arbitrability may be contested and the general presumption that all disputes are arbitrable. Finally, the paper discussed the various disputes that are generally considered non-arbitrable in most jurisdictions around the world.

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The Challenge of Practicing Reconciliation in Conflict Management: A Critical review of Joanna Santa-Barbara's "Reconciliation"[1]

By: ***Henry Murigi****

Reconciliation is one of the Alternative Dispute Resolution Mechanisms that have been recognised as offering meaningful options in conflict management[2]. Questions abide on why is it difficult to gain traction on the pedagogy and practice of reconciliation in conflict management. This article seeks possible answers to this issue from the chapter by Joanna Santa-Barbara's chapter on reconciliation. This article adopts a critical review of the chapter that commences discusses reconciliation from a primatologist who interestingly finds the idea of resolution of disputes in primates. The chapter argues that as a fundamental process of human interaction, reconciliation between humans is found in *Hinduism, Buddhism, Judaism, Christianity, and Islam* among other religions The chapter adopts the definition of reconciliation from a relationship perspective and suggests that "*reconciliation is the restoration of relationship, where entities are at least not harming each other and can begin to be trusted not to do so in future which means that revenge is foregone as an option*". In a brief, the chapter argues that to reconcile means "*coming back together into council*". With that conceptual background, the chapter considers harm as, among others, deprivation of the sufficiency of life support systems. It considers the intentionality, irreversibility and personalisation of harm as critical, as advanced by Johan Galtung. For example, breaching international law by the USA in invading Iraq was harm occasioned to the global society.

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[1] In Charles Webel and Johan Galtung, editors, Handbook of Peace and Conflict Studies, (Routedge, New York NY 10016, 2007). pp. 173-186

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[2] Article 159 (2) (c) of the Constitution of Kenya 2010

Reconciliation Process

The chapter adopts the processes of reconciliation as suggested by Lederach[3] in which one of the critical issues is the *truth,* especially, where powerful interest may be threatened by the revelation of the truth. The chapter suggests that there is a need to compare the two opposing narratives one based on disclosed truth while the other is based on undisclosed truths. The process of reconciliation follows the trajectory of *acknowledgment* (taking responsibility), *apology* (expression of guilt), *forgiveness* (forego revenge) and *justice* (equality adjusted according to need). All these are heavy issues with unending debates over practicality. *Revenge* is another big issue discussed in the chapter. Govier makes a moral argument for revenge to mean payment for wrongdoing[4]. It is argued, that in revenge, the avenger becomes the offender and reconciliation becomes unattainable.

Reconciliation and Justice

Retributive justice on the other hand ensures that the offender gets fairness as the state system seeks to rehabilitate them. The issue that emerges is why the most powerful are not never tried yet they commit atrocities. *Restorative justice* is depicted as being victim centred aimed at compensation for victims. The victim is mostly lost in the process of retributive justice system and the focus is on the perpetrators rights within a state. The chapter proposes that to prevent future recurrence in situations such as ethnic, political civil war, peace education in schools would be a constructive contribution as an institutional and cultural measure to avert violence. The chapter concludes by asserting that, knowledge and skill in reconciliation, after harm has been done. is vital for peace scholars in the future of human interaction, in this stressed planet.

[3] Lederach, J.P, (1997), Building Peace; Sustainable Reconciliation in Divided Societies, Washington, DC: United States Institute for Peace.
[4] Govier, T (2002) Forgiveness ad Revenge, New York: Routledge.

Critical Review

The chapter is thought provoking and offers good insights on the connection between reconciliation and peace studies. It interestingly highlights of several examples such as the role of United States invasion on Iraq, Documentation Centre in Cambodia, the apology by Prime Minister Willy Brandt in Germany, Nelson Mandela in South Africa, credibility of women in the context of justice in Afghanistan, Rwandan Genocide, International Criminal Court, comparative justice systems in Canada and Australia, and lastly Bosnia – Herzegovina. These are few examples that demonstrate the direct connection between peace and security studies which should attract applause for the chapter being pointed toward reconciliation as an imperative for peace and security.

The depths of knowledge displayed in the chapter is captivating as it projects forgiveness as a possibility in the context of a group or society. The suggestion is that groups can suffer both harm and healing as groups. For example, of Palestinian suffer from Israeli occupation of their land on the one hand and Israeli suffer from suicide bombings on the other hand. This suggestion raises a number of questions. One, can suffering be distributed equally? Secondly, can anxiety be experienced in the same magnitude? Thirdly, will healing be experienced simultaneously when the degree of group harm differs? Fourth, is the expression healing by a legitimate leader in the absence of dissent sufficient evidence of complete healing? All these are questions that call for further analysis and study and as such the chapter does well to provoke scholarly ideas.

On the issue of justice, though not adequately addressed, the chapter posits the idea of fairness. Reconciliation being a process, the chapter considers the society to contain, victims and perpetrators needing both, retributive and restorative justice. This is an interesting thought since the victim seeks one kind of justice (retribution) which may in be viewed as inflicting harm to the perpetrator and the once victim becomes perpetrator. The justice systems give special focus on treating perpetrator fairly so that punishment can be justified. Whichever way one view the justice system, it seems to suggest returning 'bad' for '*bad*'. This

becomes an injustice when the scales of justice differ depending on the class of the perpetrator such as the elite. The transformation of the idea of justice is interestingly projected in the chapter to be on the decline, such as the global efforts to ensure no innocent person is punished and also abolishing of death penalties by some Nation States.

The role of culture, societal structures, and values offer a roadmap for reconciliation. The chapter correctly locates these three in the context of Johan Galtung's[5] work on direct violence (harm) structural violence (justice) and cultural violence (forgiveness, apology and revenge). It is interesting to note that there is no international norm or law that is codified to postulate on the practice of reconciliation yet there are numerous traces of injustices and conflict that are in and of themselves opportunities of reconciliation practice.

[5] Johan Galtung (1969), Violence, Peace and Peace Research, Journal of Peace Research Vol. 6. No 3. pp 167 – 191

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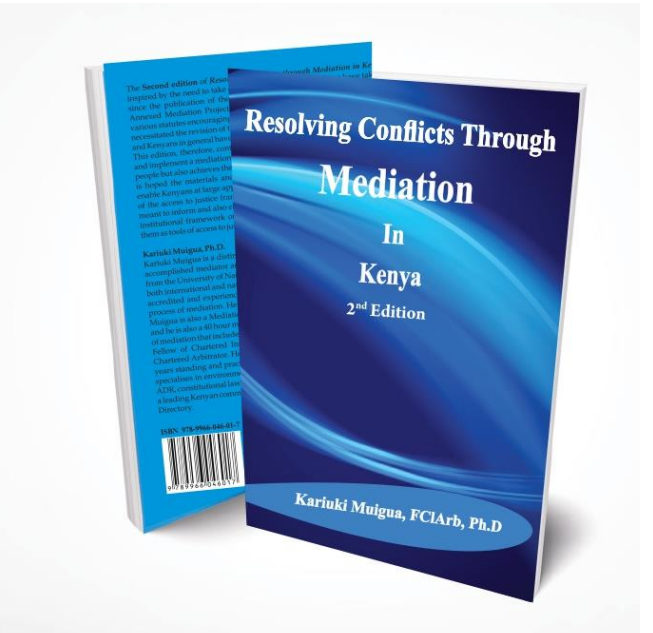

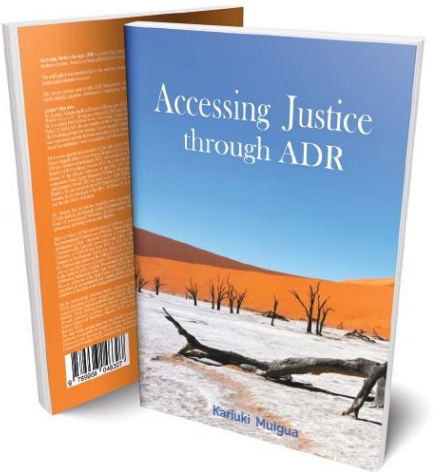

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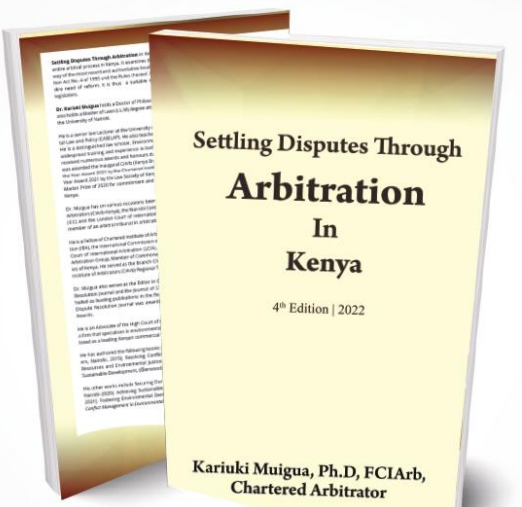

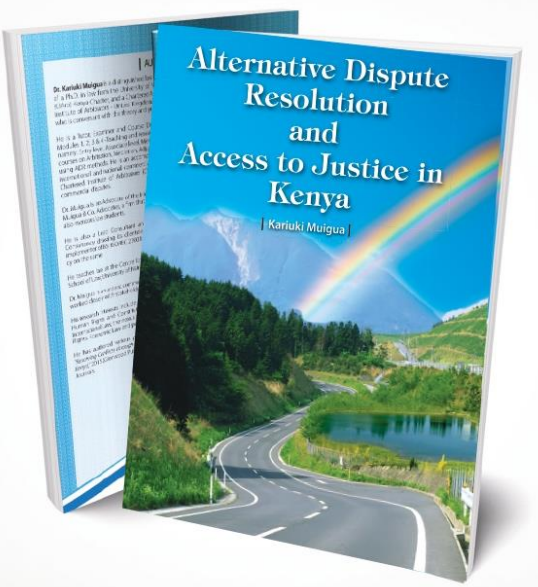

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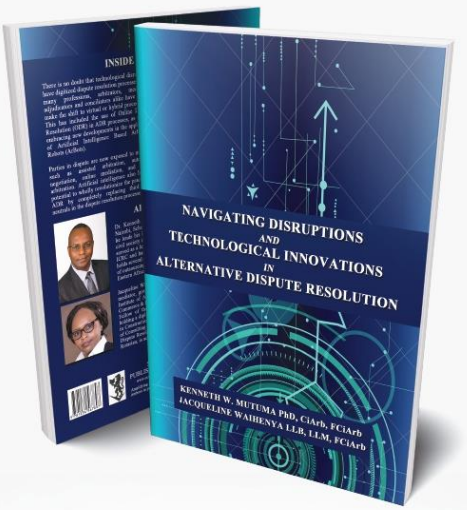

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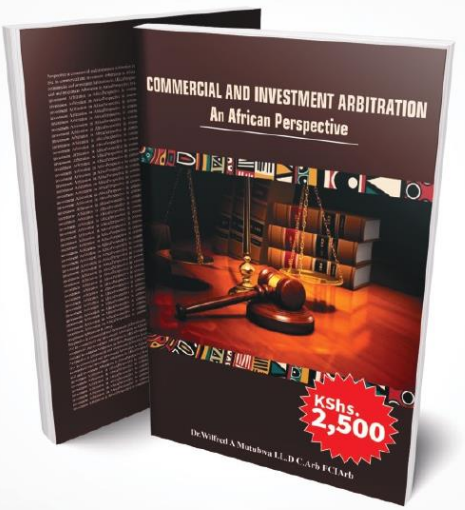

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