



Alternative Dispute Resolution

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Chartered
Institute of
Arbitrators

CI Arb

Kenya

ALTERNATIVE DISPUTE RESOLUTION

VOLUME 1 NUMBER 1

2013

Alternative Dispute Resolution is a journal of the Chartered Institute of Arbitrators (Kenya Branch) published twice a year

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Printing by:

Mouldex Printers
P.O. Box 63395,
Tel - 0723 366839,
[Nairobi, Kenya.](#)

Published by:

Glenwood Publishers Limited
P.O. Box 76115 - 00508
Tel +254 2210281,
[Nairobi, Kenya.](#)

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This Journal should be cited as (2013) 1 Alternative Dispute Resolution

ISBN 978-9966-046-02-4

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Editor's Note

Welcome to the inaugural issue of the Alternative Dispute Resolution Journal of the Chartered Institute of Arbitrators-Kenya Branch - CI Arb (K).

This edition has been informed by the Chartered Institute of Arbitrators - Kenya first Annual Regional Conference themed 'Enhancing Access to Justice through Alternative Dispute Resolution Mechanisms', that was held in Nairobi, Kenya, on 25th and 26th July, 2013. The conference was a great success, with participants from the East African region, the larger African continent and around the world, including a representative from London.

The CI Arb (K) ADR Journal will be published bi-annually while the conference will be held after every three years. These two events mark a significant milestone by the Institute. I take this opportunity to express my immense gratitude to all those who played a role in actualizing these two great ideas.

This Journal seeks to cut across the board by providing comprehensively researched and detailed articles by scholars and practitioners, on the various Alternative Dispute Resolution mechanisms and related issues. This follows the fact that ADR has rapidly gained formal recognition in our modern society and has become a main frontier in attaining access to justice.

This Journal contains a compilation of rich articles on Alternative Dispute Resolution presented at the Conference or submitted for the same. The articles sought to contribute to the theme and they present

an interesting reading not only to ADR practitioners but also to those who desire to obtain information on this area.

The articles offer a wide berth for a comprehensive critique of ADR as well as providing an avenue where ideas can be shared and followed up by ADR practitioners worldwide as well as the general Kenyan public. After all, the theme revolves around enhancing access to justice through ADR for the people.

The Institute is grateful to all those who have made the publication of this journal possible.

Dr. Kariuki Muigua, Ph.D, FCIArb

Chairman,

Chartered Institute of Arbitrators (Kenya)

Nairobi, December 2013.

ACHIEVING ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTION

by **CHIEF BAYO OJO ***

1.0 MEANING AND CONCEPT OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

Alternative dispute resolution simply put denotes all forms of dispute resolution other than litigation or adjudication through the courts. This definition of ADR, however, makes no mention of a vital consideration. This is that ADR provides an opportunity to resolve disputes and conflicts through the utilization of a process that is best suited to the particular dispute or conflict.

Orojo defined Alternative Dispute Resolution as including binding arbitration since it qualifies as an alternative to court litigation. The better view is that the distinguishing feature of ADR is that the parties with few exceptions determine their own destiny rather than having the decision of another imposed upon them.

The dispute may be resolved directly, by negotiation, or with the assistance of a third party neutral, as with mediation. Accordingly, ADR is generally used to describe the methods and procedures used to resolve disputes either as an alternative to the traditional disputes resolution mechanism of the court or in some cases as supplementary to such mechanism.

Although ADR takes various forms, it is generally understood to include:

- a. direct negotiation between the parties
- b. early neutral evaluation
- c. non-binding arbitration, (another form of neutral evaluation)

* SAN, member of the Board of Trustees of the Chartered Institute of Arbitrators London

- d. mini-trial, yet another form of neutral evaluation
- e. mediation med-arb (a combination of mediation and arbitration) and;

- f. judicial settlement conferences, which are very similar to mediation as it is most commonly practiced

Indeed, Alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.

At an international level, the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they states or individuals is Article 33 of the Charter of the United Nations which outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to. It provides that *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice*. ADR in this era of the 21st Century seeks to find domestically and internationally, a faster, economical and more efficient system that contrasts with litigation which is time consuming and expensive. Concerned about efficiency of national court system in cross border disputes, foreign investors normally prefer mediation or arbitration. Dispute settlement through Arbitration/ADR is not only domestic but also an increasingly growing international phenomenon in the context of cross border transactions.

2.0 MEANING OF ACCESS TO JUSTICE

Access to justice has been defined in various ways. It refers to a system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state. It consists of guaranteeing equal access and achieving just outcomes. It could also simply refer to *'mechanisms by which an individual may seek legal assistance'*.

Access to justice requires guaranteeing the right of access and making available gateways to access. The right of access to justice is undisputed. All persons have a right to access the justice system but avenues through which the right of access may be exercised have been the subject of access to justice

reforms. How do disadvantaged persons or groups including women, migrants, the poor, persons with a disability fair in accessing justice? Is there sufficient public information about available services? How do associated costs affect access? Are available services suitable to perceived needs?

Obviously, one of the surest ways of providing answers to the above questions in the affirmative is through alternative dispute resolution.

3.0 ACHIEVING ACCESS TO JUSTICE THROUGH ADR

In Africa, when we talk about access to justice, you either make access to courts and tribunals easier and more timely or you go through ADR. With these options, one does not need a soothsayer to tell him that the best pick is the option of ADR because the justice system has its own challenges and sadly so, the harsh reality is that access to justice is grossly limited within the justice system. Indeed, access to justice entails giving people choices and providing appropriate forum for each dispute and this is just what ADR has come to do and actually what it does.

Under ADR, disadvantaged members of the community, including women, minority cultural groups, people with disabilities, people living in rural and remote communities and people with low socio-economic power are granted a better access to justice through the use of ADR. ADR identifies the concerns even where not voiced and the ability to do this is very crucial to the 'justice' of the process. The advantages of ADR over litigation betray the reason why it is a most useful tool in achieving access of justice.

For example, when disputes arise in contracts of sales, construction, employment, banking, insurance, etc, in most cases, what is required is simply the appropriate interpretation of just one or two clauses of the contract. Such matters cannot wait for endless years to be resolved, where what is actually required is a constructive and amicable interpretation of the grey clauses for the contract to continue. In this and as in many other examples, we can see that litigation simply proves inadequate in the resolution of disputes in most instances.

Generally where relationships are on-going in nature, litigation is to say the least insufficient in resolving disputes that arise from the relationship. Differences arising from on-going personal relationships get complicated when litigation is resorted to because of the obvious win-lose nature of litigation. Court judgments identify clear winners and outright losers. The winner

becomes a triumphant champion, the loser naturally loses everything and this creates a lot of hard feelings.

Indeed, this and many other limitations of litigation justify the focus now being placed on ADR in most contemporary jurisdictions as means of achieving access to justice.

4.0 ACCESS TO JUSTICE THROUGH INDIGENOUS SYSTEMS OF ADR

In Africa, traditional forms of dispute resolution, which, for present purposes may be termed ADR processes, have long existed in indigenous societies.

Those who reside in the country side or other rural localities away from urban areas resolved their disputes through the effort of the village head, the priest, or just a close confidante or a trusted family friend. So mediation, conciliation and arbitration were the only known judicial processes used in resolving disputes.

For example, mediation or arbitration is not a new phenomenon in Africa, particularly with regard to the old ancient Empires spread across the continent like the Old Ghana, Songhai, Benin, Oyo and the Hausa Empires. Arbitration or Mediation was used for resolving conflicts because of their emphasis on moral persuasion and their ability to maintain harmony in human relationships.

In the environs of Benin City, The village head (Odionwere) or the family head (Okaegbe) principally functioned as the arbitrator or the mediator while in the Hausa Kingdom the Emir has a court and in the Oyo Empire, the Alafin functioned to resolve conflicts or disputes among his people. The parties were also at liberty to request any member of the community in which they reposed confidence to mediate or arbitrate with the undertaking to abide by his decision.

In certain types of disputes there would be a review in the palace at the instance of one of the parties, either by way of rehearing, or as there was no written record of the earlier proceedings, narrating what had transpired before him and indicating the area of disagreement.

5.0 CONCLUSION

In conclusion, these remarks have identified in the main the evolution and concept of Alternative Dispute Resolution as well as the concept and

meaning of access to justice and how the former can be utilized in effectively bringing about the latter.

By way of recommendation, it is submitted that Africa should endeavour to practice what is obtainable in other jurisdictions of the world, which is to make it mandatory for legal advice to be given to ensure that parties to a dispute are fully informed as to the most cost effective means of resolving their disputes. This calls for a reform in the civil system of adjudication. The position is that if litigation is handled with some daftness and some of the rules amended or completely eliminated, ADR would be complementary as against being an alternative.

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TOWARDS EFFICIENCY AND ECONOMY IN ARBITRATION

by **NORMAN MURURU***

1.0 THE PROBLEM

There is currently great concern worldwide from users of arbitration (both domestic as well as international) with the time and cost it takes to bring closure to disputes. Two of the key selling points for arbitration used to be expeditious proceedings and affordable costs. With increase in complexities of commerce, disputes have similarly become more complex and larger (in monetary terms). This has led to the use of more formal proceedings (akin to state court proceedings), the production of masses of documents etc... all which contribute greatly to lengthy and expensive proceedings. This trend is often referred to as “over lawyering” and “over judicialisation” of arbitration. Attempts are being made by arbitration practitioners to control this worrisome trend by making proposals that reduce time and costs in the process. For any meaningful impact to be felt and seen, all actors in the discipline must contribute positively to the endeavour. The actors include Arbitrators, parties (users), Counsel (both in-house and external), experts and other witnesses as well as bodies that provide arbitration services of appointment and case administration. In recognition of the problem, all major arbitral bodies have devised “short form” or “fast track” or “expedited” arbitration rules which may be employed to cut down on time and cost. In particular, The College of Commercial Arbitrators has recommended protocols for the realization of expeditious, cost effective commercial arbitration proceedings. Some of the recommendations are:

* BA (BEcon), LLB (Hons), Dip Hsg, FIQSK, FAAK, FCIArb, Chartered Arbitrator

2.0 TO USERS AND IN-HOUSE COUNSEL

- 2.1** Be careful with “standard” arbitration agreements and procedures. Select procedure that is suitable to the nature of transaction and likely disputes.
- 2.2** Choose procedures that limit discovery to what is essential and avoid court style procedures.
- 2.3** Where appropriate, choose “fast track’ or other expedited process.
- 2.4** If dispute is small and uncomplicated, agree on sole Arbitrator.
- 2.5** Specify default provisions in case of failure to agree on Arbitrator.
- 2.6** Depending on size, importance and complexity of dispute, decide the optimal resources to allocate to process and broad time frames for the task. Bear in mind that lengthy proceedings disrupt company operations and the management time expended is in most cases not recoverable whatever the outcome.
- 2.7** Select outside Counsel based more on arbitration experience than litigation experience as well as acquaintance with the subject industry or trade.
- 2.8** Consider alternative fee arrangements with outside Counsel and agree on the one that best suits the circumstances of the case and one which best predicts the total outlay, always

bearing in mind that even in the event of success, it is rare for all costs to be recovered. See also 3.3. below.

- 2.9 If tribunal is being formed after a dispute has arisen, select members with expertise in the area of dispute. Such a tribunal is likely to process the dispute much faster, reduce hearing time and time for making the award. Savings in time translate to savings in costs.
- 2.10 A tribunal with expertise in the subject matter is likely to reduce the need for experts. Experts can be expensive. If they are reduced to a minimum (e.g. 1 appointed jointly) or if avoided altogether, significant savings in time and costs will be realised.
ICC research shows that over 80% of total costs in arbitration are taken up by legal services. Special attention to be paid to this aspect.
- 2.11 Employ a co-operative attitude towards the opposition to prevent antagonism and unnecessary adversarial postures. This way agreement is possible on many issues thus cutting down on time and costs.

3.0 TO OUTSIDE COUNSEL

- 3.1 Accept instructions only if familiar with arbitration principles and procedures, have the time for it and have some acquaintance with the area in which the disputes occurs. When all actors (Arbitrators, counsel and witnesses) are familiar with industry in which the dispute has arisen, the process will move smoothly and expeditiously.

- 3.2 Counsel to provide client with an early neutral case assessment and then agree the approach and strategies to employ in the proceedings; e.g. content of pleadings, what to admit and what to contest, type and nature of evidence and witnesses etc.
- 3.3 Agree remuneration as early as possible to avoid misunderstandings later on. Conduct the arbitration economically bearing in mind that even with success, not all expenses are recoverable. Alternatives are; lump sum fee, hourly billing, pro rata to claims or to award, contingency fee based on success etc... See also 2.8. above.
- 3.4 At the earliest opportunity cultivate a cordial professional relationship with opposing counsel. This way more gets done for less. Benefits of such conduct to be explained to the parties as well as the benefits of working to the agreed programme.
- 3.5 To always be alert to opportunities for compromise (negotiated settlement) on some or all issues, opportunities for mediation, expert determination and other less contentious dispute management alternatives.
- 3.6 If appointed, experts to be issued with terms of reference and to be encouraged to meet to agree as much as possible so as to narrow the area of dispute. This way savings in time and costs can be realised.
- 3.7 To control time and costs, agree with client to advance only 'serious' claims and defences and avoid spurious and irrelevant documents to support your case. Masses of documents supplied as background material cost money to

produce and cost money to analyse. Even though labelled “background” or “supplementary”, the opposing party and the tribunal will have to go through them to assure themselves that nothing material has been overlooked in the dispute resolution process.

- 3.8** Counsel to keep constantly in touch with each other exploring ways of expediting the proceedings, agreeing matters not in contention and agreeing issues for decision by the tribunal. Also to seek tribunal’s assistance if issues arise that require the tribunal’s intervention. This way, the agreed programme is likely to be honoured without material deviation, thus contributing to time and cost control.

4.0 TO ARBITRATORS

- 4.1** Ultimate responsibility for the efficient management of arbitration proceedings falls to the Arbitrator making the statement that “arbitrations are only as good as the Arbitrator”, true. Therefore, do not accept appointment if not trained and experienced in arbitration principles and practice.
- 4.2** Experience in case management as well as exposure in or acquaintance with the relevant trade or calling is an added advantage.
- 4.3** Knowledge and experience in case preparation and presentation (advocacy) gives the tribunal a deeper insight into the core of the litigants’ grievances.
- 4.4** Possession of judicial attributes is a necessary qualification for good Arbitrators; namely, patience, ability to listen

keenly, neutrality, ability to analyse evidence and identify issues for decision, understanding of the relevant applicable law, arriving at findings and decisions purely on the basis of the applicable law and evidence, arriving at just and fair decisions etc.

- 4.5 Establish cordial but professional atmosphere with Counsel and parties. Agree programme and “lead by example” by complying with it so that others may do likewise.
- 4.6 Tribunals with strong management skills should be ready to penalize parties who deliberately drag or delay proceedings or engage in unnecessary applications or motions.
- 4.7 Where appropriate, explore feasibility of resolving the dispute on the basis of documents only.
- 4.8 Pro-actively manage the proceedings and invite Counsel to approach tribunal any time they need assistance and in case changes are required to the timetable and deadlines as well as to procedure.
- 4.9 Where convenient, agree written witness statements and the number of witnesses. Witnesses to be restricted to those with probative evidence; not just background information.
- 4.10 Where preliminary issues may decide the fate of the arbitration, encourage their resolution upfront.
- 4.11 Agree time to be allocated to each party or each witness in both exam-in-chief as well as in cross-examination but with flexibility in case of need.

- 4.12 Aim to complete the oral hearing in one continuous session or nearly so. Multiple adjournments require multiple preparations which add to overall costs.
- 4.13 Agree time for issuing the award, tailor the programme to suit. Not to be varied except for good cause.

5.0 TO ARBITRATION PROVIDERS

- 5.1 To offer business users a clear variety of options to choose from to fit with the particulars of the case, e.g. fast-track, expedited, standard procedure or procedure for large and complex cases and provide rules to go with each alternative.
- 5.2 To promote stepped/tiered dispute resolution clauses commencing with the informal and ending with the most formal (arbitration).
- 5.3 Participate in the training of Arbitrators, and lawyers appearing in arbitrations.
- 5.4 Where appropriate, take part in the constitution of the tribunal and in the management of the case.
- 5.5 Prepare an evaluation of Arbitrators after the proceedings and share report with the Arbitrators. If consented to, report may also be sent to parties and Counsel.
- 5.6 Manage time effectively to achieve dispute closure within programme and with minimum deviations.

- 5.7 Publish scales of fees which fairly remunerate the provider and the Arbitrators. Ditto for guidance to the tribunal on the costs that a party may recover from the other if so ordered by the tribunal.
- 5.8 To provide introductory and orientation programmes to arbitration users (clients and counsel) who may be new to the process.
- 5.9 Encourage parties and Arbitrators to allow publication of awards for the education of potential clients and representatives.
- 5.10 Play a pro-active role in the development of arbitration laws, rules and procedures that promote expeditious and fair resolution of disputes with minimum involvement of state courts.

THE CHALLENGES OF IMPLEMENTING ADR AS AN ALTERNATIVE MODE OF ACCESS TO JUSTICE IN KENYA

by **PROF. PAUL MUSILI WAMBUA***

ABSTRACT

Access to justice is a core tenet of democracy and a basic Human Right. Article 48 of the Kenyan Constitution enshrines the right to justice as a fundamental right and requires that the same shall not be limited by time or scarcity of resources. Article 159(2)(c), enumerates Alternative Dispute Resolution (commonly abbreviated to ADR) as one way of accessing justice by granting the courts power to promote ADR as an alternative to the adversarial and overly technical method that is litigation.

Arbitration and Mediation are the two most preferred means of ADR by which parties seek to resolve disputes of a commercial nature. The current Arbitration law in commonwealth Africa is influenced by the UNCITRAL Model Law, an initiative of the Africa-Asia Legal Consultative Committee aimed at standardizing arbitration practice around the world. With globalization of commerce and multiplicity of commercial disputes, ADR has become the preferred mode of settlement of disputes in most jurisdictions.

Despite the growing popularity of ADR in Kenya as an alternative to court litigation, there are still serious challenges that face the practice of ADR. A sound and effective legal framework for ADR in Kenya is key to facilitation of commerce and attainment of Vision 2030. This paper examines the legislative framework for ADR in Kenya, highlights the various challenges that face ADR and makes proposals for reform.

“From the Bible and Islamic culture, we learn that you can negotiate anything. In fact, you can negotiate with God. The story of Abraham’s protracted negotiation with God over the destruction of Sodom is just one example. The Prophet Mohammed negotiated with Allah over the number of times the faithful would need to pray in a day, successfully bringing it down from 50 to five”¹

*Associate Professor of Law University of Nairobi and Member of the Chartered of Arbitrators.

¹ Mutunga, Dr. Willy, Chief Justice/President of the Supreme Court of Kenya in a speech at the induction retreat for cohesion and goodwill ambassadors, delivered at the Crowne Plaza Hotel Nairobi on August 29th 2011. Available online at www.judiciary.go.ke/.../speeches/CJ's%20SPEECH%20AT%20CROWNE (Last accessed on 25th August, 2013).

1.0 INTRODUCTION

ADR refers to the various approaches used in resolving disputes outside of the formal litigation in court. ADR typically includes, but is not limited to, early neutral evaluation, enquiry, negotiation, conciliation, expert determination, mediation, and arbitration². The two major forms of ADR are Arbitration and Mediation³. ADR has found favour with most litigants because of the inordinately long delays experienced in litigation and the unreasonable costs associated with such long processes. There are other advantages as well; parties are able to conduct the processes away from the public glare and are in control of the process by having the right to dictate the procedures to be used⁴. Due to their consensual nature ADR processes are considered less adversarial in nature and thereby tending to reconcile the parties at the end of the process thus preserving their relationships. It is this attribute of ADR which has prompted some commentators to refer to it as “Appropriate Dispute Resolution”⁵.

ADR has been adopted in many jurisdictions around the globe as the preferred means of settling disputes and is now recognized as one of the ways in which access to justice as a fundamental human right can be achieved. Various international conventions that promote the use of ADR have been adopted such as: Convention on the Recognition and Enforcement of Foreign

² For a discussion on the definition see Legal Information Institute available at http://www.law.cornell.edu/wex/alternative_dispute_resolution. Last accessed on 29th July 2013. See also Fenn P, “Introduction to Civil and Commercial Mediation” in Chartered Institute of Arbitrators *Workbook on Mediation* (CIArb, London), 2002 pp.50-52.

³ Although Arbitration and Mediation are the two major forms of ADR, Negotiation is almost always attempted first to resolve a dispute. It is the preeminent form of dispute resolution which allows the parties to meet and resolve a dispute thereby allowing them to control the process and the solution.

⁴ See sections 10 and 29 (1) of the Arbitration Act, 1995.

⁵ The debate of whether to refer to ADR as Alternative Dispute Resolution or Appropriate Dispute Resolution started in the United States of America, See <http://www.doj.state.or.us/adr/Pages/index.aspx>. (Last accessed on 16th August ,2013).

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Arbitral Awards (the New York Convention 1958)⁶; the UNCITRAL Model Law on International Commercial Arbitration 1985⁷; UNCITRAL Arbitration rules, 1978; Convention on the Settlement of Investment Disputes Between States and Nationals of other States (Washington Convention, 1965); and Convention for the Pacific Settlement of International Disputes, 1907. ADR has been provided for in the Constitution of Kenya 2010⁸.

This paper examines the philosophical/theoretical basis of ADR, gives an overview of legislative framework for ADR in Kenya and outlines the challenges that face the practice of ADR. At the end, the paper makes proposals for reform necessary for the attainment of access to justice through ADR as envisaged in Article 48 of the Constitution of Kenya 2010.

2.0 THE PHILOSOPHICAL AND THEORETICAL FOUNDATION FOR ADR

A prominent legal scholar rightly points out that the theoretical foundations and concepts that have been responsible for ADR developments cannot be overlooked for the reason that the underlying knowledge base provides the essential framework for policy makers and practitioners alike to rely on when deciding how or whether to use ADR processes or techniques in various dispute settlements⁹. A discussion of the theoretical framework for ADR must therefore involve a discussion of the two concepts of ‘dispute’ and

⁶ Adopted on 10th June, 1958 and came into force on 7th June, 1959. Kenya acceded (with a reservation on reciprocity) to the New York Convention on 10th February 1989.

⁷ Adopted by the United Nations Commission on 21st June, 1985 and passed by the UN General Assembly as Resolution 40/72 of 11th December, 1985 which recommended that all member states harmonize their arbitration laws to meet the unique needs of the international commercial arbitration practice.

⁸ See Article 159(2) (c) which requires the courts of Law to use ADR as a means of accessing Justice.

⁹ Pirie Andrew J, *Alternative Dispute Resolution: Skills, Science and the Law*. Irwin Law Toronto, Ontario 2000, p.3.

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“justice”. As discussed below there is a conceptual difference between disputes and conflict with some scholars noting that conflict exists where there is an incompatibility of interests¹⁰.

‘Justice’ is a difficult concept to define and one capable of varying meanings depending on the context and one’s perspective. Indeed according to Torstein Eckhoff, it is characteristic of principles of justice that they are general and vague¹¹. Some leading scholars have come up with derivative theories on the concept of justice¹².

Sustac¹³ defines conflict as “a contextual social phenomenon determined by the clash between the interests, the concepts and the needs of certain persons or groups when they enter into contact and have different or apparently different objectives”. He states the major theories as pertains to the causes of conflict as: the theory of community interests¹⁴; the negotiation theory¹⁵; the

¹⁰ Brown Henry J. and. Marriot, Arthur L, *ADR Principles and Practice*, London: Sweet & Maxwell, 1993, p.5.

¹¹ Eckhoff, T. *Justice – Its Determinants in Social Interaction*, University of Oslo, Rotterdam University Press,1974, p.34

¹² See Rawls, J.A, *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge Massachusetts, 1971; West, R.L, *Re-Imaging Justice: Progressive Interpretations of Formal Equality, Rights and the Rule of Law*, Ashgate Publishing Limited, 2003 (West describes this as the ‘dominant interpretation of legal justice’); and Simmonds, N.E, *Central Issues in Jurisprudence – Justice, Law and Rights*, 1986, p 88.

¹³ See Sustac, Zeno Daniel, *A Philosophical Approach to Alternative Dispute Resolution Systems I* Available online at http://world-of-mediation.com/Concluzii%20teza%20de%20doctorat_EN%20site.pdf. (Last accessed on 21st July 2013).

¹⁴ According to which the conflict is caused by polarization, distrust and hostility between different groups within a community, and for improving the community relations we must first improve communication and understanding between the groups in conflict, but also promote toleration and diversity.

¹⁵ According to which negotiation is a “people’s way of living together, as a means of structuring social relations on a certain system of values”.

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human needs theory¹⁶; the identity theory¹⁷; the intercultural misunderstanding theory¹⁸; and the conflict transformation theory.¹⁹ Burton²⁰ notes the conceptual differences between disputes and conflicts and distinguishes between dispute settlement and conflict resolution with the former involving conflicting but negotiable interests (requiring judicial treatment or arbitration) and the latter revolving around non negotiable issues of basic human needs deprivation (requiring analytical problem solving). After noting that many global wars are a spillover of internal conflicts he concludes that "we are forced to the conclusion that conflict is a generic phenomenon that knows no system boundaries"²¹.

It is argued that the causes that led to the creation of ADR systems are represented by conflicts because as Thomas Hobbes puts it: " the laws of nature

¹⁶ According to which the conflict is caused by the non-fulfillment of human needs, by the psychological, physical and social frustrations, and it is necessary: to assist the parties in conflict in identifying and sharing their unfulfilled needs and in generating options for their fulfillment, but also to assist parties in reaching an agreement.

¹⁷ According to which conflict is generated by the identity threatening feeling which often has its roots in traumas of the past, and the solution is to facilitate, by means of dialogue, the identification of the fears that the parties in conflict have.

¹⁸ This insists on the need to increase the mutual exchange of information on the cultural aspects of the parties involved in the conflict, to reduce the negative impact created by stereotypes and on consolidating intercultural communication.

¹⁹ Which militates for the change of structures and environment which generate inequality and injustice (economic context); long term improvement of relations and attitudes of the parties in conflict; and development of certain processes and systems that promote justice, peace, reconciliation and mutual acknowledgement.

²⁰ Burton, John W. "Conflict Resolution as a Political Philosophy" in *Conflict Resolution Theory and Practice: Integration and Application*. Ed. Dennis J. D. Sandole and Hugo van der Merwe. Manchester and New York, Manchester University Press, 1993. pp. 55-64. Summary of the chapter by Mariya Yevyukova available online at <http://www.colorado.edu/conflict/transform/burton.htm>. (Last accessed on 1st July 2013).

²¹ Ibid p. 56.

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are reduced to life preservation and contract observance, the rest being *bellum omnium contra omnes* or the war of all against all”²². Consequently, a proper study of ADR must adopt an interdisciplinary approach and must encompass not only the philosophical perspective but also the psychological, the sociological, the religious, the economic and the political views. Other scholars see conflict as “part of a healthy relationship” being at the same an integral component of reconciliation. "Human beings need different institutional spheres where to find their intimacy, to update their individuality and to enjoy political communion", and "the conflict is the price of this differentiation."²³

According to Wandberg, conflict resolution is “a process of reducing or calming the conflict to prevent violence (...) is a method of building or rebuilding trust in a relation”.²⁴In attempting to build a new theory of conflict, a central problem is represented by the understanding of the conflict’s ambivalent nature, of its capacity to generate creative solutions and high levels of personal and collective integration, of its capacity to generate virulent consequences when it becomes violent²⁵. The progress of conflict analysis over time reveals five approach possibilities: traditional approach, approach by human relations perspective, interacting approach²⁶; pluralist or behavior approach; and radical approach²⁷.

The traditional methods of conflict resolution were defined as being “those methods of conflicts extinguishing, characterized by a certain authority imposing a solution to the parties involved in the conflict”. They are also known

²² Hobbes Thomas, *Leviathan*, Forgotten Books (1651), republished 2008, p. vii.

²³ Hardimon, Michael O, *Hegel’s Social Philosophy: The Project of Reconciliation*, Cambridge Univ. Press, New York, 1994, pp. 92-93.

²⁴ Wandberg, Robert, *Conflict Resolution: Communication, Cooperation, Compromise*, Capstone Press, Minnesota, 2001, p. 6

²⁵ Cheldelin, Sandra, Druckman, Daniel, Fast, Larissa and Clements, Kevin, *Theory, Research, and Practice*, in vol. Cheldelin, Sandra Druckman, Daniel and, Fast Larissa (edit.), *Conflict: From Analysis to Intervention*, Continuum, London, 2003, pp. 10-11.

²⁶ Robbins,S.P., *Organizational Behaviour*, Prentice Hall, New Delhi, 1994, p. 110.

²⁷ Şuştac, Zeno, op.cit. note 13.

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as the “classic methods” or “authoritarian methods” of conflict resolution the major disadvantage of these methods being that the solution is imposed on the parties to the dispute. A classic example of this method is the trial court. The alternative methods of litigation resolution took shape as a reaction to the low level of efficiency or the lack of efficiency, and huge costs associated with the traditional methods.

Burton²⁸ traces two conceptual frameworks in the conflict resolution as “political realism” (dating back to feudal times and which used coercive means of resolving conflicts) and “idealism (which emerged several decades ago and which leaned towards cooperative relationships) and notes that neither of the two had a theoretical basis. He therefore suggests (i) a new theoretical paradigm based on a theory of behavior that requires that institutions have to adjust themselves to basic human need and (ii) that scholars in their social analysis have to move from institutions as the main units of their research to persons and, based on this, create a political theory. Political philosophy has to incorporate conflict resolution which is applicable to any economic and political system. It is external to any ideological framework. Problem-solving and conflict prevention are the missing parts needed for peaceful transformation of troubled societies²⁹.

It can therefore be concluded that presently there is no single ADR philosophy or consensus that any one of the different ADR approaches can properly and authentically represent the ‘true spirit’ of ADR³⁰. Some of the major underlying objectives of ADR are: the principle of cooperative problem-solving; empowerment of individuals; reduction of delays and costs associated with litigation; production of better outcomes; preservation or enhancement of personal and business relationships; simplification of procedures and relative informality³¹. The principle of co-operative problem-solving is regarded as one of the main objectives of ADR, but it has been argued that some parties in ADR

²⁸ Burton Op cit note 20 p.58

²⁹ Ibid p. 63

³⁰ Brown H and Marriot, A, *ADR Principles and Practices*, London Sweet and Maxwell,1993,p.9

³¹ Ibid pp. 9 – 10.

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may well be using the process as a means to an end in getting their case settled without necessarily feeling any sense of being engaged in mutual problem solving³². It has also been argued by some commentators that ADR does not depend for its effectiveness on the parties adopting a problem-solving approach. ADR processes can be equally effective where the parties adopt positional bargaining, competitive negotiation, problem-solving modes or any permutation of these or other approaches³³.

3.0 AN OVERVIEW OF THE LEGISLATIVE FRAMEWORK FOR ADR IN KENYA

The legislative framework for ADR in Kenya is to be found in the Constitution of Kenya 2010, the Arbitration Act (Cap 49 Laws of Kenya), the Civil Procedure Act (Cap 21 Laws of Kenya), the Civil Procedure Rules 2010, the Appellate Jurisdiction Act (Cap 9 Laws of Kenya) and the International Arbitration Centre Act 2013. In the following paragraphs an overview of each of these legislations is discussed.

3.1 THE CONSTITUTIONAL BASIS FOR ADR

The constitutional foundation for ADR is found in Article 159(2) which requires the courts and tribunals in exercising their judicial authority, to be guided by the four listed principles including the principle that: "Alternative forms of dispute resolution including, reconciliation, mediation, arbitration and traditional dispute resolution mechanisms."³⁴

³² Ibid p.11.

³³ See in Mwenda Winnie Sithole, *Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia* (unpublished Ph.D thesis) p 25 available at <http://uir.unisa.ac.za/bitstream/handle/10500/2163/thesis.pdf?sequence=1>. (Last accessed on 21st July, 2013).

³⁴ See Article 159 (2)(c) of the Constitution of Kenya 2010 that was promulgated on the 27th August 2010 (Available online at <http://www.kenyalaw.org/klr/index.php?id=741> (Last accessed on 14th August, 2013).

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The Constitutional anchoring of ADR as a means of resolving civil disputes emphasizes the importance that the drafters of the Constitution placed on ADR as an alternative to formal court litigation. The objective is to enlarge the avenue for accessing justice to all Kenyans. It is worth noting that in the repealed Constitution, there was no provision on ADR as a means of resolving disputes and accessing justice.

The ADR mechanisms shall be promoted, subject to sub-clause 159(3)³⁵. The scope of application of ADR has also been widened by Article 189(4) which provides that all national laws shall provide for the procedures to be followed in settling intergovernmental disputes by ADR including negotiation, mediation and arbitration. These constitutional provisions on ADR have been amplified in the Civil Procedure Act and the Appellate Jurisdiction Act.

3.2 THE CIVIL PROCEDURE ACT AND THE CIVIL PROCEDURE RULES 2010

Section 1A & 1B of the Civil Procedure Act provides that the overriding objective (commonly referred to as the Oxygen principle³⁶) is to promote just, expeditious, proportionate and affordable resolution of civil disputes. The Oxygen principle calls for the courts to ensure that the parties explore alternative means to resolve their disputes. The court on its own motion or at the request of the parties can refer a before it to any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1 A and 1 B of the Act.

³⁵ Article 159(3) places a restriction on the application of the Traditional Dispute resolution mechanism by providing that they are not to be used in way that “(i) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality; or (c) is inconsistent with this constitution or any written law”.

³⁶ For a full discussion of what the Oxygen principle entails, see the judgment of Nyamu JA in *Kenya Commercial Bank vs Kenya Planters Cooperative Union* [2010] eKLR. Commentary of the judgment is available online at <http://joply-achanceatlaw.blogspot.com/2010/07/oxygen-principle.html> (Last accessed on 17th August, 2013).

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The statutory provisions require the courts to explore other forms of ADR to resolve the dispute between the parties. The Civil Procedure Rules 2010 provides a new approach to case management that envisages prompt, expeditious, and just disposal of civil suits in compliance with the Oxygen principle³⁷. Under Order 46 of the Civil Procedure Rules 2010 and Sections 59 and 59(C) of the Civil Procedure Act³⁸ a court can make orders referring a suit to arbitration.

There is no legislative framework on mediation in the Civil Procedure Act or the Civil Procedure Rules 2010. However, the Civil Procedure Act provides for the Mediation Accreditation Committee³⁹ that is tasked with the responsibility of determining the criteria for the certification of mediators; propose rules for the certification of mediators; maintain a register of qualified mediators; enforce such code of ethics for mediators as may be prescribed; and set up appropriate training programmes for mediators.

³⁷ Order 11 of the Civil Procedure Rules 2010, (which were gazette on 17th September, 2010) became effective on 17th December 2010. It provides for pre-trial rules which court need to consider such as ADR before setting the matter for hearing. On more discussions see *The Mechanisms of Case Management under the new Civil Procedure Rules, 2010* by The Hon. Lady Justice Jeanne W. Gacheche (as she then was), Presiding Judge, Constitutional and Judicial Review Division of the High Court of Kenya 2011, available online at <http://www.kenyalaw.org/klr/index.php?id=896> (Last accessed on 14th August, 2013).

³⁸ Chapter 21, Laws of Kenya.

³⁹ See Section 59A of the Civil Procedure Act, CAP 21 Laws of Kenya on the membership of the Mediation Accreditation Committee that is appointed by the Chief Justice. The Mediation Accreditation Committee shall consist of - the Chairman of the Rules Committee; one member nominated by the Attorney-General; two members nominated by the Law Society of Kenya; and eight other members nominated by the following bodies respectively :the Chartered Institute of Arbitrators (Kenya Branch);the Kenya Private Sector Alliance; the International Commission of Jurists (Kenya Chapter); the Institute of Certified Public Accountants of Kenya; the Institute of Certified Public Secretaries; the Kenya Bankers' Association; the Federation of Kenya Employers, and the Central Organisation of Trade Unions.

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The Civil procedure rules provides that the courts may on the request of the parties concerned; or where it deems it appropriate to do so; or where the law so requires, direct that any dispute presented before it be referred to mediation. Upon the court referring the dispute to mediation, the parties shall select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee and proceedings are to be conducted in accordance with the mediation rules. An agreement between the parties to a dispute as a result of a process of mediation is to be recorded in writing and registered with the court giving the direction⁴⁰.

3.3 THE APPELLATE JURISDICTION ACT

Sections 3A and 3B of the Appellate Jurisdiction Act replicates the provisions on the Oxygen principle as stated in sections 1A and 1B of the Civil Procedure Rules. Sections 3A and 3B requires the court, while exercising its powers under the Act or the rules made there under or interpreting the provisions of the Act or the Rules, to give effect to the overriding principle. In *Kenya Commercial Bank Vs Kenya Planters Cooperative Union*⁴¹, Hon Nyamu JA noted that since the application before him was principally grounded on sections 3A and 3B of the Appellate Jurisdiction Act, the decision that the list of factors to be considered was not exhaustive, was prophetic in that after the enactment of the Oxygen principle, the Court was statutorily required when exercising its powers either under the Act or the rules made pursuant to the Act or in interpreting the provisions of the Act or the rules to give effect to the Overriding Objective.

Under the Oxygen principle, the court's mandate in each case or appeal was to act justly and as far as was practicable, to act fairly. The principal purpose of the Oxygen principle is to achieve or attain justice, and fairness in the circumstances of each case; reduce cost and delay; deal with each matter in ways which are proportionate; and ensure that the parties are on an equal footing and

⁴⁰ See section 59B of the Civil Procedure Act.

⁴¹ Op.cit note 36 above.

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finally, allot to each case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases⁴².

3.4 THE ARBITRATION ACT 1995

The Arbitration Act, 1995 (the 1995 Act) was amended by the Arbitration (Amendment) Act 2009 (the 2009 Act) which came into operation on 1st January 2010. The 1995 Act came into force on 2nd July 1996 after the repeal and replacement of the Arbitration Act of 1968 (the 1968 Act) which was closely modeled on the English Arbitration Act of 1950. The main weakness in the provisions of the 1968 Act has been identified as the frequent reference of the arbitration proceedings to court and the interference by courts of the arbitral process. This prompted the introduction of Section 10 in the Arbitration Act, 2009 to cushion the arbitral processes from court interference. The 2009 Act is modeled on the UNCITRAL Model Law on International Commercial Arbitration of 1985⁴³. One of the major reforms introduced by the 2009 Act is the introduction of Section 10 that cushions arbitral proceedings from court interference.

3.5 THE ARBITRATION RULES 1997

The Arbitration rules provide for the procedure to be followed in the course of arbitration proceedings. The rules were formulated by the Honorable Chief Justice on 6th May 1997 pursuant to Section 40 of the Arbitration Act, 1995. The section empowers the Chief Justice to, inter alia, make such rules. The rules provide for the application of the Civil Procedure Act in matters involving the Arbitration Act.

⁴² See commentary on Hon Nyamu JA's judgment in *Kenya Commercial Bank Vs Kenya Planters Cooperative Union* at <http://joply-Achance at law.blogspot.com /2010/07/oxygen-principle.html> Op.cit note 36 above.

⁴³ UNCITRAL Model Law on International Commercial Arbitration of 1985 was adopted by the United Nations Commission on 21st June, 1985. This follows the General Assembly resolution 40/72 of 11th December, 1985 that recommended all states to harmonize their arbitration laws to meet the unique needs of international commercial arbitration practice.

3.6 THE INTERNATIONAL CENTRE FOR ARBITRATION ACT NO. 26 OF 2013

This recent legislation provides for the establishment of an International Arbitration Centre in Kenya. It seeks to avail a readily available centre for international commercial dispute resolution and give investors the necessary confidence in the country's legal system. This would in turn open up the country to foreign investment thereby contributing to its economic development.

4.0 CHALLENGES FACING ADR IN KENYA

Despite the Constitutional anchoring of ADR as a means of resolving disputes between parties, there is lack of proper and comprehensive legislative and institutional framework to guide the ADR processes. Moreover, there is no legislative framework on court mandated arbitration prior to litigation. Sections 4 and 10 of the Arbitration Act emphasize party autonomy. Parties can decide when to exercise the right to arbitration, the place, the arbitrator and the language to use. In addition, Order 45 Rule 3 provides that a court of law can order arbitral proceedings only if the parties file a consent order to that effect⁴⁴. The current laws on ADR are not in tandem with the constitutional provisions on ADR and access to justice for all as most of these laws were passed prior to the coming into force of the new Constitution on 27th August, 2010.

There are explicit gaps and duplicity in the various legislative frameworks on ADR. The current laws on ADR do not expressly provide for the mediation even though mediation is the most popular means of dispute resolutions as compared to arbitration and litigation which are deemed more costly. There is no legislative framework on mediation in the Civil Procedure Act or the Civil Procedure Rules 2010. However, the Civil Procedure Act provides for the Mediation Accreditation Committee only.⁴⁵

⁴⁴ See Gakeri Jacob K. ,*Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR*, International Journal of Humanities and Social Science Vol. 1 No. 6; June 2011 p. 2 available online at <http://ir.library.strathmore.edu/fileDownloadForInstitutionalItem.action;jsessionid=9E5FF2EC6DBB95D872EA5AD81AAB740A?itemId=375&itemFileId=329> (Last accessed on 25th August 2013).

⁴⁵ Supra note 38

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Gakeri argues that the reasons why arbitration has not been embraced even by the business community and those involved in it lies partly in the manner in which arbitration was introduced and adopted before and after independence. He further argues that one of the reasons why the impact of arbitration has yet to be felt is that it was presented as an exotic concept foreign to the experiences of the local population and business community⁴⁶.

Not all disputes can be solved through ADR. For example, criminal cases cannot be referred to arbitration and therefore this limits ADR to civil cases. It should also be noted that arbitrators tend to specialize in certain sectors thereby leaving disputes arising from other sectors in which there is no specialization to be referred to courts. There is no single doctor who is a member of the Chartered Institute of Arbitrators and therefore disputes involving medical practitioners or a doctor and patient can only be resolved by litigation or by the Kenya Medical Practitioners and Dentist Board.

Arbitration, like litigation, views the dispute as a legal analysis and seeks a solution based on entitlement and rights. However by its very nature, arbitration may ignore the interests and needs of an individual party and, critically in international disputes, may not embrace the cultural influences on the problem in hand⁴⁷. Similarly traditional dispute resolution mechanisms is not in common use due to factors such as rural-urban migration, adoption of modern culture, civilization and popularity of modern legal systems of dispute resolution.

In the post-colonial Kenya, traditional dispute resolution played a major role in settling disputes and enhancing the social fabric through customs and rules. Among the Kikuyu community, discounting minor disputes within a homestead were resolved by the head of the house as a "judge," and all other disputes were resolved by a Council of Elders (referred to as "*Kiama*").⁴⁸ If a

⁴⁶ Op cit note 44 above at p. 2

⁴⁷ For a detailed discussion see Branch, Brenda, *The Climate of Arbitration and ADR in Kenya*, Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003 pg 1 available online at <http://www.disputeresolutionkenya.org/pdf/The%20Climate%20of%20Arbitration%20and%20ADR%20in%20Kenya.pdf> (Last accessed on 23rd August 2013).

⁴⁸ Kenyatta, Jomo Facing Mount Kenya, The University of Chicago Press, 1938;

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family dispute was serious, all the heads of families within the kinfolk (referred to as “Mbari”) would be invited by the head of the family involved to participate in the resolution⁴⁹. The power to resolve all land disputes was vested in the Council of Elders, which also conducted all land transactions.⁵⁰ Among the Akamba, a Council of elders resolved conflicts and disputes among the members of the community⁵¹.

According Brainch, traditional systems in Kenya have broken down largely due to a rise in political appointments at district level and a lack of understanding of legal rights by the older, less educated generation such that the communities have come to believe that litigation provides not only the ultimate, but the only, justice⁵². Though the traditional systems of dispute resolution have been in existence since time immemorial, their non-recognition and legitimization by the operative legal framework partly explains their limited utilization in dispute resolution⁵³.

The current arbitral laws do not provide for the immunity of arbitrators for any acts of commission and omission in the process of conducting arbitral proceedings. Even though judicial immunity is recognized by the Kenyan laws⁵⁴, the same cannot be said to be extended to

Available online at <http://www.jstor.org/stable/10.1086/658069> (Last accessed on 27th August, 2013).

⁴⁹ *Ibid.* at p. 206.

⁵⁰ *Ibid* at p. 208.

⁵¹ *Op cit* note 44 at p 4

⁵² *Op cit* note 47 above.

⁵³ Gakeri. J, *Op cit* note 44 above p. 5.

⁵⁴ See section 6 of the Judicature Act, Cap 8 Laws of Kenya on protection of judicial officers. The section provides that “ *No judge or magistrate and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrant orders or other process of a judge or such person shall be liable to be sued in any court for*

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arbitrators and doubts exist as to whether an arbitrator's immunity exists under the Arbitration Act. In the United Kingdom, arbitrators enjoy statutory immunity for their acts and omissions, but they may be sued for professional negligence⁵⁵. Extending immunity to arbitral tribunals would undoubtedly strengthen the arbitral process.

Besides the challenge of lack of immunity for the arbitrator, the cost of ADR can at times be high. The view that ADR is always a cheaper process as compared to formal litigation is a misplaced one. Arbitration practice has shown that it can also be a costly alternative depending on the complexity of the case and the technical expertise which may be required.

There is lack of comprehensive Governmental policy on ADR and access to civil justice.⁵⁶ Lack of sound policy framework has led to the overlap and duplicity in the legislative frameworks. The situation is not made any better by the lack of public support and acceptance of ADR as an effective means of solving disputes. The majority of litigants would rather have their day in court than to have their disputes resolved using ADR processes. This lack of support and acceptance by the general public has negatively impacted on the growth and development of ADR in Kenya. The situation is further complicated by the fact that some members of the bench see arbitrators as competitors. Most members of the bench initially perceived ADR as a threat to the court system and are still not comfortable with it. On the other hand lawyers saw it as a threat to their incomes⁵⁷.

The Chartered Institute of Arbitrators (Kenya Branch) (the Institute) has only 378 registered members who are qualified arbitrators⁵⁸. The few arbitrators

the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it."

⁵⁵ Supra note 53 at pp 20-21. According to Lord Morris in *Sutcliff v. Thackrah*, (1974) AC. 727, (1974) 1 All E.R. 859, the fact that the arbitrator's functions are judicial in character is sufficient to confer immunity.

⁵⁶ Supra p.23

⁵⁷ Supra p. 3

⁵⁸ Sourced from the Membership list at the Chartered Institute of Arbitrators

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who are mostly based in Nairobi serve only a small portion of the entire population. The Institute has not developed a Code of Conduct and Ethics that can adequately guide its members in the discharge of their functions as arbitrators⁵⁹. In addition, members are neither considered as professionals or semi-professionals and there are no guidelines in the Arbitration Act on the minimum qualification and training of arbitrators.

5.0 PROPOSALS FOR REFORM

As the world collapses into a global village and cross-border trade increases, contracting parties are more and more finding it necessary to include in their commercial agreements arbitration clauses. Kenya has become one a major commercial and economic in the African continent and more and more commercial disputes are likely to arise between parties to the global trade. Investor confidence in a country like Kenya depends partly on the confidence the investors have in the legal system. Promoting efficient and effective means of dispute resolutions helps to boost investor confidence and thereby leads to economic growth.

The legislative framework on ADR should be reformed to give effect to the constitutional provisions which require the courts to use ADR to resolve disputes. More specifically the Arbitration Act should be amended, to provide for immunity of arbitrators in the same manner as judicial officers. Such a provision has precedent in the United Kingdom where arbitrators enjoy immunity from civil liability while undertaking their duties as arbitrators.

It is proposed that the Civil Procedure Act and the Civil Procedure Rules 2010 should be amended to require parties in civil proceedings to go to mediation before their dispute is entertained by the courts. The Act should be amended to create an institution with authority to popularize arbitration and ADR mechanisms. This body should be vested with legislative power to make rules germane to the professions etiquette and other matters pertinent to the enhancement of arbitration and ADR. The body should be mandated to consult

Website at <http://www.ciarbkenya.org/> (Last accessed on 15th August, 2013).

⁵⁹ Supra p. 23.

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with the Chief Justice for purposes of formulating rules to institutionalize court mandated ADR⁶⁰.

The Chartered Institute of Arbitrators should decentralize its operations from the Nairobi and other urban centres and open Branches in all the forty seven counties. With the Devolution of political power and the decentralization of resources to the counties, micro economies are bound to emerge at the county level. This would in turn increase commercial transactions and hence civil disputes would also increase. In order to serve this increased demand for ADR services, there is need to create a pool of trained and skilled arbitrators, mediators and conciliators to serve the business communities based in the counties.

As part of the reform of the judiciary, judicial officials need to be sensitized on the importance of ADR as an alternative to litigation. The Judicial Training Institute in conjunction with the Chartered Institute of Arbitrators (Kenya Branch) should organize seminars for judicial officers to sensitize and equip judges and magistrates with skills in ADR. As part of sensitizing the public on the benefits of ADR, the judiciary open day should include ADR as an item on the agenda for the day. Similarly the Law Society of Kenya should require newly admitted advocates to go through training in ADR before they can be issued with the annual practicing certificate. Public awareness forums should be held in the counties in order to educate the public on the benefits of ADR. This can be achieved the use of County Commissioners as part of their coordinating functions.

The constitutional provision on the traditional dispute resolution as form of ADR should be given effect by passing a legislation to govern the non technical procedure of resolving disputes. Such legislation can be merged with the proposed legislation on small claims. Since each of the ethnic community as a traditional form of dispute resolution, such mechanisms should be provided for in a statute with clear means of enforcement of the awards made by the councils of elder.

⁶⁰ For a detailed discussion of this proposal see Gakeri, J Op. cit note 44 at p.23.

6.0 CONCLUSION

The globalization of commerce requires that Kenya as an economic hub in the continent should have an efficient and cost effective means of resolving commercial disputes. This would enhance investor confidence and promote international trade and economic development. It would enable the country to achieve the objectives of Vision 2030. However in order to attract investor confidence, the legal system would require urgent reform to facilitate an efficient resolution of commercial disputes.

ADR can play a key role in promoting access to civil justice. Admittedly, the Judiciary has undergone reform process to ensure that members of the public are able to access justice through the courts. However the reforms undertaken so far fall far short of ensuring that civil justice is available to all disputing parties. ADR offers an opportunity to redress the problem of backlog of cases in the courts and to ease the pressure on the courts. This calls for the urgent need to reform the legislative framework on ADR in order to ensure that the both the members of the public as well as practicing lawyers and judicial officials are sensitized to the benefits of ADR. The services of arbitrators, mediators and conciliators should be decentralized and made available in the counties in order to serve the emergent business communities in the counties.

ENHANCING ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTION MECHANISMS - THE ZAMBIAN EXPERIENCE

by **JUSTICE CHARLES KAJIMANGA***

1.0 INTRODUCTION

It is a great honour to have been invited by the Kenya Branch to present a paper at this conference on the theme, “ENHANCING ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTION MECHANISMS” with particular focus on the Zambian jurisdiction. I wish to begin my presentation by examining the meaning of the concept of access to justice.

What is access to justice? Various explanations have been given to define this concept. One such definition I consider to be more encompassing is that access to justice is “... the right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable.”

¹ From this definition it can be argued that where there is no efficient and affordable process or mechanism for resolving disputes there can be no access to justice.

Courts in most jurisdictions are faced with the ever increasing problem of case backlog, delayed justice and the escalating costs of litigation. There can be no doubt that these factors impede access to justice. Other related causes that impede access to justice include, inter alia, delays in delivering judgments, frequent adjournments and poor case flow management. This phenomenon equally applies to Zambia.

I believe that the use of ADR is one of the significant ways by which access to justice can be enhanced. This is possible because in most ADR

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¹ http://74.119.210.141/justice/sites/default/files/pdf_archive/Access%20to%20Justice%20Per%20JSSP%20CONCEPT%20NOTEv.1.pdf

mechanisms such as Mediation and Arbitration, parties themselves are actively involved in the resolution of their disputes. When properly managed, Mediation and Arbitration tend to be much cheaper and quicker than litigation, thereby making them more affordable and accessible to many people.

2.0 ENHANCING ACCESS TO JUSTICE THROUGH ADR IN ZAMBIA

Like many other countries in the Eastern and Central Africa Region, Zambia also recognised ADR as one of the ways of enhancing access to justice. Principally, two ADR mechanisms namely, Mediation and Arbitration were duly identified. Legislation was subsequently promulgated to govern the application of Mediation and Arbitration in Zambia.

2.1 MEDIATION

Mediation was introduced in Zambia through Statutory Instrument No. 71 of 1997. Mediation in Zambia is Court-Annexed. Order 31, rule 4 of the High Court Rules provides as follows:

“Except for cases involving constitutional issues or the liberty of an individual or an injunction or where the trial Judge considers the case to be unsuitable for referral, every action may, upon being set down for trial, may be referred by the trial Judge for mediation and where the mediation fails the trial Judge shall summon the parties to fix a hearing date...”

In the Commercial Court, a decision to refer a matter to mediation is usually done at the scheduling conference. And Order 31, rule 5 states as follows:

“There shall be kept by the mediation office... a list of mediators who have been trained and certified by the Court to act in this capacity with the field or fields of bias or experience indicated against each of their names. The mediators shall be of not less than seven years working experience in their respective fields.”

Currently, there are 120 mediators with experience in various fields who have been trained and certified by the Court. The training is usually followed by a “Mediation Settlement Week” when newly trained mediators are given an opportunity to mediate Court cases.

Rule 13 of Order 31 is also worth noting. It states that:

“There shall be paid to the mediator in equal proportion by the parties to a suit, a mediation fee in accordance with the scale that may be prescribed by the Chief Justice.”

2.2 ARBITRATION

Although we had an arbitration statute dating back to 1933 (“Arbitration Act No.3 of 1933”), Arbitration was only embraced in Zambia after the enactment of the Arbitration Act No. 19 of 2000 (“AA 2000”). This Act repealed the Arbitration Act No.3 of 1933 which, among other things, gave Courts wide powers to supervise the arbitral process.

Section 6 of AA 2000 states that any dispute which parties have agreed to submit to arbitration may be determined by arbitration. However, subsection 2 gives exceptions of matters which shall not be capable of determination by arbitration. These include:

- a. “ an agreement that is contrary to public policy;
- b. a dispute which, in terms of any law, may not be determined by arbitration;
- c. a criminal matter or proceeding except in so far as permitted by written law or unless the court grants leave for the matter or proceeding to be determined by arbitration;
- d. matrimonial cause;
- e. a matter incidental to a matrimonial cause, unless the court grants leave for the matter to be determined by arbitration;
- f. the determination of paternity, maternity or parentage of a person;
or
- g. a matter affecting the interest of a minor or an individual under a legal incapacity, unless the minor or individual is represented by a competent person.”

Section 10(1) of AA 2000 makes it mandatory for the court to stay proceedings in matters which are subject of an arbitration agreement and refer the parties to arbitration. It is couched in the following terms:

“A Court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”

It is plain from Section 10(1) that where a dispute arises from a contract between parties which contain an arbitration clause, Judges are obliged to refer the parties to arbitration unless the dispute is not arbitrable or the arbitration agreement is null and void or inoperative. In my view, this provision enables the Court to play a complimentary role in the arbitral process.

The Arbitration (Court Proceedings) Rules, 2001 govern applications made to the Court pursuant to AA 2000. In addition to the High Court, “Court” also includes the Industrial Relations Court, the Subordinate Court and the Lands Tribunal. In respect of the Industrial Relations Court, rule 3 of the Industrial Relations Court (Arbitration and Mediation Procedure) Rules, 2002 provides as follows:

“Where parties to a suit are of the opinion that the matter in issue in the suit should be referred to an arbitrator for final resolution, they may apply to the Court, at any time before final judgement, for an order of reference to arbitration.”

Where the parties apply for an order of reference under rule 3 the court may grant the order stating the number of arbitrators². The rules also provide that the arbitrators shall be nominated by the parties in such a manner as the parties may agree³. If the parties fail to agree on the nomination of arbitrators or

² The Industrial Relations Court (Arbitration and Mediation Procedure) Rules, 2002, Rule

³ Ibid, Rule 5(1)

nominate an arbitrator who refuses to accept the nomination, the court may be asked by the parties to appoint arbitrators in the matter⁴.

As regards mediation, rule 12(1) states that:

“The court or a Judge may refer any action to mediation at any stage of proceedings except where:

- a. the case involves an injunction; or
- b. the court or a Judge considers a case unsuitable for reference to mediation.”

According to rule 15(2) the mediator must complete the process of mediation within ninety days from the date of collection of the suit, action or legal proceedings in respect of which the mediator has been appointed. The rules further provide that where mediation ends in a settlement, the parties and the mediator shall sign the mediation settlement document...⁵ which shall be registered and sealed by the court⁶. Such a mediation settlement shall have the force and effect of a judgement, order or any decision of the court or Judge, and shall be enforced in a like manner⁷.

Rule 27 is pertinent as it provides that no appeal shall lie against a mediated settlement.

Judges of the High Court and the Industrial Relations Court have been encouraged to invoke the existing statutory provisions for referring parties to settle their disputes through the alternative mechanisms of arbitration and mediation where appropriate, as this helps to decongest their cause lists.

3.0 IMPACT OF ADR IN ZAMBIA

⁴ Ibid, Rule 5(2)(a) and (b)

⁵ Ibid, Rule 22(1)

⁶ Ibid, Rule 22(2)

⁷ Ibid, Rule 22(3)

So far, the use of Mediation and Arbitration has registered a positive impact in enhancing access to justice in Zambia. Since the introduction of Mediation in 1997 and the enactment of AA 2000 in 2000 we have witnessed tremendous growth in their practice. There is no doubt that Mediation and Arbitration in Zambia have been warmly embraced by the Bench, the Bar and, indeed members of the public in general. With the passage of time these two mechanisms will prove to be a viable alternative to litigation. It can safely be stated that the significance of Mediation and Arbitration in our jurisdiction is that they have to some extent contributed over the years, to the reduction or decongestion of backlog of cases seized by trial courts. A good number of cases filed in the High Court and the Industrial Relations Court have been and continue to be referred to Mediation and Arbitration.

However, I wish to state that albeit embraced by many, there is a pocket of our society whose faith in litigation still remains cast in concrete. Unfortunately, our experience has shown that this pocket of our society also includes some of the lawyers. I believe that conferences of this nature can significantly contribute to creating awareness on the various advantages of ADR mechanisms and how they can contribute to the enhancement of access to justice.

4.0 CONCLUSION

Access to Justice is a fundamental right recognised in all our jurisdictions. It can be easily impeded by various factors such as case backlog, high costs of litigation, frequent adjournments, etc. One of the ways of enhancing access to justice is through the use of ADR, Mediation and Arbitration in particular. The advantage of ADR lies in the fact that unlike litigation, the parties themselves play an active role in the dispute resolution process. It is therefore incumbent upon all of us professionals to endeavour to popularise ADR in our jurisdictions.

**HERALDING A NEW DAWN:
ACHIEVING JUSTICE THROUGH EFFECTIVE
APPLICATION OF ALTERNATIVE
DISPUTE RESOLUTION MECHANISMS (ADR) IN KENYA**

by **KARIUKI MUIGUA***

ABSTRACT

This paper explores the possibility of efficiently accessing justice through alternative dispute resolution mechanisms. Access to justice is now well entrenched in the current constitution of Kenya 2010 (hereinafter the constitution) as one of its fundamental pillars.

Access to justice by majority of citizenry has been hampered by many unfavourable factors which are inter alia, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow. Alternative Dispute Resolution (ADR) is used to refer to the management of disputes without resorting to litigation.

ADR has the potential to ensure access to justice for the Kenyan people. This potential should be exploited. ADR mechanisms such as negotiation, conciliation and mediation bear certain attributes that can be tapped and lead to justice and fairness. These attributes include party autonomy, flexibility of the process, non-complex procedures and low cost.

The author argues that where they have been used in managing disputes they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective and thus facilitate access to justice by a larger part of the population.

This paper starts with a brief background and then proceeds to examine the effect of Article 159 of the Constitution, the range of alternative dispute resolution mechanisms, implementation of alternative dispute resolution mechanisms, the challenges and opportunities and ends with a short conclusion.

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1.0 INTRODUCTION

Access to justice is now well entrenched in the current constitution of Kenya 2010 (hereinafter the constitution) as one of its fundamental pillars.

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Access to justice by majority of citizenry has been hampered by many unfavourable factors which are *inter alia*, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow.² Alternative Dispute Resolution (ADR) is used to refer to the management of disputes without resorting to litigation.

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This paper explores the possibility of efficiently accessing justice through alternative dispute resolution mechanisms. The author argues that where they have been used in managing disputes they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective and thus facilitate access to justice by a larger part of the population.

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The Author wishes to acknowledge **Ngararu Maina** LL.B (Hons) Moi, for research assistance extended in preparation of this paper. (April, 2013).

¹ Articles 19, 22, 48, 159, *Constitution of Kenya*, 2010, Government Printer, Nairobi

² Jackton B. Ojwang', "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), pp. 19-29: 29

³ *What is Alternative Dispute Resolution (ADR)? - African Mediation And Community Service*, Available at <http://www.metros.ca/amcs/international.htm> (accessed on 27th April, 2013); See also Kariuki Muigua, *Reflections on ADR and Environmental Justice in Kenya*, page1, Available at <http://www.chuitech.com/kmco/attachments/article/97/Reflections.pdf>

This paper starts with a brief background and then proceeds to examine the effect of Article 159 of the Constitution, the range of alternative dispute resolution mechanisms, implementation of alternative dispute resolution mechanisms, the challenges and opportunities and ends with a short conclusion.

2.0 BACKGROUND

Before the advent of the current Constitution of Kenya 2010, justice was perceived to be a privilege reserved for a select few who had the financial ability to seek the services of the formal institutions of justice. This is because in the past litigation has been the major conflict management channel widely recognized under our laws as a means to accessing justice.

Litigation however did not and still does not guarantee fair administration of justice due to a number of factors. Courts in Kenya and even elsewhere in the world have encountered a number of problems related to access to justice. These include high court fees, geographical location, complexity of rules and procedure and the use of legalese.⁴

The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves'.⁵ Conflict management through litigation can take years before the parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice. Litigation is so slow and too expensive and it may at times lose the commercial and practical credibility necessary in the corporate

⁴ *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. Available at <http://www.chuitech.com/kmco/attachments/article/101/Avoiding.pdf>

⁵ Jackton B. Ojwang, "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," Op cit

world.⁶ Litigation should however not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary. Criminal justice may also be achieved through litigation especially where the cases involved are very serious.

Litigation is associated with the following advantages: the process is open, transparent and public; it is based on the strict, uniform compliance with the law of the land; determination is final and binding (subject possibly to appeal to a higher court).⁷ However, there are also many shortcomings associated with litigation so that it should not be the only means of access to justice. Some of these have been highlighted above. Litigation is not a process of solving problems; it is a process of winning arguments.⁸

As recognition of the above challenges associated with litigation, the Constitution under article 159 now provides that alternative forms of dispute resolution including reconciliation, mediation, arbitration and Traditional Dispute Resolution Mechanisms shall be promoted as long as that they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.⁹

⁶ Ibid, page 7; See also Patricia Kameri Mbote et al., *Kenya: Justice Sector and the Rule of Law*, Discussion Paper, A review by AfriMAP and the Open Society Initiative for Eastern Africa, March 2011, Available at <http://www.opensocietyfoundations.org/sites/default/files/kenya-justice-law-discussion-2011> (accessed on 27th April, 2013)

⁷ Chartered Institute of Arbitrators, *Litigation: Dispute Resolution*, Available at <http://www.ciarb.org/dispute-resolution/resolving-a-dispute/litigation> (Accessed on 27th April, 2013)

⁸ *Advantages & Disadvantages of Traditional Adversarial Litigation*, Available at <http://www.beckerlegalgroupp.com/a-d-traditional-litigation> (accessed on 27th April, 2013)

⁹ Article 159(3)

Globally, the role of alternative dispute resolution mechanisms in the management of a range of conflicts has been noted over time.¹⁰ Courts can only deal with a fraction of all the disputes that take place in society. Courts have had to deal with an overwhelming number of cases and as one author notes 'one reason the courts have become overburdened is that parties are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity'.¹¹

Regionally most African countries still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common. It has been observed that throughout Africa the traditions have since time immemorial emphasized harmony/togetherness over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa. Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts.¹²

¹⁰ Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, page 2. Available at

<http://www.chuitech.com/kmco/attachments/article/111/Paper%FINAL.pdf>; See also Sunday E. N. Ebye, The relevance of arbitration in international relations, *Basic Research Journal of Social and Political Sciences* Vol. 1(3) pp. 51-56, November 2012 Available at <http://www.basicresearchjournals.org> (accessed on 15th April, 2013).

¹¹ Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society', page 2, 31 *UCLA L. Review*. 4, October 1983, Available at

<http://www.marcgalanter.net/Documents/papers/ReadingtheLandscapeofDisputes.pdf> (accessed on 23rd April, 2013).

¹² Mkangi K, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualised Paradigm for Examining Conflict in Africa*, Available at www.payson.tulane.edu.

Another author confirms that access to justice has always been one of the fundamental pillars of many African societies. He notes that 'Igbo justice is practised in land matters, inheritance issues, socio-communal development strategies, interpersonal relationships and sundry avenues'.¹³

Thus, the recognition given to traditional dispute resolution mechanisms in the said Article 159 (2) (c) of the Constitution is thus a restatement of customary jurisprudence.¹⁴

Under our constitution, there however exists a qualification for the application of Traditional Dispute Resolution mechanisms in that they must not be applied in a way that contravenes the Bill of Rights. For instance, they must not lead to outcomes that are gender-biased or act as barriers to accessing justice. They must also not be repugnant to justice and morality or result in outcomes that are repugnant to justice or morality.¹⁵

Justice and morality are however not defined in the Constitution and therefore it would be difficult to ascertain when a mechanism is repugnant to justice and morality. Alternative and Traditional dispute resolution mechanisms must also not be used in a way that is inconsistent with the constitution or any written law.¹⁶

¹³ Ikenga K. E. Oraegbunam, *The Principles and Practice of Justice in Traditional Igbo Jurisprudence*, *African Journal Online*, page 53, Available at

<http://www.ajol.info/index.php/og/article/download/52335/40960> (accessed on 26th April, 2013)

¹⁴ Ibid

¹⁵ Article 159(3) of the Constitution , 2010

¹⁶ Repugnancy and morality qualification clauses were seen as obstacles put in place by the British colonial Law makers to undermine the legitimacy of the African customary laws. See also s. 3(2), *Judicature Act*, Cap 8, Laws of Kenya. Though there are certain aspects of customary laws that do not conform to human rights standards, the subjection of customary laws to the repugnancy clause has been used by courts to undermine the efficacy of these laws. See Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 5

If ADR mechanisms could be applied in a way that conforms to International Human Rights standards they can play a major role in the management of disputes. ADR mechanisms focus on the interests and needs of the parties to the conflict as opposed to positions, which approach is contrary to the formal common law and statutory law practices.¹⁷ These are capable of ensuring that justice is done to all by addressing the concerns of the poor and vulnerable in the society through legally recognized but more effective means.

3.0 CONSTITUTION OF KENYA, 2010 AND ACCESS TO JUSTICE

Article 22(1) of the constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Article 22(3) further provides that the Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy amongst others the criteria that:

- a. formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation; and
- b. the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.¹⁸

Clause (4) provides that the absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.

¹⁷ See Roger Fisher, William Ury & Bruce Patton, *Getting to Yes-Negotiating Agreement Without Giving in*, (3rd Ed. (Penguin Books, United States of America, 2011) p.42

¹⁸ Article 22(3) (b)(d) *Constitution of Kenya*, 2010

Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

Article 159 (1) of the Constitution provides that judicial authority is derived from the people and is vested and exercised by courts and tribunals established under the constitution. In exercise of that authority, the courts and tribunals are to ensure that justice is done to all, is not delayed and that it is administered without undue regard to procedural technicalities.¹⁹

Article 159(1) echoes the right of all persons to have access to justice as guaranteed by Article 48 of the constitution. It also reflects the spirit of Article 27 (1) which provides that “*every person is equal before the law and has the right to equal protection and equal benefit of the law*”.

For this constitutional right of access to justice to be realized, there has to be a framework based on the principles of: *expedition; proportionality; equality of opportunity; fairness of process; party autonomy; cost-effectiveness; party satisfaction and effectiveness of remedies.*²⁰

Recognition of ADR and traditional dispute resolution mechanisms is thus predicated on these cardinal principles to ensure that everyone has access to justice (whether in courts or in other informal fora) and conflicts are to be resolved expeditiously and without undue regard to procedural hurdles that bedevil the court system.²¹

It is also borne out of the recognition of the diverse cultures of the various communities in Kenya as the foundation of the nation and cumulative civilization of the Kenyan people and nation. Most of these

¹⁹ Ibid., Article 159(2) (d)

²⁰ See Maiese, Michelle. "Principles of Justice and Fairness," *Beyond Intractability*, (Eds.) Guy Burgess and Heidi Burgess, Conflict Information Consortium, University of Colorado, Boulder (July 2003) Op cit

²¹ Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, op. cit. page 6

mechanisms are entwined within the cultures of most Kenyan communities which are also protected by the Constitution under Article 11.²²

In a report on access to justice in Malawi, the authors rightly note that 'access to justice does not mean merely access to the institutions, but also means access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values that are in conformity to constitutional values and directives'.²³ If the foregoing is anything to go by, then litigation scores poorly especially in terms of access to fair procedures and affordability.

On the contrary, ADR mechanisms are flexible, cost-effective, expeditious, foster relationships, are non-coercive and result in mutually satisfying outcomes. They are thus more appropriate in enhancing access to justice by the poor in society as they are closer to them. They may also help in reducing backlog of cases in courts.²⁴ The net benefit to the court system would be a lower case load as the courts' attention would be focused on more serious matters which warrant the attention of the court and the resources of the State.²⁵ Case backlog is arguably one of the indicators used to assess the quality of a country's judicial system.²⁶

²² Ibid

²³ Wilfried Schärf, et al., *Access to Justice for the Poor of Malawi? An Appraisal Of Access To Justice Provided To The Poor Of Malawi By The Lower Subordinate Courts And The Customary Justice Forums*, page 4, Available at <http://www.gsdr.org/docs/open/SSAJ99.pdf> (accessed on 20 April, 2013)

²⁴ See Shantam Singh Khadka, et al., *Promoting Alternate Dispute Resolution to reduce backlog cases and enhance access to justice of the poor and disadvantaged people through organizing Settlement Fairs in Nepal*, Case Studies on Access to Justice by the Poor and Disadvantaged, (July 2003) Asia-Pacific Rights And Justice Initiative, Available At <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/Nepal-Settlement Fair> (accessed on 20th April, 2013)

²⁵ Ibid

²⁶ Alicia Nicholls, *Alternative Dispute Resolution: A viable solution for reducing Barbados' case backlog?*, page 1, Available at

All the methods that are employed to address conflicts are either “resolving” or “settling” in nature. It is important that we look at each of the concepts closely to decide which of the two approaches is best suited in ensuring an efficient access to justice.

4.0 RESOLUTION AND SETTLEMENT²⁷

ADR mechanisms seek to address the root cause of conflicts unlike litigation which concerns itself with reaching a settlement. Settlement implies that the parties have to come to accommodations which they are forced to live with due to the anarchical nature of society and the role of power in relationships. Since a settlement is power-based and power relations keep changing, the process becomes a contest of whose power will be dominant.²⁸ It has been observed that a settlement is an agreement over the issue(s) of the conflict which often involves a compromise.²⁹

Settlement practices miss the point by focusing only on interests and failing to address needs that are inherent in all human beings, parties’ relationships, emotions, perceptions and attitudes. Consequently, the causes of the conflict in settlement mechanisms remain unaddressed resulting to conflicts in future.³⁰ Examples of such mechanisms are litigation and arbitration.

<http://www.adrbarbados.org/docs/ADR%Nicholls> (accessed on 22nd April, 2013)

²⁷ Kariuki Muigua, *Resolving Conflicts Through Mediation in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012), Chapter six, pp79 - 88

²⁸ Ibid, page 80

²⁹ David Bloomfield, Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland, *Journal of Peace Research*, vol. 32 no. 2nd May 1995 151-164, Available at <http://jpr.sagepub.com/content/32/2/151.short> (accessed on 18th April, 2013).

³⁰ Kariuki Muigua, *Resolving Conflicts through Mediation in Kenya*, *Op cit.*, Page 81

In litigation the dispute settlement coupled with power struggles will usually leave broken relationships and the problem might recur in future or even worse still the dissatisfied party may seek to personally administer 'justice' in ways they think best. Resentment may cause either of the parties to seek revenge so as to address what the courts never addressed. ADR mechanisms are thus better suited to resolve disputes where relationships matter.

Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship. The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based outcomes.³¹

A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.³² Resolution is based on the belief that the causes of conflicts in the society are needs of the parties which are non-negotiable and inherent to all human beings.³³ Resolution is usually preferred to settlement for its effectiveness in addressing the root causes of the conflict and negates the need for future conflict or conflict management.³⁴

Furthermore, resolution is arguably more effective in facilitating

³¹ Kenneth Cloke, "The Culture of Mediation: Settlement vs. Resolution", *The Conflict Resolution Information Source*, Version IV, December 2005, Available at <http://www.beyondintractability.org/bi-essay/culture-of-mediation> (accessed on 26th April, 2013); See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 7

³² Makumi Mwagiru, *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 42; See generally David Bloomfield, "Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland", op. cit., p. 153.

³³ J. Bercovitch, "Mediation Success or Failure: A Search for the Elusive Criteria", *Cardozo Journal of Conflict Resolution*, Vol.7.289,p.296

³⁴ Ibid

realization of justice than settlement. This is tied to the fact that in resolution focus is more on addressing the problem than the power equality or otherwise. This ensures that a party's guarantee to getting justice is not tied to their bargaining power. ADR mechanisms that are directed at dispute resolution should therefore be encouraged.

5.0 ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

Alternative dispute resolution refers to all those decision-making processes other than litigation including but not limited to negotiation, enquiry, mediation, conciliation, expert determination, arbitration and others.³⁵

At an international level, the legal basis for the application of alternative dispute resolution mechanisms in disputes between parties be they states or individuals is Article 33 of the Charter of the United Nations³⁶ which outlines the various conflict management mechanisms that parties to a conflict or dispute may resort to.³⁷ It provides that *the parties to any dispute shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation,*

³⁵ Kariuki Muigua, "Alternative Dispute Resolution and Article 159 of the Constitution of Kenya" Op cit. page 2; See also Alternative Dispute Resolution, Available at

http://www.law.cornell.edu/wex/alternative_dispute_resolution (accessed on 23rd April, 2013)

³⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> (accessed on 17th April 2013)

³⁷ See generally Eunice R. Oddiri, *Alternative Dispute Resolution*, paper presented by author at the Annual Delegates Conference of the Nigerian Bar Association, 22nd - 27th August 2004, Abuja, Nigeria. Available at

<http://www.nigerianlawguru.com/articles/arbitration/ALTERNATIVE%20DISPUTE%20RESOLUTION.htm> (accessed on 17 April, 2013); See 'The Role of Private International Law and Alternative Dispute Resolution', Available at http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html (accessed on 17th April, 2013).

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arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.³⁸ ADR in this era of the 21st Century seeks to find domestically and internationally, a faster, economical and more efficient system that contrasts with litigation which is time consuming and expensive. Concerned about efficiency of national court system in cross border disputes, foreign investors normally prefer mediation or arbitration. Dispute settlement through Arbitration/ADR is not only domestic but also an increasingly growing international phenomenon in the context of cross border transactions.³⁹

The scope for the application of ADR has been broadly widened by the constitution with Article 189 (4) stating that national laws shall provide for the procedures to be followed in settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. These key provisions form the constitutional basis for the application of ADR mechanisms in Kenya; their import is that ADR can apply to all disputes and hence broadening the applicability of ADR. It is also a clear manifestation of the acceptance of ADR as a means of conflict management in all disputes.⁴⁰

These mechanisms can effectively be applied in resolving a wide range of commercial disputes, family disputes and natural resource based conflicts, amongst others thus easing access to justice.⁴¹

The Ireland Law Reform Commission identifies what they call the

³⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

³⁹ Surridge & Beecheno, *Arbitration/ADR Versus Litigation*, September 4, 2006, Available at http://www.hg.org/articles/article_1530.html (accessed on 23rd April, 2013)

⁴⁰ Kariuki Muigua, "Court Annexed ADR in the Kenyan Context" page 1. Available at <http://www.chuitech.com/kmco/attachments/article/106/Court%20Annexed%20ADR.pdf>

⁴¹ See generally, Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Available at <http://www.lawreform.ie/fileupload/consultation%20papers/cpADR.pdf> (Accessed on 18th April, 2013)

main principles of ADR as follows: Voluntariness of the Principle; Confidentiality of the proceedings and outcome; Self-determination/party autonomy; Party empowerment; Neutrality and impartiality of facilitating third parties; Quality and transparency of the Procedure; Efficiency-Cost, time; and Flexibility-Procedural, outcome.⁴²

The above principles generally apply almost equally to most if not all ADR mechanisms as it will be seen in the following discussion below. Each of the major alternative dispute resolution mechanisms are explored here below.

5.1 NEGOTIATION

In negotiation, parties meet to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. The parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation. Negotiation is thus voluntary. It allows party autonomy in the process and over the outcome. It is non-coercive thus allowing parties the room to come up with creative solutions.

The Ireland Law Reform Commission in their consultation paper on ADR explores the four fundamental principles of what they call principled negotiation: Firstly, Separating the people from the problem; Secondly, Focusing on interests, not positions; Thirdly, Inventing options for mutual gain; and finally, insisting on objective criteria.⁴³

As such the focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both the mutual and individual interests. Consequently whatever outcome is arrived at in negotiation it is one that satisfies both parties and addresses the

⁴² Ibid

⁴³ Roger Fisher et al., *Getting to Yes-Negotiating Agreement Without Giving in* Op cit., p. 42; See also Ireland Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008 Op cit., page 43

root causes of the conflict and that is why negotiation is a conflict resolution mechanism.⁴⁴

It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.⁴⁵

It may be argued that negotiation is by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.⁴⁶ In appropriate cases courts should be at the forefront in encouraging parties to negotiate so as to come up with mutually acceptable solution and allow for the expeditious resolution of their dispute. This ensures that parties obtain justice without losing other important aspects of their lives like relationships be they business or personal.

Where parties in a negotiation hit a deadlock in their talks, a third party is called in to help them continue negotiating. This process is called mediation. Mediation has been defined as a continuation of the negotiation process by other means where instead of having a two way negotiation, it

⁴⁴ Ibid

⁴⁵ Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994, Available at http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3/Theoretical.htm (accessed on 27th April, 2013); See also Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 2

⁴⁶ Attorney General's Office, Ministry of Justice, *The Dispute Resolution Commitment-Guidance For Government Departments And Agencies*, May, 2011, Available at <http://www.justice.gov.uk/downloads/courts/mediation/drc-guidance-may2011.pdf> (accessed on 27th April, 2013); See also Kariuki Muigua, *Avoiding Litigation through the Employment of Alternative Dispute Resolution*, page 8, Available at <http://www.chuitech.com/kmco/attachments/article/101/pdf>

now becomes a three way process: the mediator in essence mediating the negotiations between the parties.⁴⁷

5.2 MEDIATION

Mediation is defined as "the intervention in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute." Within this definition mediators may play a number of different roles, and may enter conflicts at a variety of different levels of development or intensity.⁴⁸

It is one of the dispute resolution mechanisms known as alternative dispute resolution (ADR), as opposed to the legal mechanisms, such as litigation and arbitration.

The salient features of mediation are that it emphasizes interests rather than (legal) rights and it is cost - effective, informal, private, flexible and easily accessible to parties to conflicts. An example of the use of mediation informally to resolve conflicts is the peace committees in Northern Kenya among the Pastoralist communities.⁴⁹

5.3 CONCILIATION

⁴⁷ Makumi Mwangi, *Conflict in Africa: Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), Op cit. pp. 115-116.

⁴⁸ Christopher Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004). Summary written by Tanya Glaser, Conflict Research Consortium, Available at http://books.google.com/books/about/The_Mediation_Process.html? (accessed on 17th April, 2013).

⁴⁹ Kariuki Muigua, *Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*, Op cit. page 7; The use of Mediation is envisaged by statute, s. 59A & B of the *Civil Procedure Act*, Cap 21, Laws of Kenya.

This process is similar to mediation except for the fact that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation except that the conciliator can propose solutions making parties lose some control over the process. Conciliation works best in trade disputes. For instance, Section 10 of *the Labour Relations Act*,⁵⁰ provides that if there is a dispute about the interpretation or application of any provision of Part II of the Act dealing with freedom of association, any party to the dispute may refer the dispute in writing –

- a. to the Minister to appoint a conciliator as specified in Part VIII of the Act; or
- b. if the dispute is not resolved at conciliation, to the Industrial Court for adjudication.

Conciliation is different from mediation in that the third party takes a more interventionist role in bringing the two parties together. In the event of the parties are unable to reach a mutually acceptable settlement, the conciliator issues a recommendation which is binding on the parties unless it is rejected by one of them. While the conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, it is not a determinative role. A conciliator does not have the power to impose a settlement.⁵¹ This is a reflection of the Model Law on International Commercial Conciliation of the United Nations Commission on International Trade Law.⁵²

⁵⁰ No. 14 of 2007, Laws of Kenya

⁵¹ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. page 49.

⁵² Article 6 (4) of the Model law states that –The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute,

5.4 ARBITRATION

Arbitration is a dispute settlement mechanism. Arbitration arises where a third party neutral (known as an arbitrator) is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award.

The *Arbitration Act, 1995* defines arbitration to mean —*any arbitration whether or not administered by a permanent arbitral institution*. This definition is not an elaborate one and hence regard has to be had to other sources. Arbitration has also been described as a private consensual process where parties in dispute agree to present their grievances to a third party for resolution.⁵³

Lord Justice Raymond defined who is an arbitrator some 250 years ago and which definition is still considered valid today, in the following terms:

An arbitrator is a private extraordinary judge between party and party, chosen by their mutual consent to determine controversies between them, and arbitrators are so called because they have arbitrary power; for if they observe the submission and keep within their due bonds, their sentences are definite from which there lies no appeal.⁵⁴

UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002). Available at

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html (accessed on 23 April, 2013).

⁵³ Farooq Khan, *Alternative Dispute Resolution*, A paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8th -9th March 2007, at Nairobi.

⁵⁴ B.Totterdill, *An Introduction to Construction Adjudication: Comparison of Dispute Resolution Techniques*. (Sweet & Maxwell, London, 2003) p. 21.

An arbitrator is also defined as a legal arbitrator; a person appointed by two parties to settle a conflict, arbitrate, and decide by arbitration, judge between two parties to a conflict (usually at the request of the two parties).

Arbitration in Kenya is governed by the *Arbitration Act*, 1995 as amended in 2009, the *Arbitration Rules*, the *Civil Procedure Act* (Cap. 21) and the *Civil Procedure Rules* 2010. Section 59 of the *Civil Procedure Act* provides that all references to arbitration by an order in a suit, and all proceedings there under, shall be governed in such manner as may be prescribed by rules. Order 46 of the *Civil Procedure Rules*, inter alia, provides that at any time before judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference. Institutional Rules are also used in guiding the arbitrators as they carry out their work.

Its advantages are that parties can agree on an arbitrator to determine the matter; the arbitrator has expertise in the area of dispute; any person can represent a party in the dispute; flexibility; cost-effective; confidential; speedy and the result is binding. Proceedings in Court are open to the public, whereas proceedings in commercial arbitration are private, accordingly the parties who wish to preserve their commercial secrets may prefer commercial arbitration.

5.5 MED-ARB

Med-Arb is a combination of mediation and arbitration. It is a combination of mediation and arbitration where the parties agree to mediate but if that fails to achieve a settlement the dispute is referred to arbitration. It is best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he transforms himself into an arbitrator.

Med-Arb can be successfully be employed where the parties are looking for a final and binding decision but would like the opportunity to first discuss the issues involved in the dispute with the other party with the understanding that some or all of the issues may be settled prior to going

into the arbitration process, with the assistance of a trained and experienced mediator.⁵⁵

Elsewhere, the courts have held, the success of the hybrid mediation/arbitration process depends on the efficacy of the consent to the process entered into by the parties.⁵⁶

5.6 ARB-MED

This is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. It is best to have different persons mediate and arbitrate. This is because a person arbitrating may have made up his mind who is the successful party and thus be biased during the mediation process if he transforms himself into a mediator. For instance in the Chinese case of *Gao Hai Yan & Another v Keeneye Holdings Ltd & Others* [2011] HKEC 514 and [2011] HKEC 1626 (“Keeneye”), the Hong Kong Court of First Instance refused enforcement of an arbitral award made in mainland China on public policy grounds. The court held that the conduct of the arbitrators turned mediators in the case would “cause a fair-minded observer to apprehend a real risk of bias”.⁵⁷ Although the decision not to enforce the award was later reversed, the Court of Appeal did not have a problem with the observation on risks involved but with the particular

⁵⁵ Mediation-Arbitration (Med-Arb), Available at

[http://www.constructiondisputes-cdrs.com/about%20MEDIATION ARBITRATION.htm](http://www.constructiondisputes-cdrs.com/about%20MEDIATION%20ARBITRATION.htm) (accessed on 23rd April, 2013).

⁵⁶ Edna Sussman, Developing an Effective Med-Arb/Arb-Med Process, *NYSBA New York Dispute Resolution Lawyer*, Spring 2009, Vol. 2, No. 1, page 73, Available at <http://www.sussmanadr.com/docs/Med%20arb%20PDF.pdf> (accessed on 23rd April, 2013).

⁵⁷ Mark Goodrich, Arb-med: ideal solution or dangerous heresy? Page 1, March 2012, Available at <http://www.whitecase.com/files/Publication/fb366225-8b08-421b-9777-a914587c9c0a/Presentation> (accessed on 23rd April, 2013).

details of that case where the parties were deemed to have waived their right to choose a new third party in the matter.⁵⁸

5.7 ADJUDICATION

Adjudication is defined under the CIArb (K) Adjudication Rules as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract. Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision within 28 days or the period stated in the contract), flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation. Adjudication is thus effective in simple construction dispute that need to be settled within some very strict time schedules.

The demerits of adjudication are that it is not suitable to non-construction disputes; the choice of the arbitrator is also crucial as his decision is binding and that it does not enhance relationships between the parties.⁵⁹

6.0 IMPLEMENTATION OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

⁵⁸ Ibid

⁵⁹ K.W. Chau, Insight into resolving construction disputes by mediation/adjudication in Hong Kong, *Journal Of Professional Issues In Engineering Education And Practice*, ASCE / APRIL 2007, pp 143-147 at Page 143, Available at http://www.academia.edu/240893/Insight_into_resolving_construction_disputes_by_mediation (accessed on 23rd April, 2013).

In order to realize access to justice through these mechanisms, they must be effectively entrenched within the justice system. Caution should however be taken in linking these mechanisms to the court system to ensure that they are not completely fused with the formal system as is the case with arbitration.

The legal environment has swallowed arbitral practice in Kenya. It has become a court process in which lawyers use court technicalities to derail the process. There is thus a need to create awareness especially among the judicial officers on the effective use of these mechanisms to realize access to justice.

The existing framework providing that before parties file a case in court, they should first exhaust alternative dispute resolution mechanisms in appropriate disputes need to be enhanced and enforced by courts so as to ease backlogs in courts. Section 59 of the Civil Procedure Act was amended to introduce the aspect of mediation of cases as an aid to the streamlining of the court process. This will involve the establishment of a Mediation Accreditation Committee to be appointed by the Chief Justice which will determine the criteria for the certification of mediators, propose rules for the certification of mediators, maintain a register of qualified mediators, enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators.⁶⁰

Whereas court-annexed mediation is a legal process leading to a settlement informal mediations result in a resolution because of their flexibility, informality, voluntariness, autonomy and the fact that they foster rather than destroy relationships.

It should be noted that though ADR and Traditional Dispute Resolution Mechanisms have been recognized in the Constitution, they are to operate under the shadow of the law. It can be argued that this denies them the full autonomy which would lead to the enjoyment of the full benefit of the informal mechanisms.

⁶⁰ Section 59A of the *Civil Procedure Act*, Cap 21, Laws of Kenya

7.0 DEMERITS/CRITICISM OF ADR MECHANISMS

Although the ADR mechanisms are praised as having all the above advantages, there is still a school of thought that is completely against them. One of the known advocates of this school of thought is Owen Fiss. In his work, '*Against Settlement*', Owen Fiss criticises ADR mechanisms and the whole notion of it on the premises that: There is imbalance of power between the parties; There is absence of authority to consent (especially when dealing with aggrieved groups of people); ADR presupposes the lack of a foundation for continuing judicial involvement; and Adjudication promotes justice rather than peace, which is a key goal in ADR.⁶¹

He thus argues that a settlement will thereby deprive a court of the occasion and, perhaps, even the ability to render an interpretation. Thus, when parties settle, society gets less than what appears and for a price it does not know; parties might settle while leaving justice undone.⁶²

The other demerit is that in mediation power imbalances in the process may cause one party to have an upper hand in the process thus causing the outcome to unfavourably address his/her concerns and /or interests at the expense of the other.⁶³ Regardless of the type of conflict, it is a fact that power imbalances disproportionately benefit the powerful party. However, it may be claimed that inequality in the relationship does not necessarily lead to an exercise of that power to the other party's disadvantage.⁶⁴

⁶¹ Owen Fiss, '*Against Settlement*', 93 *Yale Law Journal* 1073, (1984) pp. 1073-1090. Available at <http://www.law.yale.edu/documents/pdf/againstsettlement.pdf> (accessed on 16th April, 2013).

⁶² *Ibid.*

⁶³ Kariuki Muigua, "*Court Annexed ADR in the Kenyan Context*" *Op cit.* page 5.

⁶⁴ Shokouh Hossein Abadi, The role of dispute resolution mechanisms in redressing power imbalances - a comparison between negotiation, litigation and arbitration, page 3, *Effectius Newsletter*, Issue 13, (2011) *Effectius: Effective Justice Solutions*, Available at

The other demerit that affects ADR is that most of the mechanisms under ADR that are voluntary in nature mostly rely on the goodwill of the parties and any withdrawal of such goodwill might result in collapse of such a process.

Contrary to ADR, adjudication through court is usually based on law, rules and regulations provided for, which results in consistent decisions based on law and precedents; Parties are bound by the decision of the court, which can be enforced; Court decisions are appealable and errors can be corrected, reviewed or reversed by the appellate courts.⁶⁵

8.0 CHALLENGES

Despite the strides made in coming up with a framework for the use of ADR in Kenya, there are still certain challenges in the effective application of the same to enhance access to justice, reduce backlogs and expedite conflict management.

8.1 MEDIATOR, CONCILIATOR AND ARBITRATOR TRAINING

These challenges relate to lack of capacity in terms insufficient personnel who can handle disputes using ADR mechanisms and lack of understanding on the working of some mechanisms such as mediation and/or arbitration. The professional alternative dispute resolvers are overwhelmed by the large number of disputes due to a high population and cannot possibly deal with all the matters suggested by the various laws to be handled using ADR mechanisms and supported by the constitution.

There are few institutions that train ADR practitioners in the entire country. The most significant one is the Chartered Institute of Arbitrators (Kenya Chapter), which provides training to its members. The Dispute Resolution Centre also deals with its members only without necessarily offering courses in mediation to the general public. These institutions cannot

http://effectius.com/yahoo_site_admin/assets/docs/Effectius_Theoleofdisputeresolution_mechanisms

⁶⁵ Surridge & Beecheno, *Arbitration/ADR versus Litigation*, Op cit

possibly meet the needs for training and therefore, more institutions ought to take up the training of ADR practitioner, more so the several middle level university colleges spread all over the country.

8.2 CODE OF ETHICS

There is likelihood that there is going to be a flood of mediators, arbitrators and conciliators if training efforts are enhanced. This is against a background of the fact that the code of ethics in place is specific to arbitrators and the provisions in the *Arbitration Act* provide for removal or disqualification of arbitrators only.⁶⁶ The major challenge will be regulating Independent practitioners unless it is made compulsory that every practitioner must belong to a professional body. This way it will be easier to come up with an effective code of ethics and with better mechanisms of enforcement for their regulation.

8.3 ACCEPTANCE BY THE SOCIETY

Our society still believes in seeking justice through courts. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent of parties' goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts and other tribunals, as opposed to all the cordial talks that are ADR. The society has become so litigious that to convince disputants to embrace ADR becomes an uphill task.

8.4 INSTITUTIONAL CAPACITY

⁶⁶ Kariuki Muigua, "*Overview of Arbitration and Mediation in Kenya*"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011. Page 11, Available at [http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation Kenya.pdf](http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation%20Kenya.pdf)

There is the need to enhance the capacity of various institutions to meet the demands for ADR mechanisms introduced by the constitution. These institutions include: Chartered institute of Arbitrators (Kenya Chapter) established in 1984, Dispute Resolution Centre, a non-profit organisation established in 1997. There is need to enhance the capacity of these institutions as well as putting in place mechanisms to establish more institutions. This will greatly improve the rolling out of ADR services to a larger group of citizens.

8.5 THE CHANGING FACE OF ARBITRATION

The major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court.⁶⁷ When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings.

This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to inquire into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties' intent on derailing the arbitral proceedings and thus delaying justice for all concerned. This means then that parties are slowly losing confidence in the arbitral process as it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination. This comes at a time when the constitution is trying to do the opposite.

9.0 PROSPECTS

Alternative dispute resolution mechanisms have been effective in administration of justice where they have been used. The constitutionalisation of these mechanisms means that there will be a paradigm shift in the policy on resolution of conflicts towards encouraging

⁶⁷ Ibid. Page 11

their use to enhance access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities.

A comprehensive policy and legal framework to operationalise alternative dispute resolution mechanisms is needed. It should be realized that most of the disputes reaching the courts should never have reached there in the first place and can be resolved without resort to court if alternative dispute resolution mechanisms were to be applied and be treated not as inferior alternatives to litigation but as equally appropriate means to realization of justice. Where they have been used in managing conflicts and seeking justice they have been effective since they are closer to the people, flexible, expeditious, foster relationships, voluntary and cost-effective.

The Investment Climate Advisory Services of the World Bank Group while making their recommendations in their work ADR guidelines recommended that providing free ADR services could to an extent help in building up a culture of employment of ADR services in a society. They observe that when first developing ADR services in a jurisdiction, stakeholders may consider providing the service for free to encourage parties to use the process. They go further to suggest that newly trained and enthusiastic ADR practitioners who want to be involved in the project may offer to do this for a while⁶⁸.

This, with proper infrastructure in place, could be tried as part of the legal aid programmes in place. However, the above World Bank group also observes that if disputants become accustomed to receiving a service for free, it will be very difficult later to collect a fee for that service⁶⁹. Therefore, this can only be done with very appropriate measures in place to decide when such services should be sought and by which class of people.

Alternative dispute resolution has also been said to have indirect benefits. As already noted elsewhere in this paper it can increase the

⁶⁸ World Bank Group, *alternative dispute resolution guidelines*, page 44, Available at http://siteresources.worldbank.org/INTECA/Resources/15322_ADRG_Web.pdf (accessed on 18th April, 2013).

⁶⁹ Ibid

effectiveness of courts by reducing backlog. This can in turn improve trust in the country's legal system, which may increase foreign investment.⁷⁰

Another viable recommendation is the adoption of Village Mediation Programmes. The Village Mediation Programme (VMP) is a model of mediation established first in Africa by the Paralegal Advisory Services Institute (PASI) in Malawi.⁷¹ The VMP introduces a village-based diversion and mediation scheme that can assist poor and vulnerable people to access justice in civil and some minor criminal cases. The Programme is inspired by the *Madaripur Mediation Model* in Bangladesh and other village-based mediation programmes around the world.⁷²

10.0 CONCLUSION

The direct inclusion, as opposed to inference, of ADR mechanisms as part of the means of conflict management in the Constitution and in Acts of Parliament is a bold ground breaking move. However, there is need for caution so that this effort is not defeated by capacity challenges, some of which are discussed above.

The Law Commission in Dublin observes that 'Alternative dispute resolution must be seen as an integral part of any modern civil justice system. It must become such a well established part of it that when considering the proper management of litigation it forms as intrinsic and as instinctive a part of our lexicon and of our thought processes, as standard considerations like

⁷⁰ Inessa Love, *Settling Out of Court: How Effective Is Alternative Dispute Resolution?*, page 1, The World Bank Group Financial and Private Sector Development vice presidency, October 2011. Available at

<http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Sector> (accessed on 22nd April, 2013).

⁷¹ Paralegal Advisory Services Institute (PASI), *Village Mediation Programme*, page 2, Available at http://www.afrimap.org/english/images/documents/PASI-VMP_bookletOct09.pdf (accessed on 20th April, 2013).

⁷² Ibid

what, if any, expert evidence is required.’⁷³ They go on to state that while litigation must always remain available for clients, this can be a very stressful undertaking and should be seen as the final place for resolving a dispute.⁷⁴

It is essential that in the application of ADR and to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld.⁷⁵

The future of ADR in Kenya is bright and really promising in bringing about a just society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements. Finally, a party who wishes to avoid the complexities of litigation can seek the services of ADR mechanisms experts and do so legally.

There may come a time when ADR becomes the norm rather than the exception in conflict management in our fast growing country and one embracing globalisation where court systems differ significantly.

ADR mechanisms can rightly be referred to as Appropriate Dispute resolution mechanisms instead of alternative as the use of the word ‘alternative’ makes them appear inferior to litigation while this is not the case. The reality is that these mechanisms should at least be treated as equal if not better mechanisms when compared to litigation. These have the potential for being made applicable in all walks of life wherever there exist possibilities of any dispute, a potential only waiting to be tapped. This is the time to recognize that alternative dispute resolution mechanisms stand independently and not as an alternative to any adjudicatory process.⁷⁶

It is possible to herald a new dawn and achieve justice through the effective Application of ADR in Kenya.

⁷³ Law Reform Commission, *Consultation Paper on Alternative Dispute Resolution*, July 2008, Op cit. page 34

⁷⁴ Ibid

⁷⁵ Articles 19-51, Constitution of Kenya, 2010

⁷⁶ Laxmi Kant Gaur, *Why I Hate ‘Alternative’ in “Alternative Dispute Resolution”*, page 4, Available at http://delhicourts.nic.in/Why_I_Hat1.pdf (accessed on 22 April, 2013).

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THE KENYAN ADJUDICATION BILL AND POTENTIAL TEETHING PROBLEMS

by DAVID SIMPER*

1.0 INTRODUCTION

We have had statutory adjudication in the UK since 1998 but before that some of the standard forms of building contract had adjudication clauses, particularly for set off between Main Contractors and Subcontractors. I became involved in statutory adjudication at its outset and have been training adjudicators for 15 years for both the Chartered Institute of Arbitrators (“CI Arb”) and the Royal Institution of Chartered Surveyors (“RICS”).

I am here to talk about potential teething problems in Kenya when the new Adjudication Bill is introduced. First of all I would like to point out a couple of inconsistencies in the Draft Adjudication Bill that I have been provided with. Under ‘**Part 1 Preliminary**’ paragraph 3 there are a series of definitions. The definition for Referring Party” should actually be “Responding Party” because it is the Responding Party who receives the Notice of Adjudication from the Referring Party.

Paragraph 14.2 needs the words “to appoint a replacement” or something similar to be added. In paragraph 18.1 the word “Adjudication” in the first line needs to be replaced by “Adjudicator”.

2.0 ADJUDICATION GENERALLY

Since its statutory introduction in the UK adjudication has been very popular to the degree that the courts are less busy and arbitration in

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the construction industry has almost died out. Some countries have followed the UK. Today, adjudication as a statutory process can be found in Australia and New Zealand and I believe in Singapore and Malaysia. Also it is soon to be introduced into Ireland. In Kenya my understanding is that the adjudication process will not be compulsory but will be up to the parties to decide whether or not they incorporate the procedure into their contract.

As I have said adjudication was introduced in the UK in 1998 but it was limited to construction contracts. The Bill is often referred to as the "Construction Act". I notice however that your Bill is not restricted to the Construction Industry which for me is interesting. I say that because in the UK most adjudicators have construction qualifications. Adjudicators are often quantity surveyors or engineers or builders, although some lawyers have slipped in. If the Kenyan Bill is not restricted to the construction industry and some form of panel accreditation is not brought in at the same time, it could be possible to have quantity surveyors deciding medical disputes and doctors deciding building disputes. That could be a major headache.

3.0 THE NOTICE OF ADJUDICATION

The adjudication procedure starts when the party wanting the dispute decided (the Referring Party) sends a "Notice of Intention to Refer a Dispute to Adjudication" (often shortened to "Notice of Adjudication" or simply "Notice") to the other party (the Responding Party). In the UK the Referring Party then has 7 days in which to refer the matter to an adjudicator. The Kenyan Bill does not stipulate a period in which the matter must be referred to the adjudicator after the Notice has been issued. The only reference to a period that I have found in the Bill is at paragraph 13.1 v, but no actual time is stated. That means that the contract between the parties will have to state the period between the Notice and the referral (Statement of Case). If the period for referring is overlooked the Referring Party can take as long as he likes and that is not a very satisfactory situation.

If the contract does state a period for the Statement of Case and it is not complied with, the courts may declare the process has failed but that depends upon the words used. If the requirement is that the Statement of Case must be served within 7 days of the Notice, the word 'must' is mandatory and after say 8 days the courts may outlaw the Statement of Case. However the courts may allow a late service if the contract uses the word 'may' rather than 'must'.

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Paragraph 13.1 of the draft Bill echoes the UK Act in that a Notice of Adjudication may be given at any time by either party. The courts in the UK have however restricted 'any time' to 'any time but as long as the dispute has crystallised'. That means there must be a dispute in the first place. So for example if a contractor submits a final account to the Employer one day and then issues a Notice of Adjudication the next day, the courts in the UK will almost certainly decide that no dispute has crystallised because the Employer has not had a chance to consider the final account. How long is reasonable would depend upon the nature of the dispute and probably in Kenya (because adjudication will be contractual) depend upon what the contract says. To avoid potential problems the contract containing the adjudication procedure could include a clause clarifying the period.

4.0 APPOINTMENT OF THE ADJUDICATOR

Paragraph 14.1 of the Bill covers the appointment of the adjudicator. He can be named in the contract or if he is not named or he cannot act he is selected by an independent body from a list. The selection body should be named in the contract and in the UK such a body is called an Adjudicator Nominating Body ("an ANB"). If an ANB is not named in the contract, the High Court of Kenya takes over and makes the nomination. The nomination has to be within 14 days of the application. Jurisdictional problems can arise if the wrong ANB is approached.

Once the adjudicator has been nominated paragraph 15.1 of the Bill requires the dispute to be referred to the adjudicator within 3 days of his appointment. That means the Referring Party must have the Statement of Case ready to go probably before he applies for the nomination of the adjudicator or sends his Notice of Adjudication, otherwise he may miss the deadline and will have to start the process all over again. If the 3 day time period is exceeded it is possible that the Kenyan courts may find the submission time barred and the process will be void.

5.0 CONFLICT OF INTEREST

The adjudicator has to act impartially (paragraph 6c of the Bill). That, in my opinion, means if he has had any involvement with either of the parties or with the contract he cannot be the adjudicator. That comment flies in the face of

paragraph 7 of the Bill which allows the adjudicator to be employed by one of the parties, but only with the agreement of the parties. I can foresee problems there.

6.0 ADJUDICATION AGREEMENT

The draft Bill requires the parties and the adjudicator to enter into a separate agreement (paragraph 12 of the Bill), unless the principal contract requires otherwise (paragraph 14.3). What happens if they fail to enter into the written agreement annexed to the Bill? Will any decision be set aside? I doubt it, but the situation is not clear. In the early days of statutory adjudication in the UK, adjudication agreements were signed by the parties. However after 15 years of the process it rarely happens today and I know of no cases that have declared the process void as a result.

7.0 JURISDICTION

Paragraph 20 of the Bill states that the adjudicator shall decide the matters set out in the Notice of Adjudication. The UK courts have decided that if the Statement of Case includes matters that are not in the Notice, then the additional matters are outside of the adjudicator's jurisdiction unless the parties have agreed otherwise. So for example if the Referring Party does not claim for a particular variation in the Notice but does so in the Statement of Case the adjudicator has no jurisdiction to decide that variation. If however the Responding Party does not take issue in the Response and answers the claim, it will be deemed that the Responding Party has agreed to that variation being dealt with by the adjudicator. I would expect that to happen here, but the warning is: make sure the Notice and the Statement of Case contain the same dispute!

The Bill in various places refers to 'the' or 'a' dispute in the singular (for example paragraphs 3, 4, 5c, 7, 13.1, 15.3, 18.3, 22, 23.1, 23.2, 23.3, 27 and 28). The UK courts have decided that multiple disputes are therefore outside of an adjudicator's jurisdiction. For example if a variation dispute and an extension of time dispute were referred to adjudication at the same time, the adjudicator might not have jurisdiction to decide them both. However if both of those matters were included in a dispute on the final account then maybe they would

be allowed. Until the Kenyan courts have made a judgment I would be very careful how Notices and Statements of Case are put together.

8.0 CONDUCT OR PROCEDURE OF THE ADJUDICATION

After the Notice has been sent by recorded delivery (paragraph 13.2 of the draft Bill), no time period is set for the Statement of Case save that it has to be sent within 3 days of the appointment of the adjudicator. Although the Notice has to be sent by recorded delivery there is no similar requirement for the Statement of Case. Only the words “shall send” are used (paragraph 15.1). Does that include delivery by hand or by email or by facsimile? There is the possibility of disputes arising out of how the Statement of Case has been sent, so my advice would be to ensure that the contract sets out how delivery should be made.

A similar situation arises with the Response. In this instance the Responding Party has 10 days from the Statement of Case in which to “submit” a Response (paragraph 16). The word “send” is replaced by “submit” but the method of submission is not stated so I would assume that it is by any means. Again I would ensure that the contract sets out how delivery should be made.

9.0 NATURAL JUSTICE

Adjudication is a judicial process where each party is given a chance to put its case to the tribunal. You may well find that some adjudicator’s decisions will be set aside by the courts because the adjudicator has failed to give both parties a chance of putting their case to the adjudicator. It is part of the process known as ‘Natural Justice’ (Paragraphs 6a, 11 and 12 of the draft Bill).

Natural Justice requires the adjudicator to act fairly and without bias or perceived bias. For example he must allow a party to reply to new evidence otherwise he must exclude it and not consider it himself. In one UK case the adjudicator received an expert’s report 24 hours before he was due to publish his decision, but he failed to allow the other side to consider the report, although he considered it himself. The court set aside his decision.

It is also important that the adjudicator does carry out exercises that amount to putting a case for one of the parties or using his own experience or knowledge to reach his decision without giving both parties a chance of commenting upon that exercise or experience. In another UK case, and much to

the annoyance of the Responding Party, the adjudicator carried out a critical path analysis of the delays in a major project because neither of the parties had done such an analysis to calculate the delays. He spent over £60,000 (Kshs 7½millions) in doing so; using members of his firm, but he did not allow the parties to comment upon his findings. The court found that to be perceived bias.

10.0 THE DECISION

The adjudicator has 28 days from the date that he received the Statement of Case (paragraph 15.3 of the draft Bill) in which to reach his Decision (paragraphs 6d and 23.1 of the draft Bill). The parties can agree a longer period and the contract can state a different period, but it is not stated in the draft Bill whether it can be a shorter or longer period (paragraph 23.1). If the contract states a shorter period the quality of any decision may be reduced and many adjudicators may refuse to take on the task.

11.0 CONCLUSION

The provision for adjudication in Kenya is to be commended because adjudication has been shown to be cheaper and quicker than both litigation and arbitration. It has also been successful in that most adjudication decisions have been accepted by the parties as finally resolving their disputes.

It might be seen to be disappointing that the Bill will not make adjudication compulsory and therefore parties may not incorporate the provisions into their contracts. Many smaller sub-contractors will probably not become aware of the new provisions and accordingly they will not benefit if contractors do not put the provisions into their orders.

There is also a great opportunity for the Kenyan branch of the CIArb to become an ANB under the Bill. The CIArb in the UK is an ANB and nominates adjudicators. It can assist the branch in setting up training courses and indeed a Panel of Adjudicators.

**PROPORTIONALITY OF COSTS IN PURSUIT OF
EFFECTIVE REMEDIES: A CONCEPTUAL IMPERATIVE**

by DR. K. I. LAIBUTA*

1.0 INTRODUCTION

In the context of this paper, the term “civil justice” is used as a derivative of the wider notion of justice. Civil justice refers to both “fairness of process” in the adjudication of civil claims and the quality of outcomes”, which denote the effectiveness of remedies, in addressing justiciable issues.

¹ Justiciable issues may be described as those problems for which there is a potential legal remedy within a civil framework² and in relation to which effective remedies are only attainable where the parties have full and equal access to judicial services. However, many factors impose barriers and affect the justness and efficacy of the legal process in the administration of civil justice. According to Mason and others, these factors include the “resources” of the parties³ and their ability to meet the appurtenant cost of litigation. Inordinately high cost of civil litigation has been a matter of concern in various common law jurisdictions.⁴ A study of the judicial system in Kenya demonstrated that the national tribunals have for the most part failed to effectively satisfy increasing demands for fair procedures and effective remedies. The overbearing and

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¹ P Mason and others *Access to Justice: A Review of Existing Evidence of the Experiences of Minority Groups based on Ethnicity, Identity and Sexuality* (Report) (Department for Constitutional Affairs (now Ministry of Justice) May 2009) p.14 available at: <<http://www.justice.gov.uk/publications/research.htm>> (last accessed on 4th November, 2009).

² *Ibid.*

³ *Ibid* at¹⁶.

⁴ KI Laibuta “Access to Civil Justice in Kenya: An Appraisal of Policy and Legal Frameworks” A thesis submitted in fulfilment of the Requirements of the Degree of Doctor of Philosophy, School of Law, University of Nairobi (Nairobi November 2012) ch 5.

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bureaucratic nature of the judicial process, the high cost of access, the markedly formal nature of civil proceedings, and in many cases outright inaccessibility by ordinary members of public,⁵ among other impeding factors, makes the civil justice system (which is characterised by highly structured rules of procedure) incapable of delivering quality outcomes at proportionate costs.

High cost of civil litigation is primarily attributable to complex rules of procedure, which suit the adversarial system that encourages litigants to wage legal battles rather than seek effective redress of their just grievances. The system becomes an unduly expensive battlefield of technicalities, which is difficult to access without representation by legal counsel. On the other hand, engagement of legal counsel invariably diminishes party autonomy and escalates the cost of access. The very fact of hiring costly legal minds is tantamount to buying justice. It is no wonder that litigation has been described as “a gamble or luxury that only the affluent can afford”.⁶ This view is shared by Hon. Justice (Dr.) Smokin Wanjala who concludes that “[a]ccess to justice for the poor (in Kenya) has been elusive in many respects” and has become what the learned judge of the Supreme Court describes as “... an extremely rare commodity for the majority of the people”.⁷

The balancing model of access to civil justice proposed in this paper calls for proportionality, i.e., a balance between the costs of the procedure in the adjudication of disputes and the benefits that it produces.⁸ In his Interim Report to Lord Chancellor on the Civil Justice System in England and Wales, Lord

⁵ International Commission of Jurists (Kenya Chapter) *Strengthening Judicial Reforms: Performance Indicator (Report)* (2003) p.3.

⁶ Dr. Justice TN Singh ‘Constitutional Values and Judicial Process’ available at: <<http://www.cili.in/articles/download/1493/1084>> (last accessed on 8th October, 2009).

⁷ S Wanjala (ed) *Law and Access to Justice in East Africa* (Claripress Ltd Nairobi 2004).

⁸ M Maiese ‘Procedural Justice’ in G Burgess and H Burgess *Beyond Intractability* (Conflict Research Consortium, University of Colorado Boulder January 2004) available at: http://www.beyondintractability.org/essay/procedural_justice (last accessed on 12th March, 2010).

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Woolf addresses the issue of access to civil justice specifically in the context of the English judicial system, whose comparative experience is shared by many developing common law jurisdictions. In Part IV of his book entitled *The Pursuit of Justice*, he provides an overview of the access to justice in England and Wales. The report⁹ extensively referred to in his book was “designed to meet the needs of the public in the 21st century by creating a comprehensive and coherent package for the reform of civil court proceedings. It aimed to improve access to justice and lessen the cost of litigation, reduce the complexity of the rules and modernize terminology, and remove unnecessary distinctions of practice and procedure”.¹⁰

Lord Woolf identifies defects in the English system at the time of his 1995 interim report¹¹ and draws attention to a number of general principles which the civil justice system should meet in order to ensure access to justice at proportionate costs. He identifies the principles of equality, economy, proportionality and expedition as fundamental to an effective system of justice, and concludes that a system of accessible civil justice is essential to the maintenance of a civilized society.¹²

2.0 ACCESS TO JUSTICE

The notion of “access to justice” may be broadly interpreted as embracing a range of interrelated principles, namely-

- a. the ability to realize the right to full and equal access to protection of one’s entitlements by the law enforcement agencies without undue delay, expense or technicalities. This presupposes the existence of:
 - (i) simplified procedures that maximize party control (in the context of participatory justice) which in turn reduces the cost of litigation;
 - and (ii) a legal aid scheme to guarantee access to law by the poor even though questions may arise as to who, how much and in what kind of cases litigants merit legal aid);

⁹ Lord Woolf ‘Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales’ (HMSO 1995) ch 1 in Lord Woolf *The Pursuit of Justice* (Oxford University Press New York 2008) p.311.

¹⁰ *Ibid.*

¹¹ *Ibid* p.312.

¹² *Ibid* p.311.

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- b. ease of entry into the justice system and the availability of physical judicial institutions with appropriate alternatives to conventional dispute resolution mechanisms;
- c. less resource-intensive pre-trial protocols and civil process of claim adjudication;
- d. affordability of competent legal representation in the adjudication process
- e. the principle of equity and efficiency;
- f. cultural appropriateness and conducive environment within the judicial system; and
- g. expeditious processing of claims and timely enforcement of judicial decisions,¹³ which are dependent on the underpinning policy and legal frameworks.

3.0 THE PRINCIPLE OF PROPORTIONALITY

As explained by Hon. G. L. Davies, the principle of proportionality underscores the need to “match the extensiveness of the procedure with the magnitude of the dispute”.¹⁴ By doing so, we balance the interest of justice with cost-effectiveness in order to increase access to justice. This is because the primary goal of a civil justice system is the just resolution of disputes through a fair but swift process at a reasonable expense. Conversely, delay and excessive

¹³ C Ngondi-Houghton *Access to Justice and the Rule of Law in Kenya* (paper developed for the Commission for the Empowerment of the Poor) (November 2006) pp.4-5.

¹⁴ Victorian Law Reform Commission *Civil Justice Review* (Report) (2008) p.14 para 4.1.4. available at <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/resources/8/1/8137a400404a0bed9549fff5f2791d4a/VLRC+Civil+Justice+Review+-+Report.pdf> (last accessed on 1st August 2011).

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expense negate the value of an otherwise just resolution and erodes the effectiveness of remedies. Moreover, quality outcomes and effective remedies are an integral part of full and equal access to civil justice and that delay in determination of civil claims impede access to civil justice where the remedies come too late in the day.

In every case, expedition and cost-effectiveness are critical in accessing justice. Systemic delay and expense (characteristic of many systems for the administration of civil justice render the system inaccessible. While there is no objective or unqualified measure of a reasonable expense, Goldschmid observes that “most jurisdictions around the world have come to realize that the cost of resolving a dispute should be proportional to its magnitude, value, importance and complexity”¹⁵ so as to deliver quality outcomes to which all disputants aspire.

An example of the broad application of proportionality as a general principle is the new code of civil procedure in the United Kingdom. The code is guided by an “overriding objective” of enabling the court to deal with cases justly.¹⁶ Dealing with cases justly includes dealing with the case in ways which are proportionate to (a) the amount of money involved; (b) the importance of the case; (c) the complexity of the issues; and (d) the financial position of each party.¹⁷ Accordingly, the principle of proportionality obligates the court only to allot a case a share of the court’s resources proportionate to the magnitude of that case while taking into account the need to allot proportional resources to other cases.¹⁸ The court is bound to give effect to the overriding objective when exercising its

¹⁵ Ibid.

¹⁶ Civil Procedure Rules 1998 (UK) r 1.1.

¹⁷ The Hong Kong Civil Justice Reform, Final Report, (2003) p. 54 suggests that the elements of proportionality should not be specifically set out but should only be guided by “commonsense notions of reasonableness and a sense of proportion to inform the exercise of procedural discretion.”

¹⁸ Ibid.

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powers under the rules or when interpreting any rule.¹⁹ In every case, the parties are required to assist the court in furtherance of the overriding objective.²⁰

To illustrate, the recent amendment in 2009 of the Civil Procedure Act (Cap. 21 Laws of Kenya) is a significant step towards the improvement of access to civil justice. Section 1A (1) of Cap. 21 sets out the overriding objective of the Act and the rules made there under, namely: to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Section 1B of Cap. 21 imposes a duty on the court to conduct judicial proceedings in an expeditious and cost-effective manner. Similarly, section 3A(1) of the Appellate Jurisdiction Act (Cap. 9 Laws of Kenya) sets out the overriding objectives of the Act and the rules made thereunder, namely: "... to facilitate the just, expeditious, proportionate and affordable resolution of appeals ...". Section 3B of the Act imposes a duty on the court to ensure expedition and cost-effectiveness in the determination of appeals. However, no legislative reforms have been undertaken to breathe life to these overriding objectives and eliminate the complexity of procedures despite the directive principle expressed in Article 48 of the Constitution of Kenya, 2010, which imposes an obligation on the State to ensure access to justice for all at affordable cost.

Even though the courts in Kenya are bound to determine all civil claims with the primary objective of ensuring, among other things: (a) the just determination of the proceedings; (b) the efficient use of the available and administrative resources; and (c) the timely disposal of proceedings before the court at a cost affordable by the parties; in furtherance of the overriding objective stated in the Constitution and in the respective provisions of Chapters 9 and 21 of the Laws of Kenya, there is no corresponding reform of the complex rules of procedure to give effect to this overriding objective. Only then can the

¹⁹ Civil Procedure Rules 1998 (UK), Rule 1.2.

²⁰ Civil Procedure Rules (Quebec), Rule 1.3. In Quebec, the burden of ensuring proportionality is placed on the parties: "Parties must ensure that the proceedings they choose are proportionate, in terms of the costs and time required, to the nature and ultimate purpose of the action or application and to the complexity of the dispute." Quebec, Code of Civil Procedure, Rule 4.2.

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burden of the lamentable high cost of litigation reported in the data generated from the inquiry of the Kenyan judicial system²¹ be minimized.

According to Nobles, the promulgation, enforcement and administration of laws and other rules is just only if standards, such as equal treatment of all citizens, are satisfied, demanding nothing of them that did not lie easily beyond their powers.²² In effect, a set of rules that require conduct beyond the powers of the affected party (such as burdensome costs) results in miscarriage of justice.²³ Nobles' postulation draws from his analysis of Fuller's *Morality of Law*²⁴ with reference to which it may be concluded that full and equal access to civil justice demands the prospect of every party to enjoy the cost-effectiveness, fairness of process, expedition and need satisfaction of the dispute resolution mechanism in question.

In every case, the parties' right to seek justice from the courts should not be burdensome or compromised by costs and technicalities of procedure that place impediments to their full participation in the process. Participatory procedures guarantee recognition and acknowledgement by the courts of the litigants' corresponding needs and interests. Granted, the need for rules to govern procedure cannot be ignored altogether. However, such rules should be effective and expeditious vehicles for just outcomes but should by no means be so complex as to result in escalation of costs that in turn impede access to judicial services.

4.0 INTERNATIONAL STANDARDS

To ensure its own survival in a world characterized by a dynamic social order, frictions and competing interests, the international community has worked to articulate collectively the substantive and procedural requirements

²¹ Laibuta op. cit. note 4.

²² R Nobles and D Schiff 'The Evolution of Natural Law' in Barron and others *Introduction to Jurisprudence and Legal Theory: Commentary an Materials* (Oxford University Press New York 2005) pp.74-76.

²³ Ibid p.77.

²⁴ L Fuller *The Morality of Law* (New Haven and London Yale University Press 1969) p.68.

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for the administration of justice for more than half a century.²⁵ To this end, various international human rights instruments establish principles and minimum rules for the administration of justice in the determination of competing claims and offer detailed guidance to States Parties on human rights and justice. They comprise the 1948 Universal Declaration of Human Rights (UDHR) and specific Covenants, Conventions, rules, guidelines and standards promulgated by the international community under the auspices of the United Nations and various regional organisations.

The shared aspiration to establish and maintain universal standards of access is echoed in express provisions of diverse international Declarations, Conventions, Optional Protocols and municipal laws that provide benchmarks against which various civil justice systems are measured. In prescribing the basic standards of access to civil justice in the quest for effective remedies, these instruments presuppose the existence of competent and accessible national tribunals founded on appropriate policy, legal and institutional frameworks for the promotion and protection of one's rights and freedoms and for the enforcement of effective remedies²⁶ at proportionate costs.

This diverse range of international human rights instruments prescribe minimum standards and essential elements of equal access to civil justice. These elements may be viewed as conceptual imperatives of access to civil justice and of which proportionality is an integral part. Once ratified and domesticated by States Parties, those instruments form part of the municipal law founded on guiding policy that in turn dictates the legal and institutional frameworks for the administration of civil justice.

Notably, though, these international and regional standards of access to civil justice would only find meaning and effect through policy guidelines, legislation and administrative procedures. The extent to which

²⁵ UN General Assembly 'Report of the Secretary-General S/2004/616' (2004) UN Doc. (2).

²⁶ G Metiku 'Access to Justice under the International Human Rights Framework' in Abyssinia Law Blog available at: <http://www.abyssinialaw.com/index.php/our-blog/entry/26-access-to-justice-under-the-international-human-rights-framework> (last accessed on 5th June, 2012).

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they are expressed in policy documents domesticated through legislation would perhaps be the best indicator of the degree to which policy, legal and institutional frameworks are well suited to ensure effective access to civil justice in conformity with international standards. It becomes necessary, therefore, to appraise judicial policies and statute law to: (a) gauge the extent to which they guarantee equal access to civil justice; and (b) identify the gaps in policy and legislation that require immediate reform in accord with international standards prescribed in various treaty instruments.

5.0 POLICY AND LEGISLATION

It is common ground that policy, legislation and administrative procedures play a significant role in the administration of justice and the extent to which judicial services are accessible on an equal basis. Article 2(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR)²⁷ requires State Parties to take the necessary steps, in accordance with its constitutional processes and with the provisions of the ICCPR, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in this Covenant. These rights include *inter alia*: (a) the right to effective remedies as guaranteed by Article 2(3); (b) the right to fair trial guaranteed by Article 14; (c) the right to equal treatment before the law as provided for in Article 16; and (d) the right to freedom from discrimination guaranteed by Articles 2(1) and 26.

The appropriateness of national policy and legislation dictates the extent to which the system of civil justice delivers effective remedies. Their frameworks determine the shape of procedure designed to support access to civil justice in pursuit of quality outcomes at proportionate costs. On the other hand, inept policy and legislation do not guarantee quality procedures and outcomes. It becomes necessary, therefore, for States to undertake institutional and legislative reforms to guarantee access to civil justice on an equal basis through appropriate policy and legal frameworks that minimise the cost of claim adjudication and increase the quality of procedures and outcomes. The

²⁷ The 1966 International Covenant on Civil and Political Rights (ICCPR), U.N. Doc. A/6316 (1966).

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following are examples of legislative interventions designed to guarantee proportionality of costs in judicial proceedings in respective jurisdictions.

The desired simplicity of procedure in subordinate courts became a reality in Kenya in 1934 when both the Civil Procedure Ordinance and the Rules made there under made provision for summary procedure in petty cases where the pecuniary value of the claim did not exceed Shs 200. The rules placed limitations on the right of appeal, as did the Scottish small debt court procedure under the Small Debt (Scotland) Acts 1837-1889. The 1934 Ordinance and Rules made thereunder echoed the principle of proportionality, which is presently reflected in the provisions of the Debts (Summary Recovery) Act (Cap. 42 of the Laws of Kenya). The Act makes provision for the summary recovery of civil debts, a statutory departure from the complex rules of procedure prescribed under the Civil Procedure Act (Cap. 21).

Rule 2 of the Debts (Summary Recovery) Rules requires the particulars of a complaint for recovery summarily of a civil debt to be in prescribed form setting forth the particulars of the complaint.²⁸ After commencement of proceedings, the Magistrate before whom the complaint is lodged issues summons “stating shortly the matter of the complaint and requiring the defendant to appear at a certain time and place before the court to answer the complaint”.²⁹ If the defendant fails to appear, the Magistrate may proceed *ex parte*.³⁰

The procedure for hearing under the Act is notably uncomplicated and relatively expeditious. Section 8(1) of the Act provides that “[i]f on the hearing of the complaint the Magistrate is satisfied that the defendant is liable to pay the sum claimed or any part thereof, he shall make an order that the defendant do

²⁸ This contrasts with the formal requirements of a Plaintiff and the attendant Memorandum of Appearance, Defence, and Reply to Defence, interlocutory applications (for summary judgment etc) or other applications provided for in the Civil Procedure Rules, all of which add to the complexity of procedure even in ordinary debt claims.

²⁹ Debts (Summary Recovery) Act (Cap. 42 of the Laws of Kenya) s 4(1).

³⁰ *Ibid* s 5.

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pay into court such sum as the Magistrate may adjudge is payable by the defendant" either in lumpsum or by installments.³¹ Where default is made in paying any money payable by virtue of an order made under Cap. 42, a Magistrate may either: (a) commit the defaulter to prison for a term not exceeding six weeks or until payment of the sum due (whichever period is the shorter); or (b) order execution of the order by attachment and sale of any property liable to form such form of execution under the provisions of the Civil Procedure Act. In the alternative, the Magistrate may order attachment of debts, including salary accruing or due to the judgment debtor.³² On the other hand, the Magistrate may dismiss the claim in accordance with section 9 if satisfied that the defendant is not liable to pay the sum claimed or any part of it.

Notably, though, summary procedure under the Act is restricted to the recovery of debts and does not extend to other causes of action that could as well enjoy the application of the principle of proportionality in equal measure (particularly in relation to small claims), as is the case in South Africa. The South African Small Claims Courts Act No. 61 of 1984 establishes small claims courts with jurisdiction in respect of causes of action: (a) for delivery or transfer of any property, movable or immovable; (b) for ejection against the occupier of any premises or land within the area of jurisdiction of the court; (c) actions based on or arising out of a liquid document or a mortgage bond; (d) actions based on or arising out of a credit agreement; (e) actions other than those already mentioned above; and (f) actions for counterclaim.³³ Section 15 of the Act requires the value in respect of every cause of action to be determined by the Minister of Justice from time to time by notice in the Gazette.

This institutional and legal framework is comparable to the magistrate's courts or courts of petty sessions in England and Wales. A magistrate's court or court of petty sessions, formally known as a police court, is the lowest level of courts in England and Wales and many other

³¹ Ibid s 8(2).

³² Ibid s 11(1) (a) and (b).

³³ The Small Claims Courts Act No. 61 of 1984 (SA) s 15.

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common law jurisdictions.³⁴ A Magistrate's Court has jurisdiction to hear any complaint.³⁵ Where a complaint relating to a person is made to a justice of the peace, the justice of the peace may issue a summons to the person requiring him to appear before a magistrates' court to answer to the complaint.³⁶

Section 53 prescribes simple procedure on hearing and empowers the court to: (a) state the substance of the complaint to the defendant; (b) upon hearing evidence, make the order for which the complaint is made or dismiss the complaint; (c) make the order with the consent of the defendant without hearing any evidence where the complaint is for an order for the payment of a sum recoverable summarily as a civil debt.³⁷ The jurisdiction, powers and procedures of the court under the 1980 (UK) Act are comparable to the jurisdiction, powers and expedited (or simplified) procedures of the Magistrates' Court in Kenya as prescribed by the Debts (Summary Recovery) Act (Cap. 42 of the Laws of Kenya).

The State of Western Australia serves as another beneficial example of a common law jurisdiction that has a system of small claims courts with expedited or simplified procedures. The Magistrates' Court of Western Australia is the first tier court in Western Australia. The court has jurisdiction in respect of criminal and civil matters, as well as a range of administrative matters. These include civil claims, minor cases of the value of up to \$10,000, consumer/trader claims and minor case consumer claims of up to \$10,000. The court came into existence in May 2005 as a result of the amalgamation of the Court of Petty Sessions, the Small Claims Tribunal and the Local Court of Western Australia into a single court. The amalgamation has provided greater access to, and more efficient use of, the court system,

³⁴ Haywood, Lunn and Allen Solicitors 'The Magistrates' Court' available at: <<http://www.hla-law.co.uk/Magistrates.aspx>> (last accessed on 1st February 2012).

³⁵ Magistrates' Courts Act 1980 (UK) s 51(1).

³⁶ *Ibid* s 52.

³⁷ The Magistrates' Courts Act, 1980 (UK) s 58(1).

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by simplifying court processes, resolving cases more quickly, and with less expense.³⁸

The Small Claims Courts, Courts of Petty Sessions and Magistrates Courts in England, the State of Western Australia and South Africa, are by nature informal. As originally conceived, these informal courts were to be true “people’s courts”, most of which relax the technical rules of procedure and evidence that apply in formal courts.³⁹ Trials in these courts are intended to be informal, with many of the specific procedures employed left to the discretion of the judge⁴⁰ or magistrate, as the case may be. Such courts offer litigants simplified procedures, reduced cost and delay, limitations of the right of appeal, and, above all, the chance to appear in court without a lawyer.⁴¹ Indeed, some courts do not permit lawyers to appear, requiring those wishing to have a lawyer represent them in court to transfer the case to a higher court.⁴² As Conely and O’Barr further observe, early in the history of informal justice, some jurisdictions did not even require judges presiding over such courts “... to decide cases according to the law, as long as their judgments comported with a common sense notion of justice ...”,⁴³ thereby subordinating technicalities of law and procedure to the quality of outcomes.

Although there is no defined policy on access to civil justice in Kenya, the 2010 Litigant’s Charter (among other correlated policy documents) provides strategic direction towards proportional costs of

³⁸ Government of Western Australia Department of the Attorney General ‘Magistrates’ Courts’ (2009) available at: http://www.courts.dotag.wa.gov.au/L/magistrates_court_print.aspx (last accessed on 1st February 2012).

³⁹ JM Conely and WM O’Barr *Rules Versus Relationships: The Ethnography of Legal Discourse* (University of Chicago Press London 1990) p.24.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid pp.24-25.

⁴³ Ibid.

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litigation. The Charter expresses the judiciary's commitment to noteworthy policy priorities, namely: (a) to enhance and promote timely, efficient and effective administration of justice; (b) to ensure accessible justice to all; (c) to reduce the backlog of cases; and (d) to reduce the cost of litigation, among other things. These accord with the inspirational "mission" of the judiciary, i.e., "... to provide an independent, accessible, responsive forum for the just resolution of disputes in order to preserve the rule of law and to protect all rights and liberties guaranteed by the Constitution ...".⁴⁴

6.0 CONCLUSION

The appurtenant high cost and complexity of adversarial civil justice system in common law jurisdictions, including Kenya, have over the years been matters of global concern. This is because complex, costly and time-consuming systems impede justice, even though there are other factors to which delay and high costs may be attributed. These include case management issues, such as motion practice (that involve a wide range of interlocutory proceedings inundated by multiple applications under the Civil Procedure Rules), and the lack of awareness, or unavailability of, or failure to use, other appropriate dispute resolution mechanisms well suited for certain cases.⁴⁵ The reality on the ground is that the courts continually face the challenge of striking a realistic balance between ensuring "orderly and efficient conduct of their own processes and procedures... [involving complex steps in interlocutory proceedings] and delivering substantive justice based on a proper consideration of the merits of a case".⁴⁶

⁴⁴ Government of the Republic of Kenya 'The Judiciary Litigants Charter, 2010' (2010).

⁴⁵ R Goldschmidt 'The Civil Justice Reform Context Behind British Columbia's Expedited Litigation Rule and the Small Claims Court Jurisdictional Limit Increase' (paper developed for the joint Continuing Legal Education/Ministry of Attorney General conference, Restructuring Justice Vancouver June 2005) available at <<http://www.ag.gov.bc.ca/justice-reform/initiatives/publications/pdf/Goldschmid.pdf>> (last accessed on 11th July 2011).

⁴⁶ DBM Mosotah 'Article 159 and Oxygen Principle Not Magic Wands' (April 2011) Nairobi Law Monthly available at: <<http://nairobiawmonthly.com/index/content.asp?contentId=311&isId=7&ar=1>> (last accessed on 27th June 2011).

EFFICACY OF COURT-ANNEXED ALTERNATIVE DISPUTE RESOLUTION: ACCESSING JUSTICE THROUGH ADR

by KYALO MBOBU*

1.0 INTRODUCTION

Agree with thine adversary quickly, whiles thou art in the way with him; lest at any time the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison.¹

Alternative Dispute Resolution (ADR) has been described as “relatively new name coined to describe an old process.”² While this process is as old as humanity, its use over the years has diminished. The court reformers and legislators have however realized that ADR could come in handy in the bid to reduce the back log of cases and save parties the enormous expense, delay of litigation and the accompanying psychic trauma of the litigation process. The Constitution of Kenya, 2010 in its Art. 159(2)(c) embraces this process and provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including

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¹ Matthew 5:2 King James Version (KJV)

² Doug Marfice, *The Mischief of Court-Ordered Mediation*, 39 IDAHO L. REV. 57, 57 (2002).

reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

While this is a milestone in this major come-back of the ADR process, a clear strategy on how this will be achieved is yet to be clearly laid down. Courts have been very instrumental especially in referral of matters to arbitration/adjudication and in enforcing arbitral/adjudication awards. This is common in privately initiated ADR processes. This paper explores court-annexed ADR processes, its operation and its strengths and weaknesses. A look at the practice in USA and Australia reflects developed court - annexed ADR processes. Closer home in Lesotho and Rwanda courts have trained mediators who help to resolve common problems. This paper will thus assess how these systems operate.

1.1 WHAT IS COURT- ANNEXED ADR?

The concept of court annexed ADR is associated with Professor Frank Sander of Harvard University. At the American Bar Association Pound Conference³ Prof. Sander introduced what has now been referred to as the 'multi-door court house'⁴ in which he looked at the court room as having many doors through which disputes can be resolved. The gist of the concept was to divert cases to a suitable 'door' of dispute resolution. This was to be achieved through the assessment of cases before they went to trial and then referring them to a suitable mode of dispute resolution.

³ The occasion was a conference named in honour of Professor Roscoe Pound. Professor Pound had delivered a famous paper in 1906 entitled 'The Causes of Popular Dissatisfaction with the Administration of Justice'.

⁴ Sander, "Varieties of Dispute Processing", in Levin and Wheeler (eds), *The Pound Conference: Perspectives on Justice in the Future* (1979).

Broadly speaking, court-annexed ADR refers to 'court -connected' or 'court referred 'ADR'⁵. This envisions a court house with multiple dispute resolution doors or procedures. The court therefore assesses matters and refers them to suitable dispute resolution mechanisms before trial. It has been argued that this court -annexed ADR is especially suitable for small claim cases where the dispute involves issues that might best be resolved by some result other than a money judgment (e.g., child custody arrangements, support, separation agreements, housing disputes, etc.)⁶. What then is the role of the courts in the ADR process?

1.2 THE ROLE OF THE COURTS IN THE ADR PROCESS.

It is important to point out at this juncture that the proposition of court-annexed ADR is not aimed at locking out parties from the judicial process completely. The main aim of such a process is to mandate courts to refer parties to other ADR process where it is more suitable or even as a first resort. I will also be cautions to note that there are ADR processes and specifically arbitration where the consent of the parties is paramount.⁷ Be that as it may, the court-annexed ADR has been seen as the panacea to the backlog of court cases in our courts.

In other jurisdictions like in USA, the Alternative Dispute Resolution Act of 1998⁸ requires every district court to establish an ADR program that provides

⁵ Borrowed from the definition of court-annexed mediation by John North, President, Law Council of Australia at the Malaysian Law Conference in 2005.

⁶ Ettie Ward (2007) "Mandatory Court-Annexed Alternative Dispute Resolution In The United States Federal Courts: Panacea Or Pandemic? Legal Studies Research Paper Series available at <http://ssrn.com/abstract=993220> <(accessed on 14th April 2013)>

⁷ S 6 of the Arbitration Act.

⁸ Sec. 4 of the Act provides 'Notwithstanding any provision of law to the contrary and except as provided in subsections (b) and (c), each district court shall, by local rule adopted under section 2071(a), require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation. Each district court shall provide litigants in all civil cases with at least one

litigants with at least one ADR process. The Act authorizes the federal courts to compel participation in mediation or early neutral evaluation. Each district court must, by local rule, require litigants in civil cases to consider using ADR at an appropriate stage in the case.

In Kenya, though we don't have a comprehensive ADR Act, courts have not hesitated to refer parties to other alternative modes of disputes resolution especially where their agreements so stipulate. Odunga. J in *Jimmy Mutinda V Independent Electoral and Boundaries Commission & 2 Others Exparte Shailesh Kumarnata Verbai Patel & 2 Others* [2013] eKLR stated as follows in reference to the decision by Mwera J⁹

In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums. Accordingly I agree that where there is an alternative remedy and procedure available for the resolution of the dispute that remedy ought to be pursued and the procedure adhered to.

Courts have been very instrumental in referring parties to ADR processes and in enforcing the resultant awards/decisions. This has, however, been only limited to "private ADR" or individually initiated ADR. This is common in cases where parties anticipate disputes and provide for ADR processes in their agreements. Courts in such "private ADR" come in only to

alternative dispute resolution process, including, but not limited to, mediation, early neutral evaluation, mini-trial, and arbitration as authorized in sections 654 through 658'

⁹ The judge agreed with Mwera, J (as he then was) in [Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010](#)

enforce the parties' agreements. There have however been few or no incidents where courts *suo moto* have referred parties to the ADR process. What then is the place of court-annexed ADR in Kenya?

1.3 COURT ANNEXED ADR IN KENYA

Art. 159(2) (c) of the Constitution of Kenya laid the foundation for court-annexed ADR in Kenya. The Constitution in requiring judicial authorities to promote ADR mechanisms encourages this 'court-initiated' ADR. There is however yet to be established a clear legislative framework on how the courts are to refer matters to ADR processes.

Order 11 rule 5 of the Civil Procedure Act 2010¹⁰ requires parties to convene a settlement conference at least 2 months before the case conference with a view to pursuing settlement of the matter by the parties. Parties are required to exchange settlement conference briefs stating concisely their admissions and the agreed issues between the parties. There is however no mention of who should assist the parties in reaching a possible settlement. It is normally presumed that by the time parties file suits in court; they have attempted negotiations and did not reach a settlement.

The Chief Justice¹¹ has addressed this issue in the past and has been quoted requiring Judicial officers to embrace the principle of alternative dispute

¹⁰ Rule 5 provides "with a view to providing an opportunity for settlement in every suit to which this Order applies the court shall within sixty days of the case conference in the case of a fast track case, and ninety days in the case of multi-track case, convene a settlement conference for the purpose of –

- a. settling the case or issues in the case; and
 - b. providing the parties and their advocates an opportunity to appear before the court to settle the suit or narrow down the issues.
2. each party shall at least seven days before the date appointed for the settlement conference prepare and exchange a Settlement Conference Brief."

¹¹ DR. Willy Mutunga's speech at the induction retreat for cohesion and integration goodwill ambassadors, Crowne Plaza on 29th August, 2010

resolution in their daily work. He however pointed out that judicial officers do not have monopoly of ADR. He encourages other forums like the council of elders being used before matters are taken to court.

The most developed form of ADR in Kenya is arbitration. Most parties who resort to private, binding ADR would prefer arbitration. Arbitration could be said to be relatively dependent on the courts in the conduct of its proceedings. The courts role in arbitration can be said to be in three stages. At the commencement stage the courts render assistance in the appointment of arbitrators¹² where parties are unable to agree and also in providing interim reliefs to the parties. The second stage is the intermediary stage where parties challenging the mandate of an arbitrator can seek the assistance of the courts¹³. Lastly courts get involved at the point of setting aside, enforcement and recognition of an arbitral award.¹⁴

From the foregoing, it appears that the stage is set for Kenya to adopt court- annexed ADR. There is however, a lacuna on who ought to conduct this court-annexed ADR. Jurisdictions that have embraced court- annexed ADR have trained mediators, conciliators, and arbitrators etc who work hand in hand with the courts in settlement of disputes. The question that then arises is how does such a system operate?

2.0 EFFECTIVE COURT-ANNEXED ADR.

2.1 ADR IN USA

There are many jurisdictions that have adopted court-annexed ADR mechanisms that have been functional for over 30 years. In USA, following

¹² Section 6 of the Arbitration Act

¹³ Sections 13 and 14

¹⁴ Sections 35,36 and 37 of the Act

Professor Sander's 'multi- court' house concept in 1976, the Code of Civil Procedure was amended in 1978 to adopt court-based alternative dispute resolution program involving arbitration.¹⁵ Parties were required to submit to non-binding 'judicial' arbitration. The pilot projects were established in three districts¹⁶ in 1978 on a trial basis. Subsequently, the Federal Rule of Civil Procedure was in 1983¹⁷ amended to provide for increased judicial management of cases through the pretrial conference and explicitly required consideration of "the possibility of settlement or the use of extrajudicial procedures to resolve disputes.

Subsequently, the Alternative Dispute Resolution Act was enacted in 1998 which essentially laid a legal framework for the complete adoption of court annexed ADR. The Act provides *inter alia* that each United States district court shall designate an employee, or a judicial officer, who is knowledgeable in alternative dispute resolution practices and processes to implement, administer, oversee, and evaluate the court's alternative dispute resolution program. Such person may also be responsible for recruiting, screening, and training attorneys to serve as neutrals and arbitrators in the court's alternative dispute resolution program.¹⁸

¹⁵ Eric van Gin Court-Annexed ADR in Los Angeles County available at www.BusinessADR.com <accessed on 17th April 2013>

¹⁶ The three districts were the Eastern District of Pennsylvania, the Northern District of California, and the District of Connecticut

¹⁷ Rule 16(c) (7) of the Federal Civil Procedure Rules and the accompanying Advisory Committee Notes, which state that "[i]n addition to settlement, Rule 16(c) (7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse." Rule 16(c) (7) was subsequently modified in 1993 and is now renumbered as FED. R. CIV. P. 16(c) (9). The 1993 Advisory Committee Notes explain that the revision was made "to describe more accurately the various procedures that, in addition to traditional settlement conference, may be helpful in settling litigation . . . such as mini-trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits.

¹⁸ Section 3 and section 651(d) of the United States Code as amended

Regarding compensation of such neutrals the Act provides that the district court shall, subject to regulations approved by the Judicial Conference of the United States, establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case. A district court may also reimburse arbitrators and other neutrals for actual transportation and other expenses necessarily incurred in the performance of duties¹⁹. The Act also provides for exemption of some cases that ADR would not be a suitable remedy for the parties.²⁰

2.2 ADR IN AUSTRALIA

In Australia on the other hand, court-annexed ADR gained particular impetus and credibility in the early 1990s. In 1992, the then Chief Justice of the Supreme Court of Victoria, Justice Phillips, concluded that delays in the Supreme Court could only be resolved by a “massive and mighty effort using mediation as a vehicle for getting cases resolved.”²¹ This led to the so-called ‘Spring Offensive’ in Victoria in 1992, in which 762 cases waiting for trial were reviewed by a Panel of judges. Two-hundred-and-eighty of these cases were sent for mediation and 104 were settled at mediation. Mediations were conducted mainly by barristers and senior solicitors. There was no training in mediation required. In 1995, the Federal Attorney-General announced the establishment of the National Alternative Dispute Resolution Advisory Council (NADRAC) to foster the expansion of alternatives to court action in civil matters.²²

The Federal Court of Australia at an early stage commenced conducting pre-trial settlement conferences using its Registrars as an adjunct

¹⁹ Section 10 of the Act

²⁰ Section 4(d)

²¹ Supra note 5

²² Ibid

to listing for trial. In the early 1990s, O 10 r 1(2) (g) was introduced into the Federal Court Rules.²³ The Court was empowered to order that the parties attend before a Registrar or a Judge in a confidential conference with a view to reaching a mediated resolution of the proceedings or an issue therein or otherwise clarifying the real issues in dispute so that appropriate directions may be made for the disposition of the matter or otherwise to shorten the time taken in preparation for and at the trial.²⁴

Section 53 A of the *Federal Court of Australia Act 1976*, which was enacted in 1991, empowers the Court to refer proceedings, any part of them, or any matter arising out of them to a mediator or an arbitrator for mediation or arbitration in accordance with the Rules of the Court²⁵. However, words said or admissions made at conferences conducted by a mediator under s 53A are not admissible in any court²⁶.

The practice in USA and Australia reflects developed systems that have embraced court-annexed ADR. The systems have operated effectively as the laws of their lands have made specific provisions on what ought to happen when the matters are referred to ADR by the courts. In Kenya however, while the Constitution expressly encourages judicial authorities to promote ADR, there are no clear guidelines on how this ought to be done. If Kenya was to adopt such a system, the following issues ought to be addressed:

- a. who should conduct the court annexed ADR processes?
- b. who meets the cost of the neutral?
- c. what's the effect of resultant decisions?

²³ Chief Justice Robert French (2009) *Perspectives on Court Annexed Alternative Dispute Resolution Law Council of Australia – Multi-Door Symposium* available at www.hcourt.gov.au/assets/publications (<accessed on 12th April 2013>)

²⁴ Ibid

²⁵ Federal Court of Australia Act 1976 (Cth), s 53 A (1).

²⁶ Federal Court of Australia Act 1976 (Cth)

- d. are parties bound by the decisions?
- e. will evidence adduced at such forums be admissible in
- f. judicial proceedings in the event that settlement is not reached?
- g. what is the place of judicial officers in the proceedings?

2.3 ADR IN LESOTHO

Closer home in Lesotho, courts have embraced what were originally traditional dispute resolution mechanisms. In Lesotho, courts have embraced court-annexed mediators. Currently, all the designated mediators are Court personnel -Assistant Registrars and Judges' Clerks who through the assistance of the International Law Institute - African Centre for Legal Excellence (ILI-ACLE), with funding from the Millennium Challenge Account - Lesotho, received intensive training on Mediation theory and practice.²⁷

The mediation process is governed by the High Court Mediation Rules which were published in Gazette No. 48 of May 26, 2011. A typical court annexed mediation process starts with lodging pleadings at the High Court. A case file is opened in the High Court and in the pleadings each party includes a brief statement indicating whether that party consents to or opposes a referral of the dispute to mediation under the Court Annexed Mediation (CAM) programme. If a party opposes the referral to mediation, then upon proper cause being shown by that party, the Mediation Administrator makes a recommendation on that party's motion for

²⁷ Lesotho legal information Institute 'The Introduction of Court Annexed Mediation in the High Court and Commercial Court of Lesotho' available at http://www.lesotholii.org/content/court-annexed_mediation (<accessed on 19th April 2013>)

exemption from mediation under the CAM Rules. This process applies to cases filed from the commencement of these Rules.²⁸

2.4 THE GACACA SYSTEM OF RWANDA

In Rwanda, the *Gacaca*²⁹ courts have incorporated elements of African dispute resolution and Western-style criminal courts to address a violent past. The Rwandan Government in 2001 decided to establish up to 11,000 *gacaca* courts. The courts were headed by the *Inyangamugaya* – “people of integrity”- who were suggested and elected by the local community. Community members were not only spectators, but also active participants whose accounts and testimonies directly influenced the trial and, subsequently, the verdict. Finally, in many cases the courts would sentence the guilty parties to community work instead of prison. This approach reduced the number of prisoners and supported the re-integration of perpetrators into society.³⁰

The Rwandan situation is more of introduction of ADR into the criminal justice system. Such a system obviously has its own challenges especially regarding the principles of a criminal justice system. This paper will however not delve into those

2.5 WHAT ARE THE STRENGTHS AND SHORTCOMINGS OF COURT-ANNEXED ADR?

Many of the arguments against traditional litigation are in favor of a shift to court- annexed ADR process. It has been argued that court annexed ADR is

²⁸ Ibid

²⁹ *Gacaca* – literally meaning “grass” – were local community courts in which victims and perpetrators of the genocide presented their narrative of the case

³⁰ Thomas Hauschildt (2012) *Gacaca Courts and Restorative Justice in Rwanda* available at <http://www.e-ir.info/2012/07/15/gacaca-courts-and-restorative-justice-in-rwanda/> (<accessed on 19th April 2013>)

the panacea to the back log of cases in our courts. By assessing cases that are amenable to ADR and referring the same to a suitable dispute resolution mechanisms, courts will be relieved of cases that would take much of its time yet they could be easily solved by other modes of dispute resolution.

Also, this process has been echoed for being less time consuming and cost effective, giving more satisfaction to the parties. To echo Chief Justice Burger, there has to be a "better way."³¹ Judges are increasingly socialized to the concept that "the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement."³²

In addition, parties have greater control over the decision-making process, especially in the identification and presentation of evidence; and they perceive the process as fair, especially in the sense of the perceived openness of the procedures and the opportunity to have "voice" in the proceedings.

This mode of ADR has its own weaknesses. Some commentators have argued that "ADR's legitimacy is eroded by its association with compulsion." Parties (and/or their counsel) who have chosen court process rather than private ADR and have not voluntarily opted for court-assisted ADR may become hostile to the process³³.

A separate but related concern is that the less formal ADR resolution procedures might turn out to be a time wasting process as parties are given the option of litigating in the event of a complete impasse especially in mediation. Also the informality of procedures and absence of any transcript or record, and the lack of reviewability contribute to these concerns.³⁴

Despite its weaknesses, the benefits of court-annexed outweigh its shortcomings. The process is not only beneficial to the parties but also to the judicial system.

2.6 THE CHALLENGE OF IMPLEMENTATION

³¹ Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 273 (1982)

³² *Supra* note 6

³³ *Ibid*

³⁴ *Supra* note 6

The concept of the court-annexed ADR as a part of judicial system is feasible. A pessimist may see many impediments in the implementation of the court-annexed ADR and would think about the unimaginable cost of establishing such a system in our crawling economy. However, for a country which in the recent past has been keen on expeditious disposal of cases, it is not impossible to make budgetary allocation for a beneficial cause, which, in the long run, can solve one of the ugliest problems of a fast developing country. Moreover, the importance of ADR has already been established by Article 159 of the Constitution of Kenya, 2010.

If court annexed ADR can be implemented with determination, it will enable the country to carry out a major legislative intent and provide to the nation a stimulant for the growth of its commerce, industry and global interests.³⁵ It will provide a new and fresh solution to the ailing problem of delays in the court. The present delay in disposal of the cases is likely to create a crisis of confidence. It requires a resolute determination and strong will to infuse the court annexed ADR in the Kenyan legal system.

3.0 CONCLUSION

Court-annexed ADR is a challenge worth undertaking. It will be a daunting task but not impossible to implement. Court-annexed ADR will solve the problem of the backlog of cases in our courts. The court annexed umpires can be drawn from members of the bar, i.e. experienced lawyers, law professors, leading and respected businessmen and even the retired bureaucrats. However, a basic training for neutrals, from whichever class they are chosen, would be essential. If such a system can provide affable alternative to litigants, the parties will go home with greater satisfaction, and lesser time spent for resolution of their disputes, they will be more willing to participate in the process.

³⁵ Niranjana j. Bhatt *Court Annexed Mediation*

**A NEW PARADIGM FOR HANDLING DISPUTE
RESOLUTION IN FINANCIAL
SERVICES IN COMESA: ADDENDUM**

by **PHILLIP ALIKER**

1.0 A TEN YEAR-OLD THESIS 2003

Ten years ago, I suggested in a thesis that the Member States of the Common Market for East and Central Africa ought to establish a uniform scheme for the resolution of financial services disputes. Drawing on the experience of South Africa's Ombudsman for Banking Services and the UK's Financial Ombudsman Service, I argued that the trend towards consolidation in the financial services sector coupled with cross-boarder trade (as a COMESA Treaty object) required the adoption of an international standard for the resolution of financial services disputes.

2.0 TEN YEARS ON; 2013

In April 2013, KPMG produced a satisfaction survey entitled "*African Banking Industry Customer Satisfaction Survey*". The survey focuses on customer satisfaction in the banking industry across 14 countries in Africa. The report reflects the perceptions of customers using a "Customer Satisfaction Index" ("CSI") and gauges customer satisfaction using five weighted measures including convenience, customer care, transactions (methods and systems), pricing, products and services.

On the issue of customer care, the KPMG researchers concluded that:-

"African banking customers overwhelmingly (94%) voted 'staff friendliness' as the most important factor influencing their satisfaction

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with their bank. Yet while eight in ten [80%] expressed satisfaction with this element¹, results for other customer care elements were rather weak across the continent: just three in ten [30%] customers said they were very satisfied with their bank staff's knowledge of banking products and only ten percent indicates that they were extremely satisfied that their complaints were being promptly addressed"²

The drawback to efficient and effective complaints handling arising out of the over-familiar relationship between customer and banker is evident from an analysis of channel supply. Most African customer use branch services. The KPMG report states that 80% of customers are content with "staff friendliness" but less satisfied with staff knowledge of banking products by a margin of 50% and even fewer were satisfied with customer complaints handling by a huge margin of 70%. It is axiomatic that inadequate staff knowledge of products is a factor leading to customer complaints.

Of significance to the thesis, the KPMG researchers wrote:-

"Excellent customer service should not be limited to branch visits alone, but must be carried through to all delivery channels such as call centres and internet banking...bank's understanding of their needs and being proactive in presenting alternatives is important to them, which highlights the fact the banks need to constantly be steps ahead of the customer by developing various ways of resolving customer issues and problems efficiently and effectively. Developed economies such as Australia and the United Kingdom

¹ Perhaps this is symptomatic of a cultural priority for congenial relations with less emphasis on quality and delivery.

² KPMG Africa Banking Industry Customer Satisfaction Survey, Executive Summary April 2013

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have established financial ombudsman services that independently settle complaints about individuals and business that provide financial services to customers. We are witnessing the same trajectory in the African landscape, with the most sophisticated banking sector in the continent – South Africa – already with a financial ombudsman...”

The “trajectory” described by the researchers is, by and large, limited to requiring regulated financial services entities to comply with certain consumer protection standards or guidelines and to put in place internal systems for complaints handling. However, what is required (and this is the point of the thesis) is the establishment of an independent ombudsman service to resolve all financial services disputes. The regulatory requirements to establish internal complaints handling mechanism (even coupled with the reporting requirements) do not go far enough to empower consumers of financial services in dispute with financial service product providers. What is required is a single ombudsman service with powers of investigation, adjudication and determination of all disputes in the event that the customer is dissatisfied with internal complaints handling. It is a significant sign of the times that the UK Financial Services Authority is now known as the Financial Conduct Authority, the emphasis being on conduct.

3.0 THE CURRENT REGULATORY REGIME FOR BANK CUSTOMER COMPLAINTS IN UGANDA

The state of consumer complaints in the banking and insurance industry in Uganda is explained in the attached paper. In 2003, banking customer complaints were addressed by the banks with a right of complaint by the customer through the Uganda Bankers’ Association. Similarly,

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insurance customer complaints were addressed by the insurance companies with a right to escalate the complaint to the Uganda Insurance Commission³.

Matters have moved on somewhat because in 2011 the Bank of Uganda as the regulator of banking in Uganda issued the *Bank of Uganda Financial Consumer Protection Guidelines 2011* (“the Guidelines”). The objective of the Guidelines is to protect the consumer and the small firm which has suffered or may suffer (i) financial loss (ii) material inconvenience and (iii) material distress. “Consumer” is defined as “an individual or a small firm who uses, has used, or is or may be contemplating using, any of the products or services provided by a financial services provider.” It is worth noting that like the Financial Ombudsman Scheme in the UK, small business also fall within the scope of the protection. A “small firm” is defined as “a firm which employs up to ten (10) individuals only.” A reference to financial turnover may have been more helpful.

That said, the criticism in the thesis that in 2003 Uganda lacked any consumer protection legislation is no longer entirely accurate. Under the Guidelines, consumers in banking are indirectly accorded some protection through the regulatory requirements imposed by the Bank of Uganda. However, the Guidelines do not give the consumers independent rights and the sanction for non-compliance would appear to be limited to sanctions against the bank by the Bank regulator.

The objective of the Guidelines is to:-

- a. promote fair and equitable financial services practices by setting minimum standards for financial services providers in dealing with consumers;

³ The Insurance Act 2004 (Cap 213)

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- b. increase transparency in order to inform and empower consumers of financial services;
- c. foster confidence in the financial services sector; and
- d. provide efficient and effective mechanisms for handling consumer complaints relating to the provision of financial products and services.

The relationship between the financial services provider and the consumer are guided by three key principles:-

- a. fairness;
- b. reliability; and
- c. transparency⁴.

As to fairness, the Guidelines provide that the financial services provider shall act fairly and reasonably in all its dealings with the consumer. In the absence of any guidance as to reasonableness, this general requirement is unhelpful. That view may be compounded by the character of the prohibited acts identified under paragraph 6(b) which are all patently unreasonable and in all likelihood an infringement of some other statute or other law.

However, the requirement for reasonableness may actually compel banks to give the customer the benefit of any doubt because the only requirement is to be reasonable and not to accord the customer their strict legal rights.

The UK Ombudsman is under a similar obligation. DISP paragraph 3.6 of the Financial Conduct Authority Handbook provides as follows:-

⁴ Guidelines paragraph 5

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“The Ombudsman will determine a complaint by reference to what is, in his opinion, fair and reasonable in all the circumstances of the case...”

(Guidance) Section 228 of the Act sets the 'fair and reasonable' test for the Compulsory Jurisdiction (other than in relation to consumer redress schemes) and the Consumer Credit Jurisdiction and DISP 3.6.1 R extends it to the Voluntary Jurisdiction.

(Guidance) Where a complainant makes complaints against more than one respondent in respect of connected circumstances, the Ombudsman may determine that the respondents must contribute towards the overall award in the proportion that the Ombudsman considers appropriate.

In considering what is fair and reasonable in all the circumstances of the case, the *Ombudsman* will take into account:

1. relevant: -
 - a. law and regulations;
 - b. regulators' rules, guidance and standards;
 - c. codes of practice; and
2. (where appropriate) what he considers to have been good industry practice at the relevant time.”

Part III of the Guidelines establishes procedure for handling complaints by a “financial service provider” regulated by the Bank of

Uganda. The Guidelines require the financial services provider to have in place and operate appropriate and effective procedure, which it has documented, for receiving, considering and responding to complaints.⁵ The thesis refers to BS 8600:1999 (Complaints management Systems - Guide to Design and Implementation) which has now been superseded by the international standard BS ISO 10002.

The Guidelines provide that there should be a substantive response (“final response”) by the end of two weeks after it has received the complaint. An allowance is made to the timescale to cater for delays occasioned by the complainant providing further information.

The financial service provider is obliged to report all complaints not resolved “by the end of the business day after it received the complaint” i.e. within one working day. Nothing is said in the Guidelines about what action, if any, the Bank of Uganda will take in default of providing adequate redress. It remains a possibility that the customer would have to pursue alternative remedies through the Courts.

4.0 THE CURRENT REGULATORY REGIME FOR INSURANCE CUSTOMER COMPLAINTS IN UGANDA

The Insurance Regulatory Authority of Uganda (successor to the Uganda Insurance Commission) continues to offer a complaints escalation procedure through the Uganda Insurance Bureau. The scheme is managed by the industry and lacks independence.

⁵ Guidelines Regulation 9(2)

That apart, making a complaint about insurance products has been hugely simplified by the provision of an online complaints form⁶. The facility assumes a high correlation between the insured and computer literacy.

5.0 THE CURRENT REGULATORY REGIME FOR BANK CUSTOMER COMPLAINTS IN KENYA

The Central Bank of Kenya promotes a scheme which is very much like the Uganda scheme founded on guidelines called Guidelines on Consumer Protection – CBK/ PG/ 22, made pursuant to section 33(4) of the Banking Act (Cap 488).

The “purpose” of the Kenya Guidelines is virtually identical to the “objectives” of the Uganda Guidelines. The purpose of the Kenya Guidelines is to:-

- a. promote fair and equitable financial services practices by setting minimum standards for institutions in dealing with consumers;
- b. increase transparency in order to inform and empower consumers of financial products and services;
- c. foster confidence in the banking sector; and
- d. provide efficient and effective mechanisms for handling consumer complaints relating to the provision of financial products and services.

⁶ <http://www.ira.go.ug/complaints.html>

Part IV paragraph 4 sets out the provision for Complaints Handling and Consumer Recourse.

Although the Guidelines purport to provide a clear framework for protecting customers against the risks of fraud, loss of privacy, unfair practices and lack of full disclosure, like the Uganda Guidelines, the Kenya Guidelines do not appear to offer the customer redress in the event that the financial services product provider refuses to comply with the Guidelines.

However, the similarity between Uganda and Kenya ends there. On 14 March 2013, the Consumer Protection Act 2012 (“CPA”) came into force in Kenya. With this single piece of legislation, Kenya has taken a huge step to bring its statutory consumer protection into line with the best international standards. That aside the CPA does not offer an adjudicatory scheme for customer complaints; customers are still required to fall back on legal proceedings.

6.0 SHORTCOMING OF THE CURRENT COMPLAINTS ARRANGEMENTS

The KPMG Survey results show 70% dissatisfaction with staff knowledge of banking products. The regulators should be concerned as to whether complaints are actually being properly addressed by uniformly competent staff.

Though it is appropriate that complaints should, in the first instance, be dealt with “internally”, to ensure that the more difficult disputes are resolved quickly and with the minimum of fuss and so that systemic issues are identified early, there should be an independent forum for the resolution of disputes.

Mediation in its purest form is wholly unsuited to the resolution of all disputes where there is such an obvious inequality of arms. The task of the mediator is to create doubt and to procure a settlement. The skill required in many financial services disputes (where there is little scope for

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compromise) is more akin to that of an inquisitor. The ombudsman must have the power to investigate, adjudicate and determine all disputes. An assessment, mediation, recommendation and determination each have a role to play in the resolution of financial services disputes.

7.0 CONCLUSION

The argument for a new complaints handling system across COMESA based on the South African Ombudsman for Banking and/ or the UK Banking Ombudsman schemes is made in the 2003 paper⁷. Complaints handling has moved on in the member states of COMESA but it has not yet achieved parity with South Africa.

Perhaps the way forward is for the Chartered Institute of Arbitrators Kenya Branch to set up an Ombudsman Service funded by the financial services industry to empower consumers in accordance with the purpose and spirit of Article 159(2) (c) of the Kenya Constitution.

⁷ Phillip Aliker, Part Xvi of the Financial Services and Markets Act 2000; a Template for Financial Services Dispute Resolution in Uganda, 2003. (Paper available at www.ciarkkenya.org/Articles.html).

JUSTICE THROUGH EMPOWERMENT: A TRANSFORMATIVE DIFFERENCE

by **LESA B. MORRISON***

ABSTRACT

The theme of this conference is 'achieving access to justice through alternative dispute resolution'. But there is an important outcome that must first be achieved so that any justice obtained is both experienced as such by participants and long lasting. This is whether 'access to justice' is through formal or alternative dispute resolution. That outcome is empowerment. This paper discusses what this concept means, especially in the Kenyan context, why it is so important, and how it can be achieved most readily through a particular mode of mediation. The author cautions too ready adoption of vehicles presumably used traditionally for mediation that may be more myth than fact insofar as avenues for participant empowerment and ultimate sense of justice are concerned.

1.0 INTRODUCTION

The theme of this conference is 'achieving access to justice through alternative dispute resolution'. There is an important outcome that must first be achieved so that any justice obtained is both experienced as such by participants and long lasting. This is whether 'access to justice' is through formal or alternative dispute resolution. That outcome is empowerment. This paper discusses what this concept means, especially in the Kenyan context, why it is so important, and how it can be achieved most readily through a particular mode of mediation called transformative mediation. It also cautions too ready adoption of vehicles presumably used traditionally for mediation that may be more myth than fact insofar as avenues for participant empowerment and ultimate sense of justice are concerned.

* Ph.D

2.0 ACCESS TO JUSTICE THROUGH FORMAL MEANS

I begin with a story. In August, 2012, a fire completely destroyed six flats in the Mishomoroni section of Kisauni, Mombasa, making national news in Kenya. After an electrical power outage, a power surge sparked a blaze that turned the place to ashes. The residents lost everything. According to one, the power company acknowledged responsibility for the fire. The tenants recorded their losses in a police statement and with the fire and rescue department, and each made an application to the power company as they were requested. But while the power company apologized and wrote in December that they had forwarded the applications to its insurance company, six months later the residents were still waiting for compensation. They were less than hopeful about receiving any tangible response. As one wrote:

This is Kenya; we wake up every day hoping to see a new day with good positive things which normally don't happen. I just hoped to be paid by this [company] but chances of being paid are very slim nearly zero percent. I'll keep on hoping to be paid.¹

Wanting to be helpful², before talking to the tenant (in case I received no response from those to whom I would write) I asked three lawyers if they might know of a lawyer in Mombasa or would themselves be willing to assist

¹ Personal email communication from tenant, April 17, 2013.

² My response was problematic in itself, classically what has been done in development work to poor effect. Without interested parties having choice at every step of the process, intense efforts without their inclusion can result in dead ends. This will become clear in the pages that follow, although in this case, the subsequent decisions were the tenants' own.

persons who could not pay³. One wrote that he didn't know of a lawyer in Mombasa, but that in a case such as this, the parties could go directly to court without a lawyer. Another wrote that if all the parties gave him all the necessary documentation showing their losses along with their bank account numbers, he would be willing to write a demand letter (and only a demand letter) on their behalf. Delighted, I wrote back to the tenant, thinking that this could only help. But the tenant wrote the following:

[I] hope that I won't be cornered owing to the fact that MOST people nowadays are ONLY interested on personal gain. The Lawyer you talked of MUST take care of these documents and shouldn't be used without my permission. In other words I DON'T TRUST him since he comes from [a certain part of the country⁴] I NO trust. I have heard cases of Lawyers from these places conning clients. Before any proceeding I wish to meet him in person or else I won't grant the permission to be used like other [persons in my condition], and I can constitute any legal proceeding against him if he goes against my wish.

Otherwise, I wish to be helped but in a dignified way not as a vessel to someone [s] success. I [d] rather die poor but not to be used.⁵

³ Access to justice through formal court systems is of course also stymied because of costs prohibitive for many. Not only are there the actual court costs, but there may also be costs of transport to and from the venue, where their case may or may not be heard. In one such case, a man went to court, only to be told to return three months later when the apprehending officer was not present (Personal communication, July 19, 2013). Also see fn 12. Such issues are discussed even on public radio (e.g. Radio Salama, Sunday May 25, 2013).

⁴ As it so happened, the lawyer wasn't from this part of the country at all. But it made no difference, as will become clear.

⁵ Personal email communication with tenant, May 20, 2013

After a conversation in which we clarified the lawyer's heritage and he read again the correspondence the lawyer had sent, he determined that he would discuss the matter with the other tenants. But despite various meetings, his conclusion was as follows:

I tried talking to my FIVE majirani⁶ but all in all they do fear sending or even talking to someone whom they cannot be what will be going on from him face to face. I have tried but they have declined.

Because of fear of what the lawyer himself might do with their documentation, either because they had heard stories of people being taken advantage of – or having experienced that they were taken advantage of – or because they had had distressing experiences themselves, the tenants opted to simply wait for a response from the insurance company, all the while expecting that no response would be forthcoming. It was better to have lost everything they owned (the tenant with whom I spoke accrued losses over 385,000 Kenya shillings) – to proceeding with the matter. And despite the fact that I mentioned in a number of correspondences that the tenants had the option of going to court on their own, this was never acknowledged.

There is no access to justice if aggrieved parties refuse to walk through the door. And as described through this story, even in a case where parties have a claim deemed legitimate even by the company from whom they are asking compensation, this does not mean they will actually see what is owed them, simply because parties do not trust that the processes or those entrusted within designated institutions will actually safeguard their interests. How much worse then the many cases where parties' claims do not seem so clear-cut. Between distrust of their treatment and pure trepidation of the material institution, of literally walking through the door, the barriers to entry can be great. There is no access to justice if people perceive the very

⁶ *Majirani* is the Kiswahili word for neighbors

way to justice will in itself be unjust. Even making it to court and receiving a judgment that an observer might consider just may well not land that way for a participant passive in the process. They prefer to lose what might appear to be everything (or which they themselves have described as everything) than to risk proceeding in a venue in which they again forfeit control, re-introducing the very emotions that would have emerged with the original event that had them seek justice in the first place. Fear, distrust, and ultimately, disempowerment trump action.

However, despite their reservations about engaging with formal procedures, the tenants are clear with their requests. They ask to be fully included in all steps of the process, and that there be transparency, integrity, and consideration. All these are precursors to justice, necessary for it even to be entertained as a possibility. But experiencing any of these, even if others might consider them present, requires a certain modicum of empowerment, without which people do not act.

3.0 ACCESS TO JUSTICE THROUGH ALTERNATIVE DISPUTE RESOLUTION (ADR)

This single case highlights an issue that is surely widely felt with respect to formal court proceedings. So what of access to justice through alternative dispute resolution (ADR) mechanisms? Further, since I have noted above that justice to a bystander may not mean justice to those concerned, what does justice mean to any of those parties attempting to access it? I'll begin with the second question first.

3.1 CONSIDERING JUSTICE

To start, justice presupposes a sense of some wrong to be righted. The very consideration of justice does not exist without this sense of lack. It would not be pursued otherwise. Along with this sense of wrong and lack comes an expectation of redress of some sort, be it monetary, punitive, or a form of conciliation. Moreover, this lack comes with a sense on the part of

affected parties of a dearth of equitability, mutuality, and consistency or even handedness. 'Justice' is thus a just and fair outcome *as determined by parties* who have experienced themselves as wronged. It is an outcome that includes strategies that they reckon will satisfy these previously missing qualities, qualities that might otherwise be garnered for others in different ways.

Hence, alternative channels can be equally problematic. Proclaiming an alternative as such is meaningless if people perceive it as more of the same: facilitators who portend to have the best interest of all those who come before them at heart who demonstrate through their actions that 'best interest' is as *they* define it, all too often far afield from that which those seeking redress would want for themselves either left to their own devices or accorded a setting in which they could generate ideas. The type of process and the philosophy and actions of the practitioners enable or disable the ultimate sense of justice, whatever the result may be.

That is to say, 'alternative dispute resolution' may be alternative to the judicial court system, but this does not then mean that there are not within that designation more alternatives. This is true not simply in form – arbitration versus mediation, say – but also in philosophical approach. And, as declared earlier, if a priority of those involved in the process is not participant empowerment (about which there will be further discussion below), and if the philosophy and methods employed are anathema to this criterion of justice-as-experienced, then justice will no more be accessible here than it might have been through courts.

To elucidate further, arbitration is close in its form to the court case. It entails someone deciding for others their fate and determining questions of right and wrong. A distinction to ease entry is if participants can choose the arbitrator. At the very least, this meets the exemplar aforementioned tenants' requirement of inclusion in a process, and with that, some empowerment. But because arbitration cannot ensure choices for participants at each step of the process, because there is still a third party designated to decide, the method cannot ensure an absolute sense either of empowerment, or, as follows from this, of absolute justice. This is certainly

the case if all parties involved are considered, since the very arbitration model, like that of court proceedings, presumes a win-lose situation, where one party is right and another is wrong.

3.2 *MEDIATION*

Mediation might be little better, or it might be a good option, one in which participants feel incredibly empowered and certain they have indeed accessed justice or that it is a possibility. It depends greatly on the facilitators involved, the relationship they have had with the parties and the assumptions these parties have about them, and ultimately, the facilitators' intentions. Moments in which participants either see (from body language), feel (from their experience of facilitator openness, peacefulness, or aggressiveness) or hear (from facilitators' statements or questions) the true presuppositions and considerations of mediators (as opposed to what they say they desire) distinguish the degree to which they feel empowered, and the degree to which they sense they are determining their own destiny. This latter outcome is something little regarded by many mediators. This is a shame, for research, at least in other contexts, has shown that those who have this experience ultimately feel more satisfaction with the results achieved out of mediation, whether there has been an 'agreement' between or among parties or not.⁷ Also, most likely, though indirectly, there has been the possibility of grounding more deeply than they could have through any other option stronger foundations for ensuring they act, without a sense of concern or intimidation in subsequent incidents in the future in which they experience lack of justice, whether they choose formal courts, an alternative dispute resolution mode, or some other means, including those of social

⁷ See Robert A. Baruch Bush, (1996), "Mediation's 'Value-Added' For Negotiators." Ohio State Journal on Dispute Resolution. Vol 12:1. Pp. 1-36.

protest or other manners of achieving social justice.⁸ That is to say, a certain way of mediating may have repercussions way beyond the considerations simply of the case or the particularities presented. It can help with training and development of all parties involved – including the mediators themselves – that aids with the development of a justice-filled society, one in which there is mutuality, equitability, transparency, and consistency, because more citizens are equipped both to help facilitate others acting for themselves and appreciate its value and to see for themselves that their choices might be respected, and because such citizens then are more likely to insist that broader institutions then also respect the values they hold dear.

This is not to say that all cases are best handled through mediation. Cases where there are clear disparities of power such as those where persons are still being physically threatened and need a means to ensure another stays clear is one such situation. Additionally, the first instance of empowerment, of actually walking through the door, may not be present for mediation either, and voluntary cooperation is a necessary precondition for the process to work. People may be so disempowered, or be so habituated to a judge or arbitrator needing to decide for them, that the very idea of walking in a room to decide for themselves may be culturally grounded as ridiculous⁹. Alternatively, an aggrieved party may feel so empowered to use the court system, so certain of the wrong against him and of the corrective measures that can be – as he determines should be – ordered in court that he will only consider that means. As one such aggrieved party said, people are intimidated by police who tell them they must pay 60, 000 Kenya shillings

⁸ See Robert A. Baruch Bush and Joseph P. Folger, (2012) “ Mediation and Social Justice: Risks and Opportunities,” *Ohio State Journal on Dispute Resolution*, ISSN 1046-4344, 2012, Volume 27

⁹ In 2006, I experienced such a case, when a Latino woman from Central America declined mediation with a former partner because she understood that the correct processing of such a case was through the courts, even though the courts had provided the facilities for such family mediation.

to clear a case when they have done nothing wrong. "I know my rights", he said, telling me of an incident in which a bicyclist did not cede the right of way and ran into his vehicle and did not survive.¹⁰ But where mediation is accepted as an option, perhaps because of historical precedent of practices that seem on the surface to be similar such as arbitration *cum* mediation in villages throughout Africa, where parties themselves are willing to engage, the potential for access to their own empowerment – and thus their perceived sense of justice – is great.

3.3 DISTINGUISHING MEDIATION'S ESSENCE

More on distinguishing mediation's essence is in order here. That which is accorded the name mediation is not necessarily mediation in fact. That is because the designation 'mediation' presupposes certain attributes that may or may not be present in a particular case. For one, the mediator must be neutral, without any interest of his or her own and without bias for either of the parties. Second, the mediation process must be held in confidence. Third, the results of mediation must be determined by the parties themselves rather than by the mediator or any outsider. Furthermore, these conditions must be present in fact rather than simply in word. That is to say, just because a mediator *says* that he or she is neutral, just because he or she *says* that outsiders will not be privy to that which occurs and will not have a say in decisions, just because she or he *says* that she or he is sincerely interested in parties themselves creating solutions or otherwise establishing outcomes and is perfectly fine with them taking the time they need so that they are comfortable with their decisions at every step of the process, none of these is what often takes place. Because people are people and naturally carry biases, either because their experiences have accorded them an affinity for certain people of certain gender, educational attainment (or lack thereof), age, or ethnicity, or because people naturally fill in the blanks of stories about

¹⁰ Personal communication, 43 year old Kenyan man living in (the formerly called) South Nyanza, July 6, 2013.

other people on the basis of their own experiences or what they think they should accomplish within a particular timeframe, little aware of all that the parties may not be sharing (including traumatic moments of rape, incest, or other violence either at the hands of the parties present or others), even though these may little resemble the parties' own situation, the mediators may guide parties to a particular result without even being conscious of their doing so. Or even if they are conscious of what they do, because they can't possibly comprehend all of the parties' experience and understandings, the results may little correspond with what will fit in parties' own lives or proclivity to work with them.

Consider, for example another story from a village in western Kenya that illustrates this point. It matters little that the people involved were not party to mediation. The principle is the same. Rose¹¹ is an eighteen year old mother of three year old twins and her deceased sister's toddler. She has retreated to a great aunt's house to live. She, her great aunt and her uncle Odhiambo (her great aunt's son) held a conversation after supper one evening. She was headed to court the next day in hopes of being granted a divorce from her twins' father. His mother, she said, had chased her from that home, and she did not want to have anything to do with him anyway. As the three talked, she was clearly afraid. Uncle Odhiambo spoke to her. This is what will happen, he said. You go to court and they will call your name. They will call his name. And you will merely tell the court that you want a divorce, that you have three children to take care of, that he is a thief - that is his reputation today - and with the new constitution that says you now have the right to a portion of your father's land, you will ask the court to ensure that your family gives that to you. Uncle Odhiambo walked away from the gathering and she looked overwhelmed. Most decidedly she hadn't taken what her uncle had said as what was best for her to do. All she said over and over again, in her vernacular tongue and Kiswahili, was 'I don't want him'.

¹¹ The names here and that follow are pseudonyms.

Uncle Odhiambo and I stepped out and discussed the matter. She isn't all there, he said. Haven't you noticed? She says things that don't quite correspond and everything doesn't quite fit together. She's barely had any education. I responded that perhaps she needed to feel heard first before anyone started strategizing for her, and that perhaps the only person to strategize for her, despite her young age and her educational level, was Rose herself. Uncle Odhiambo went back to further the conversation with Rose. When he returned he said that Rose had opened another chapter. She revealed that her father had died, her mother had died, her grandfather had died, and two other brothers had died, all within a short time span, on that family property on which he advised she live. The only person left living there was an uncle. She was literally deathly afraid of settling there. When Uncle Odhiambo learned that, he reconsidered his opinion of Rose. I have tossed my advice, he said. What she says makes a lot of sense. And later, when referring to Rose, he said, you know, she looks stupid. But she's really clever.¹²

The same easily happens in mediation. A facilitator determines his own role – all too often in Kenya as counselor¹³ – and relates to a party as whatever he understands it means to be 'young', 'uneducated', 'female', of a certain 'tribe', or any other criteria. Uncle Odhiambo stated that he had told Rose that he was now her father, so she needed to listen to his advice. Other members of a community relate to other community members in particular, long standing ways. Indeed, readers of this paper who are familiar with Kenya will likely have decided a series of traits held by Uncle

¹² As it turned out, Rose spent a day sitting in court only to be told she would have to return with the children the following Monday. Later I learned that she didn't want anything to do with the man, despite his wanting her to be with him, except for provision for his children, because he had taken another wife.

¹³ This assertion is based on over four months of observations.

Odhiambo himself without ever having met him, simply on the basis of hearing his name and thus establishing ethnic affiliation.¹⁴

4.0 ELDERS AS MEDIATORS

This is precisely the concern about utilizing community members with pre-established, well-understood roles as mediators. With the passing of the new Kenya constitution in August 2010 legitimizing ADR and so-called 'traditional' methods of mediation, organizations are 'rediscovering' the use of elders as mediators and incorporating them into their projects, presumably re-grounding what has always been. It is widely understood that there is nothing new about mediation, that it has been practiced for generations. Indeed, it is highly 'African' and 'traditional' for parties to meet in a locale such as under a tree with an elder to resolve disputes (see, for instance, Muigua 2012). At least two such groups – one university based and one a non-governmental organization (NGO) – have come to my attention as designing such elder-focused projects.

Certainly, the image of elders sitting under a tree with villagers in conflict to decide their cases is a powerful one. But little if anything about the elder-villager relationship suggests that this strategy would be wise. This is for various reasons. First, it is unlikely that either 'traditionally' or now there has been such a thing as an elder who would either simply allow or encourage parties to generate their own solutions or simply hear them rather than offer them advice or solutions or, worse, decide in favor of one party over the other, forfeiting an idea that both parties might benefit from the encounter and give something willingly. Moreover, it is doubtful either that elders could hold a philosophical approach that would be useful for citizen empowerment or be considered by villagers in such a way that the latter might access justice as they would fully consider it. If the relationship, if the understanding of villagers has been that elders are those held in higher

¹⁴ Those familiar with Kenya will recognize 'Odhiambo' as a Luo name.

esteem whose opinions and decisions are to be respected above their own, if elders have always been turned to as arbitrators rather than mediators (meaning that they are turned to to decide cases rather than to help facilitate parties' deciding cases for themselves), and if the elders themselves see their stature in this way (as would be expected), then surely it would be exceedingly difficult if not impossible to surmise that the relationship could now be different, that elders would be willing (or anxious) to drop their expected role of being decision-makers in favor of villagers' determining for themselves. Nor would it be likely that villagers could see them in this light. Additionally, the power disparities between men and women in rural areas have been so ingrained in the fabric of decisions (given the rules that have been enforced over generations with respect to such issues as property distribution, despite new laws in Kenya giving inheritance rights to females) then it is beyond the pail of credulity to think that elders would now be neutral, without allowing their own biases to creep in to the conversation under that tree. In short, roles have been too clearly understood for the relationship to now change to one privileging parties. Elders are regarded with respect, as those who can and might and even should decide for one. The result may be accepted, because that is what villagers have learned to do with respect to elders, *because* they have been accorded this position as wise sage. But this does not mean that parties are left either empowered or with a solution that might provide grounding for future encounters they may have, either in their village, or most especially in terms of their relationship with the greater Kenyan society.

Using elders may be but a temporary solution to ensure a modicum of peace and community stability. But the costs may be great in terms of present and future lost opportunities in training and appreciation of villagers' own capacity for decision-making. Additionally, the view of elders as wise sage may be greatly myth. Indeed, one lecturer who wrote about elders as having traditionally 'mediated' noted in a private communication

that in fact, many had little regard for women, were obnoxious, and were feared by community members.¹⁵ His study was in Kikuyu communities.

A Luo man agreed on all counts. In the community, he said, people are used to going to elders who give answers and tell them what to do. People fear them and they think little of women. Villagers trust '*ujuzi ya muda mrefu*' – translated from Kiswahili as the experience of a long period of time, i.e, that the very fact that they have lived a long time means they know a lot. He quoted a Kiswahili proverb: '*kuishi kwingi ni kuona mengi*' – literally to live a lot is to see a lot – even if these elders spend their time drinking *chang'aa*, a local alcoholic brew. 'Elders' is anyone of a certain age. Simply having the years garners the respect. Traditionally this has been African mediation, he said. Elders are counselors, 'mediators' in the literal sense of stepping in the middle. People assume that once others have reached that age, they have wisdom because they must have experience. Thus, they should be accorded respect and listened to. But people don't consider that they may simply spend their days drinking, and that they are not wise at all.¹⁶

A female university student in Nairobi from apparent Kalenjin lineage ¹⁷ also agreed with the assessments from Kikuyu and Luo communities. She added another wrinkle. Because these elders are accorded particular deference, people will not say certain things in front of them. Without villagers' sense that they can fully express themselves, there is no way they can fully vet the issues important to them. What is described is a

¹⁵ SMS communication from a University of Nairobi lecturer, April 23, 2013

¹⁶ Personal communication, man in the former South Nyanza, July 11, 2013

¹⁷ This determination is given her surname, elsewhere noted as a means of signaling ethnicity.

'power-over' position (see Wineman 2003) or one in which a person lords over another in some sense rather than working with another as an equal, with mutual consideration. This is a position anathema to those needs expressed as basic to the aforementioned tenants, needs critical as a foundation to experiencing justice. And it is a position anathema to the principle of empowerment or parties' sense of their own power that is critical to a party's perception of justice achieved.

5.0 REFLECTIONS

People are trained since birth, most often through modeling (i.e., how people behave), but also through explicit instruction¹⁸ apparently across cultures around the world, to evaluate and judge situations to which they are privy and then to fix and decide for others. That is what is taught is helpful and appropriate Parents do this with children. Children then turn to parents (or in the case of certain cultures, most especially fathers¹⁹). And

¹⁸ An Alternatives to Violence Project (AVP) workshop I recently attended in Nairobi (May 5-6, 2013) explicitly teaches that proper empathetic listening means strategizing for others. This is even if the presumed empathetic party has absolutely no idea of the specifics of the person's life or any comparable experience that might be relevant. Even if they did, simply offering strategies without being asked is experienced as highly unhelpful. One young woman reported after the training session on so-called empathy that she felt more confused and 'worse' than she did before (Personal Communication with workshop participant May 6, 2013)

¹⁹ Male Luo respondents made clear that when they were making decisions on matters important to their life trajectory, they turned to their fathers. If those fathers had a strong preference for a certain strategy - in the case of Luos, these were job situations considered stable and of higher status, such as bureaucratic office jobs

ultimately, those children-turned-parents or teachers or friends themselves decide, fix, and strategize for others when those others are seen to be struggling. They mean to be helpful, but they presume to know best. Ultimately they do the opposite of honoring the other's choices and any philosophy that the person to be helped really knows best for himself. Moreover, they send a signal that perhaps the person really cannot decide for himself (a death knell for any hope of citizen empowerment and their sense of their own capability, translated ultimately in their sense of justice), and that others in authority (for the mediator also appears as an authority figure himself if he is strategizing or, worse, blatantly deciding for the parties) really are the ones to decide, however discomfited the participants feel.

The distinction between those who see themselves as knowing best and those who see the one to be helped as knowing best is mirrored in the kinds of mediators who practice facilitative mediation at one extreme of a continuum and transformative mediation at the other. The difference in philosophy and behaviors of mediators are clear. And ultimately, the differentiation is reflected in the attitudes toward – and thus practices that help nurture or not – party empowerment. So before laying out the distinctions, a discussion of empowerment is in order.

6.0 CONSIDERING EMPOWERMENT

Acknowledged or not, explicit or not, all dispute resolution forums (like any forums) summon power relationships of various sorts, most often dynamics in which certain people either note their own sense of dominance or are regarded that way. That is to say, all dispute resolution forums presuppose power, or one's sense of want thereof. However, in these forums,

rather than entrepreneurial type choices – the sons would, because of this paternal preference, take those offers instead, however much they clearly wanted to take the option that they had devised. PhD Dissertation research, South Nyanza, Summer 2000.

the power that any one individual experiences is in relation to a greater world community, society, or nation as opposed to an internal state that can be accomplished with or by oneself. But in order for a person to experience that sense of power *vis-à-vis* the world, a person must first experience a sense of power within him-or her-self. Without that internal sense, no amount of external maneuvering, of outsider views of satisfactory outcomes – will absolutely assure any one individual of that same certainty. That rests within. Requesting or demanding justice from a disempowered state will likely mean little sense of justice in one’s world. Facilitating the internal sense of power enables a sense of mutuality when engaging with others. Such a state is conducive to a person’s generating outcomes that are personally satisfactory, and to regarding those outcomes others create in such a setting as fair and just.

Hence what then is empowerment, the state I contend is necessary (although not sufficient) to have any sense of justice in one’s world? Literally, it is *within-power*. An inner state of clarity and purpose, of resolve, from which one can act or feel compelled to act. Priority needs²⁰ are experienced as obtainable, and through one’s own volition even if one cannot on one’s own accomplish them. I say ‘priority needs’ for these may shift. People move between feeling empowered and disempowered depending on their focus of attention and the degree to which they have gotten certain needs met. Or as Lakoff and Johnson (1980: 144) put it when reflecting upon an Iranian student studying in the US envisioning ‘solution to the problem’ as having some chemical flask nearby into which problems might be dissolved, one’s sense of dis-empowerment (and subsequent empowerment) may dissolve and seem to disappear, but at another moment come out of solution again. Empowerment is dependent on the context. But the more that one experiences feeling empowered, the more likely he will feel so, for these are feedback mechanisms, resembling what Kuran and Sunstein (1999) call

²⁰ For more on the importance of considering needs, see Marshall B. Rosenberg, (2003), *Nonviolent Communication: A Language of Life*, Encinitas, CA: Puddle Dancer Press.

availability cascades, where experiences reinforce each other and create new foundational norms.

Thus, empowerment, or empowerment effect, as so labeled by Baruch Bush (1996b: 729), is more than his formulation: “strengthen[ed] personal capacity for analysis and decision-making. Disempowered people analyze and make decisions, but they are likely uncomfortable with that analysis or the decisions they are making. This is especially if in analyzing they continue to feel emotions associated with not getting needs met, such as hopelessness, despair, or resignation. And if a party’s decision is to request that another he accords authority or expertise beyond himself (whether or not that person is appropriate to the task or in responding would stymie the party’s future capacity for acting on decisions), surely this is not the hallmark of one empowered either. What is of greater interest is the nature or quality of the analysis or decision-making, especially if the analysis or decision appears as if from thin air, a new creation, based on nothing but itself rather than past certainties. An empowered decision is independent, self-contained, calm, clear, and centered. Indeed, it whittles away the stories associated with analysis (for analysis is in and of itself a state of generating interpretive stories), the partial truths or perceptions held as fact that influence engagement with the wider world, remaining instead with a strategy based in getting one’s needs met while honoring others’. Thus, an empowered state is one in which one is more open to listen to others’ heart of their matter. This characterization of empowerment is critical when we return to examining the mediation experience. It is all too easy for a facilitator to say that parties are ‘analyzing’ and ‘deciding’, especially if they conclude a session with ‘solutions’. But these outcomes may or may not have been coaxed, subtly or explicitly, leaving the parties with answers on paper or in discussion that will lack any practical follow-through. Baruch Bush himself describes such situations (1996b) and the conclusions then drawn from using the practice at all rather than the means employed within the practice.

The bottom line is the degree to which a mediator is willing to redefine ‘success’. Rather than having accessed a ‘solution’ that may or may

not ultimately align with parties' own definition of success, especially in terms of having achieved something they would consider just, 'success' is defined in terms of party empowerment, and thus parties' heightened ability to access justice, most especially because they recognize it as such. And in the Kenyan context, there have been enough examples of those teaching mediation or practicing what they call transformative mediation or transformative practices, presumably practices that prioritize empowerment, that are anything but that, as alluded to above.

7.0 FACILITATIVE VERSUS TRANSFORMATIVE MEDIATION

Whether or not mediators are more philosophically inclined to be facilitative or transformative mediators, the skeletal form of mediation appears the same for all situations. A mediator or mediators sit with two parties (and if more, parties and supportive personnel), and engage in a slowed-down conversation. The mediator begins with an opening that outlines what will happen in the coming time together, and ensures that subjects covered include rules of engagement (the so-called 'ground rules', especially that while one party speaks the other be quiet and listen rather than interrupting, as usually happens in a normal conversation and most definitely when people are in conflict and reacting to what the other party says) and promises of mediator neutrality or non-bias toward either side and confidentiality of the proceedings. During the ensuing conversation, the mediator at both extremes of the facilitative-transformative spectrum will interject and reflect and summarize what the parties say.

But if an observer were to listen more deeply, she might discern that within the framework, mediators engage with parties very differently. The distinctions are based in mediators' assumptions about their role, the capacity of the participants, and the very purpose of having come to mediation in the first place.

For the facilitative mediator, the overriding concern is that the parties leave the session with solutions. Since this concern is foundational, how it is actually achieved is less important. That means that if the mediators can 'help' (as they see it) by offering strategies that they see would greatly benefit

the parties, especially given their explicit or implicit assumption that they, as unbiased and detached outsiders, have a clearer perspective than the emotional participants (as they see them), they will do so, particularly when those participants are 'stuck' and just won't get on with it (as mediators determine is the proper timeframe to move on). The offered strategies are not always suggested in terms of mediator opinions of what they consider best. Sometimes they are couched in questions that mediators deem are open-ended but really have an agenda attached (questions such as 'have you ever thought about doing X?')²¹. Nonetheless, they come from the mediators.

Moreover, a concern of facilitative mediators is that a session could get 'out of control' with overwrought participants. Angry people might yell and scream, interrupt each other and talk over each other, stand up, and be generally (what the mediators consider) unproductive and obstreperous. Therefore, it is important to facilitative mediators that they control the room and what happens therein. The session is their domain. To this end, they begin with an opening statement in which they lay out the ground rules, making explicit, most especially, that participants are not to interrupt each other. They reflect and summarize participant statements, but also are sure to make clear the issues they think important, coaxing the parties along so that they will be 'productive', and offer suggestions to ensure they leave with some sort of solution or resolution.

Transformative mediators stand in a different place. Rather than participants coming to a solution as their primary goal, they are most interested in focusing on the parties' relationship. If there is harmony in the

²¹ See Interview with Parker Palmer (2004) on the DVD that comes with his book, *A Hidden Wholeness: The Journey Toward an Undivided Life*. The author clarifies the

distinction between sincerely open-ended questions designed to help the one asked to seek answers for him or herself, and agenda-filled questions where the questioner has already predetermined the correct answer. He does so in elucidating the concept of a Circle of Trust, a setting that helps people become clear for themselves their next steps, without external strategizing or sympathy that can detract from their process. The philosophy is akin to that in transformative mediation.

relationship, they trust that the participants themselves will generate solutions, be it in the session or later. To focus there, transformative mediators recognize that each party must first be able to strengthen the relationship with him - or her - self. Indeed, that is the most important relationship. Each decision the parties make will then be solely up to the parties themselves, in their own good time as they determine is - or is not - appropriate. This will include any determination of an ongoing relationship with the other party. What matters most is that each individual leave a session clearer than when he or she arrived.

To accomplish this, transformative mediators recognize that every moment of mediation is an opportunity to help strengthen participants' capacity to decide for themselves, and in ways they likely would not have otherwise expected. That is to say, it is an opportunity for them to be creative rather than generating ideas on the basis of what they have known or understood in the past. To this end, the mediators' role is to help provide the conditions most conducive to that state where parties will be creative. Given that parties in conflict often come to the session disempowered, feeling hopeless or disgusted, certain that since they have not been able to resolve their case by themselves they may not have the capacity to do so, it is not obvious *prima facie* that this can take place. But the transformative mediators themselves trust this, because they are confident not only of people's capacity to choose for themselves, but also that they are in fact best equipped to know what would be best for themselves. That is ultimately, the transformative mediator believes that parties have the best sense of what true justice means for them, and that it is inappropriate for an outsider to determine that for them. To achieve this, a grounding principle of transformative mediation is to provide a space to help parties feel empowered²².

²² There are two guiding principles of transformative mediation: empowerment and recognition. (See Baruch Bush 1989, Baruch Bush and Folger 1994, US Postal Service REDRESS Mediator Meeting Transformative Refresher materials, December 5, 2007). The latter is hearing the other party's concerns in new ways. But I argue that empowerment is still primary. Unless a participant feels empowered, unless he or

Accomplishing this requires that even the basic skeletal moments of any mediation session be handled quite differently from the way in which they would be handled by a facilitative mediator. To start, there is no opening statement as such, especially in so far as a 'statement' carries with it the supposition that the mediators simply tell the participants what will occur. Rather, this section is regarded as an opening 'conversation', a full engagement between mediators and participants, in the full spirit of this being *their* session rather than that of the mediators. To this end, even ground rules for the ensuing conversation, determined in facilitative mediation sessions by the mediators, are determined in transformative mediation sessions by the participants. Mediators ask the participants if they would like for their own session certain conditions that have proved helpful in other cases (rather than making explicit rules), or if there are others that they would prefer instead. Later in the session, this simple distinction between the way that ground rules are established allow very different responses from mediators if the participants should break them. If they have been told they must not interrupt, then the mediator becomes like a police officer when they do, enforcing their cooperation. If, rather, participants have chosen ground rules, interrupting becomes an opportunity to either re-commit to them or to inquire why it is so difficult to maintain silence, potentially a ground breaking moment for the participants given such style of communication is likely what they are doing with each other outside the mediation session. That is to say, participant choice and commitment can later become an opportunity for their own learning and practice. Rather than a moment apart from their own lives, the session becomes a laboratory for practice.

Similarly, statements about confidentiality, laid down as fact by a facilitative mediator as what will be so during a session are in transformative mediation often followed by a conversation about the concept, accepted as much a part of the actual session (rather than of the 'preliminaries' as they

she senses that someone is hearing him or her so that he can connect with his or her own needs, he will be in no position to be hear the other party.

might be accorded in a facilitative mediation session) as any statement or detail provided by the parties after the opening conversation about the session has concluded. The way that such basics as ‘caucusing’ (or breaking into private conversations with each of the parties) and taking breaks are handled similarly, as either being dictated by mediators or being opportunities to show parties that the session is in fact theirs to own – or not – as they like.

In short, where the structure might appear the same for all mediation sessions, with opening, statements to bring out issues and concerns, conversation, and concluding segment in which parties potentially generate solutions, transformative mediators constantly look for what have been labeled ‘choice points’ (see USPS REDRESS materials 2007). These are nothing more than opportunities for parties to make choices. In so doing in the mediation session, parties learn or reinforce two critical ideas. First, they are accorded an experience in which they see it is possible that they be accorded consideration by another (in this case one whom they might first regard as an authority figure) to make their own decisions, consideration that they may have experienced little in their day to day lives. Second, they are practicing making their own choices and seeing the repercussions of them. Both are essential in building people’s sense of empowerment, and with it, I have been arguing, their experience of being able to access justice.

8.0 CONCLUSION

This paper has outlined some of the problems of accessing justice through formal means and what Baruch Bush and Folger (1994) call ‘the promise of mediation’. But it also cautions that ‘mediation’ takes different forms. Access to justice can be equally difficult through ADR. Traditional African mediation, for instance, using elders, though promoted in the new Kenyan constitution and through various projects, cannot facilitate citizen empowerment, essential for participants to have any real sense that they in fact access justice and that it will be as they understand, either in the short run or most especially in the long run. Elders are in essence arbitrators rather

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than mediators, and ones accepted by default rather than chosen. What is essential as a necessary first condition is a mediator philosophy honoring the knowing of the participants, their ability to choose for themselves whatever their background or predicament. This can be accessed through transformative mediation. Only this sort of feedback will ensure that participants themselves will, over time, guarantee their own access to justice, whatever the forum.

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THE BASTARD PROVISION IN KENYA'S ARBITRATION ACT

by PAUL NGOTHO*

ABSTRACT

This paper is a critical analysis on the provision on “entering appearance” in the Arbitration Act, No. 4 of the Laws of Kenya and amended in 2009.

Arbitration is meant to give access to justice through a private tribunal, which ensures privacy, expedition, a the right of parties to decide who resolves their disputes, especially in construction, specialist and technical areas, where judges might not be suited for the role.

The paper argues that the subject provision is a barrier to arbitration and demonstrates that such obstacles are not found in the UNCITRAL Model Arbitration Law, which the Act is basically copied and pasted from, in the English arbitration law, which Kenya has borrowed heavily from or in any other of the specific jurisdictions analysed. Where did the bastard come from?

It shows that there is no legal or any justification for having that provision in the Act or for keeping retaining it there in the 2009 amendment or retaining it there. It is a needless encumbrance on Kenyan parties, disenfranchises Kenya parties. It also creates needless litigation, which takes time and costs public funds unnecessarily for parties who already have contractual provisions to resolve their disputes by arbitration and flies in the face of freedom of contract.

The Act also governs international arbitrations carried out in Kenya. The need to address the contentious provision is now urgent, if not an emergency, given Kenya's intention to establish an international arbitration centre. Foreigners are spoilt for choice on where to take their arbitrations and are unlikely to take kindly a country with a quire provision in its arbitration law.

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Finally, the paper explores several remedies from the simple editing of the Act to a regional initiative, which would not only standardise arbitration law within the East African Community but would also put the arbitration legislation in the region largely in synch with the arbitration law used elsewhere in the world.

1.0 THE TITLE

The title and the content of this paper are intended to provoke. They will, hopefully, generate professional and academic interest in a most quire provision in the Arbitration Act of Kenya of 1995 (1995 Act). Better still, they would be considered in future amendments of that act.

Definitions and synonyms of “bastard” are: illegitimate child, whore-son, mongrel, a vicious thoroughly disliked person, something that is no longer in its pure or original form. The reader is invited to decide, after reading the paper, whether or not the subject provision in the Arbitration Act of Kenya 1995 fits any of these descriptions.

2.0 INTRODUCTION

Arbitration makes justice more accessible than courts by being faster, flexible and potentially less expensive if the parties adopt appropriate procedures. It also gives the parties power to decide how their dispute is resolved and by whom. The opportunity to take part in the choice of the tribunal is important for nationals but even more so for foreigners, who generally mistrust national courts. That also ensures that the tribunal has the relevant technical skills.

Some parties will not wish to have their disputes resolved in public. To such the privacy of arbitration is an important ingredient of access to justice. Privacy could, of course, be a barrier to arbitration, for example, if significant stakeholders are excluded from arbitral proceedings on the basis that they are not a party to the contract. At international level, this is being remedied by the increase in institutional arbitration rules that allow communities and pressure groups to take part in arbitrations either as interested parties or as friends of the tribunal.

Prof. Githu Muigai acknowledges that “there was quite some confusion in case law as to whether the provision entitled the defendant/applicant to make his application, at the stage of entering appearance, or at the stage of filing any pleadings or at the time of taking any step in the proceeding” (Arbitration Law and Practice in Kenya, Law Africa, 2011. p. 77).

Dr. Kariuki Muigua has discussed in detail the various cases on applications for stay in his book *Settling Disputes Through Arbitration in Kenya*, Glenwood Publishers, 2012.

S. 6(1) bars a stay of court proceedings pending arbitration if an application for stay is made after a party has *entered appearance*. This paper is a critical analysis of that provision, which has given much grief to parties who realise too late that their arbitration agreement was negated the minute they entered appearance.

Entering appearance is the notification by an advocate to court that he or she would be representing a certain party in the proceedings. Courts have very limited scope in interpreting the phrase, since there is no ambiguity in what the words mean as used in the Act or generally.

The discussion is limited to the issue of *entering appearance* and will not address *acknowledgement of a claim* as provided in the 2009 amendment or *taking a step in the proceedings* as provided by the Act prior to the 2009 amendment because these provisions are based on sound legal principles (waiver/estoppel) and are, in any case, also found in other jurisdictions.

Suffice to say Lord Denning MR views a step as one which “impliedly affirms the correctness of the court's proceedings and the willingness of the defendant to go along with the determination by the courts instead of the arbitration” (Eagle Star Insurance Company Ltd Vs Yuval Insurance Company Ltd).

Lord Denning's remark is relevant to cases related to filing defence or taking a step. It does not refer, directly or indirectly, to *entering appearance*. However, it has been abused widely in arguments on *entering appearance*.

The uniqueness and absurdity of the contentious Kenyan provision becomes clearer when viewed alongside the related provisions in the arbitration acts of other countries. This paper also observes below that a few particularly pro-arbitration acts allow a stay after pleadings on the primary dispute, even a hearing!

Was the contentious provision in the Kenyan legislation always there, or did it emerge mysteriously? It will be necessary to consider Kenya's earlier arbitration acts to answer that question.

All this will be reviewed in the broader context of The Constitution of Kenya 2010 and Kenya's objective of becoming a destination of international commercial arbitration.

3.0 THE CONSTITUTION OF KENYA 2010

The Constitution states in s.159.(2)(c) that “In exercising judicial authority, the courts and tribunals shall be guided by the following principles, among others ... alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted”. (Emphasis added).

This is the supreme law of the land and “if any other law is inconsistent with the constitution, the Constitution prevails and the other law to the extent of the inconsistency is void” (Jackson, T: The Law of Kenya, An introduction. Kenya Literature Bureau, Nairobi. 1978 Edition). The

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position has not changed. The Constitution itself declares in Article 2.(4) that "Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency..."

The provision on *entering appearance* does not promote arbitration. It is obstructive, instead.

Courts have not, yet, tested the contentious clause vis-a-vis the constitutional duty to promote arbitration.

4.0 UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) MODEL ARBITRATION LAW (MAL)

The UNCITRAL Model Arbitration Law (MAL) is a creature of international negotiations and has been adopted in many countries.

UNCITRAL prepared MAL in 1985 and revised it in 2006. MAL is a ready-made modern arbitration law for states to adopt as their arbitration law. A country could copy and paste the whole of MAL, put its name on it and make that its arbitration act.

The 1995 Act is based on MAL, which says in Article 8(1) that,

"A court before which an action is brought in a matter which is subject to an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the subject of the dispute, refer the parties to arbitration...". (Emphasis added)

This article was in the 1985 version of MAL and was not affected by the 2006 revision.

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Entering appearance is not, quite clearly, a statement on the subject of the dispute. Under MAL, entering appearance is of no consequence with respect to a stay.

To be fair to Kenya, a country is not under obligation to adopt 100% of MAL. Some variations are allowed. This margin is meant to enable countries include genuinely required adaptations. However, such adaptations must not contain provisions that are incompatible with modern international commercial arbitration.

5.0 ARBITRATION AND CONCILIATION ACT OF UGANDA 2000

The Ugandan legislation, which is based on MAL, presents itself to be considered separately because of its unique pro-arbitration stance. Uganda has used the latitude allowed by MAL to make its law on stay of proceedings more arbitration-friendly.

s. 5. states,

“(1) A judge or magistrate before whom proceedings are being brought in a matter which is the subject of an arbitration agreement shall, if a party so applies after the filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or she finds –

that the arbitration agreement is null and void, inoperative or incapable of being performed; or

that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Notwithstanding that an application has been brought under subsection (1) and the matter is pending before the court, arbitral Proceedings may be commenced or continued and an arbitral award may be

made.” (Emphasis added).

Again, entering appearance does not deny a party a right to a stay. Indeed, Uganda allows a stay up to the latest possible stage.

The Zambian legislation is more explicit. It allows an application for a stay “at any stage of the proceedings and notwithstanding any written law”. (s. 10 (1) The Arbitration Act 2000).

The Ugandan and Zambian acts while taking a particularly pro-arbitration stance, mean that a party can apply for a stay any time before a court gives its ruling on the merits. This raises two problems. Firstly, the parties and the court will have incurred needless costs. Secondly, it would amount to abuse of process, or using a court as a guinea pig, for a party which knows all along of the presence of the arbitration clause to allow the court to go through the motions and then invoke the arbitration clause. This amounts to forum shopping. Thirdly, the wasted time and costs. While costs might be recoverable, time is not.

Allowing a party to apply to court for a stay “at any stage” is counter-productive and not suitable for Kenya.

6.0 THE ORGANIZATION FOR THE HARMONIZATION OF BUSINESS LAW IN AFRICA (OHADA)

OHADA, is a supranational organization established by a treaty signed on October 17, 1993 in Mauritius. It is comprised of 16 sub-Saharan African member states. Bénin, Burkina Faso, Cameroon, Central Africa, Comoros, Congo, Côte d’Ivoire, Gabon, Guinea, Guinea-Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo are members. It is open to all member states of the African Union, but the current members are mostly Francophone nations.

The OHADA Uniform Act on Arbitration of 1999 authorises the practice of ADR, lays out rules of procedure, provides for the enforcement

of arbitral awards in member states. It creates a key regional ADR centre: the Common Court for Justice and Arbitration (CCJA), in Abidjan, Cote d'Ivoire. (Southerland T. & Seznec G: Alternative Dispute Resolution Services in West Africa Commercial Law Development Program US Department of Commerce, 2003).

The Act does not have an equivalent or related provision on stay of proceedings. It seems a court will not entertain an application for stay since the court would not have entertained a case with an arbitration clause in the first place. I have reached this conclusion from reading the act. I am not sufficiently familiar with the court procedures or court cases under OHADA to present this as the final position.

7.0 ENGLISH ARBITRATION ACT, 1996

This fully loaded and custom-built legislation has withstood the test of time, having evolved over hundreds of years. It is backed by rich case law. It is not based on UNCITRAL but is largely compliant. It has greatly contributed to the development of London as the leading centre of international arbitration.

The 1996 Act s.6 (1) (a) states,

“any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings”. That clause was carried forward verbatim from the 1975 and 1978 English acts.” (Emphases added).

It treats the *entering appearance* as a condition precedent to enforcing an arbitration clause. The barrier is placed at the delivery of pleadings or taking a step.

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Russell on Arbitration, 22nd Edition, is silent on *entering appearance* in the discussion of the English Act, probably because the authors did not even imagine that entering appearance could possibly be a barrier to a stay.

The Arbitration Act of Tanzania also treats *entering appearance* as a pre-condition for applying for a stay.

The Rwandese legislation does not specifically mention *entering appearance*, but it provides that a court shall submit a case to arbitration “if a party so requests, before submitting his or her statements on the substance of the dispute” (Article 10, The Law of Arbitration and Conciliation 2008).

8.0 THE US FEDERAL ARBITRATION ACT 1923, AMENDED

The Act stipulates in s.3 that

“where issue therein referable to arbitration If any suit or proceeding Be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.” (Emphasis added)

There is no reference or provision about *entering appearance*.

9.0 THE ARBITRATION ACT OF KENYA, 1995

The 1995 Act as amended in 2009 states,

“s.6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds –

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.” (Emphases added)

Prior to the 2009 amendment, the relevant part of the above section read,

“... is a party so applies not later than the time when that party enters appearance or files any pleadings... stay the proceedings and refer the parties to arbitration” (Emphasis added)

Cap 49 of 1968, s.6. (2) (a) says,

“any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings apply to the court to stay the proceedings”. (Emphasis added).

Cap 49, a derivative of the English arbitration law, was repealed by the 1995 Act, which moved the goal post from after appearance to before appearance.

It is worth noting that under the Kenyan and MAL, stay of proceedings pending arbitration is a statutory right, and not a discretion of the court, if the party meets the stipulated conditions. What makes it a right is the word “shall” in section s.6.(1). It essentially states that “A court ...shall...stay proceedings” if a party meets certain conditions. The English Act gives the court discretion in the matter.

The significance of this is that under the Kenyan act, entering appearance takes away a party's right to arbitration. Merely entering appearance disenfranchises a party.

10.0 KENYAN CASE LAW

Cases in which parties filed their applications for stay under the 1995 Act after entering appearance, and therefore lost their right to have court

proceedings stayed, are many. Most have been dismissed with costs. A few are listed below:

- a. Timothy M. Rintati Vs Madison Insurance Co Ltd [2005] eKLR
- b. Petro Oil Kenya Ltd Vs Kenya Pipeline Co. Ltd [2010] eKLR
- c. Treadsetters tyres Ltd Vs Elite Earth Movers ltd [2007] eKLR
- d. Joel Kamau Kibe v Kenyan Alliance Insurance Co. Ltd [2008] eKLR
- e. Chevron Kenya Ltd Vs Tamoil Kenya Ltd [2007] eKLR
- f. TM AM Construction Group (Africa) Vs Attorney General. High Court (Milimani), Civil Case No. 236 of 2001.

In Treadsetters Tyres Ltd Vs Elite Earth Movers Ltd, Justice Lesiit agreed with Justice Githinji in Bedouin Enterprises Ltd Vs Charles Lofty Njogu and Joseph Mungai Gikonyo T/A Garam investments. Justice Githinji had ruled that “the latest permissible time for making an application for stay of proceedings is the time that the applicant enters appearance” (Civil Appeal No. 253 of 2003). Justice Githinji's interpretation was endorsed by the Court of Appeal in Charles Njogu Lofty Vs Bedouin Enterprises Ltd (civil Appeal No. 253 of 2003 eKLR).

As the court remarked in Victoria Furnitures Ltd Vs African Heritage Ltd & Another, if s.6 (1) “were to be interpreted to mean that a party could file an appearance or take the two other steps mentioned above and then wait for some time before applying for stay of proceedings, the phrase not

later than the time he entered appearance or etc would not only be superfluous but also meaningless”.

Central Kenya Wholesalers Ltd and Inland Training Centre Ltd & Others (High Court Milimani, Civil Case No. 520 of 2000) is also worth noting. The contract had an arbitration clause. The plaintiff landlord applied to court for possession orders following the defendant's alleged breach of the lease. The defendants filed grounds of opposition and an application for stay at the same time. They did not file a defence.

The court noted that by filing the notice of opposition the respondents were merely following a procedural requirement otherwise the case could have been heard *ex parte*.

The court granted a stay but stated that it would not have done so if the respondents had filed a defence instead of a notice of opposition.

10.1 CHEVRON VS TAMOIL

Chevron Kenya Ltd Vs Tamoil Kenya Ltd [2007] eKLR deserves closer scrutiny. The defendant filed a Notice of Appointment of Advocates on 28th March 2007 and then filed an Application for Stay 2 days later. The court agreed with the respondent's counsel that the notice, which merely informs who the party's advocate is, cannot be described as a step taken in the proceedings to deprive a party its recourse to arbitration. This interpretation is not in line with either Justice Githinji's interpretation or with the simple reading of the subject clause in the Act.

The judge correctly remarked that “A Notice of Appointment of Advocates is ... not a step in the proceedings that impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with the determination of the court instead of arbitration.” The court erred by answering the question, “Is a notice of appointment a step in the proceedings”? Instead, it should have asked, “Does a Notice of Appearance

amount to *entering appearance*?" or "Can an application for a stay made after *entering appearance* succeed?"

The judge did not cite any authorities in the ruling on entering appearance in that case. He did not refer to the Court of Appeal case in Charles Njogu Lofty Vs Bedouin Enterprises Ltd, which was binding on the High Court.

Chevron Vs Tamoil was decided on 12th June, 2007. It was not appealed, and so it was not interrogated by a higher court. Apparently, the parties settled the matter out of court and so there was no need for an appeal.

The same judge gave a different ruling in Petro Oil Kenya Ltd Vs Kenya Pipeline Co Ltd on 9th February 2010. The facts, as far as *entering appearance* was concerned, were similar in both cases. He stated that, "The applicant entered appearance on 27th April 2009. This application (for stay) was lodged on 11th May 2009 long after appearance had been entered. In the plain language of s.6.(1) of the Arbitration Act 1995, the application has been filed too late. In this case, 11 days too late. That being the position, I down my tools..." He finally agreed with Justice Githinji and Justice Lesiit.

It was an error for courts applying the 1995 Act prior or post the 2009 amendment to consider whether or not *entering appearance* was a step in the proceedings. Since the Act treated *entering appearance* and *taking a step* as two different triggers in the pre-2009 amendment era, the courts should not mix the two requirements, each of which stands on its own. Asking if *entering appearance* is a step was asking the wrong question. The correct question was simple: Did the party apply for stay prior to, or at the same time as, *entering appearance*? If the answer is "yes", then the party has a right to a stay. If the answer is "no", then the party has lost its right to a stay. That was how Justices Githinji, Lesiit and Mbaluto approached the issue.

Why the contentious provision in the Kenyan Act is open to speculation. In Bedouin Enterprises Ltd Vs Charles Lofty Njogu and Joseph Mungai Gikonyo T/A Garam investments, Justice Githinji could not help speculating the intention of providing for *entering appearance* in the Act. He says, " It seems that the object of s.6.(1) was ... to ensure that applications for

stay of proceedings are made at the earliest stage in the proceedings." Fair enough, but why does that happen only in Kenya? With respect, why do Kenyans need to file their stay earlier than everybody else in the world?

The other possibility is that the provision is the result of particularly poor drafting or plain mischief. It has happened before.

Poor drafting is evident in the amended version of 1995 available at www.kenyalaw.org. The title on the front page and at the top of each of the 30 pages is, "Cap 49" even though s.42. (1) of the same act repeals Cap 49! To err is human: repeating the same mistake 28 times in as many pages is not.

Our history has a number of incidents in which provisions that were never discussed in parliament or added at proof-reading mysteriously *enter appearance* in the final, printed legislation. Could that have happened here? That is most unlikely. The Government of Kenya is usually a respondent in arbitrations and does not enter appearance in a hurry - if it did, one could argue it introduced the clause in order to be using it to avoid arbitration like any other respondent would. Indeed, the government has not been spared the agony that is caused by the contentious provision. It lost its application for a stay due to having filed the application 41 days after *entering appearance* in *TM AM Construction Group (Africa) Vs Attorney General*. High Court (Milimani), Civil Case No. 236 of 2001.

The subject clause is in good company, of bad Kenyan laws. David R Salter lamented some 30 years ago that the Land Control Act was "without teeth and largely without purpose". That act survived long because it was a minor nuisance, which Kenyan learnt to manipulate or live with. The phrase *entering appearance* in the Arbitration Act is different. It has teeth: it renders arbitration agreements unenforceable, denying parties the right to arbitration.

11.0 CONCLUSION

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This paper demonstrates that the provision on *entering appearance* has created a needless barrier, not access, to access to justice through arbitration in Kenya. It is inconceivable for an Act meant to make arbitration accessible to also have a built-in inhibition.

The provision is, at best, bad in law. It is inherently bad law. There is probably no other Act in Kenya or elsewhere under which entering appearance carries a penalty.

There is no logical or legal justification for the mere act of *entering appearance* to be used to disenfranchise a party of its legal right to arbitration. The idea that entering appearance extinguishes a party's statutory right to arbitration is a fraud.

The provision is also alien to arbitration laws in use elsewhere. Kenya, as a member of the international village and as a trade partner of many states regionally and internationally, must have a reasonable arbitration law.

The presence of the subject provision disadvantages Kenyans and foreign investors in Kenya. No other party or court anywhere else in the world spends time and costs discussing the effect of *entering appearance* on arbitration.

The clause flies in the face of all the internationally recognised arbitration principles, all of which temper the law of natural justice and the law of contract to facilitate arbitration. For example, *kompetenz-kompetenz* allows an arbitration tribunal to decide on its own jurisdiction in spite of the cardinal law that a man shall not decide his own cause, separability of the arbitration agreement facilitates arbitration even when the underlying contract is invalid while finality of the award seals the usual avenues for the losing party. The fundamental principles in the law of contract and even in the law of natural justice have been tampered to create space for arbitration. In light of all this, the provision on entering appearance stands out like a sore thumb.

The clause on entering appearance is equally applicable to domestic and international arbitrations. s.6.(1) must be amended to internationally

acceptable standards before Kenya can be considered a serious contender as home for international arbitration.

By retaining the clause in our statute, we risk it being said of us in future what St Paul said of some characters, “thinking they were wise, they became fools” (Romans 1:22).

12.0 REMEDY

Parliament created the problem. Ideally, it should also provide the solution. It could do that in three ways.

Firstly, by removing the contentious words, as follows:

“s.6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party ~~enters appearance or otherwise~~ acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds...”

Alternatively, Parliament could removing the contentious words and, at the same time, place the bar at the filing of a defence, as follows:

“s.6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party ~~enters appearance or otherwise~~ files a defense ~~acknowledges the claim~~ against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds...”

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The other option is to copy *verbatim* the relevant section of either the MAL or English Act – both have been cited above.

As noted above, attempts by courts to refer a matter to arbitration after a party has *entered appearance* are not sustainable. However, a constitutional application might remedy the situation if the contentious phrase in the act is found to be contrary to the Constitution.

A revision of the Civil Procedure Rules to require a party to disclose the presence of an arbitration agreement in its first approach to court and to give reasons for not wishing to go to arbitration would also help.

However, it is now necessary to harmonise the Kenyan Act to MAL and to take into account the Constitution of Kenya 2010 as well as the Nairobi Centre for International Arbitration Act. That calls for a more comprehensive revision of the Act.

A regional approach to arbitration laws would be even more helpful. Rwanda is in the process of amending its fairly new arbitration legislation. The arbitration acts in Tanzania and Burundi do not conform with MAL. Time is ripe for states in the East African community to follow the OHADA example and come up with a uniform arbitration act for the region instead of each state patching up its own.

ADR AS A PROMISING METHOD OF ACCESSING JUSTICE FOR THE WIDER KENYAN COMMUNITIES

by **JUSTUS MUNYITHYA** *

ABSTRACT

This paper is informed by the view that adversarial litigation can no longer be seen as the paradigmatic process of decision making in modern justice system. This is because the approach given by alternative dispute resolution (ADR) to the delivery of justice is comparatively far superior. What gives ADR the edge is its three main advantages: namely the existence of a long standing tension between formal justice and equitable access to justice for all.¹ Second, disputing institutions would be assured of more secure outcomes that go beyond providing remedies for the parties, thus making the institution maintain social order, avoid conflict, restore harmony, achieve equality and express communal identity. Moreover, the rejection of legal processes as an appropriate mode of decision making in the context of disputes is often part of an attempt to develop or retain a sense of community “how to resolve conflict, inversely stated, is how (or whether) to preserve community”.²

Access to justice in Kenya has for a long time been affected and defined by the kind of judicial system inherited from the colonial government. The common law system adopted through the Judicature Act was characterized by three main elements namely: a historical dominance of state sponsored adjudication and hence litigation in the theory and practice of civil justice. Having dominated the judicial landscape, litigation acquired a privileged status as the most preferred mode of dispute resolution and lawyers as the purveyors of that trade, besides monopolizing dispute management. The nature of this monopoly was only revealed when a lawyer was appointed to higher office as a mark of successful legal practice. Third, and much more importantly lawyers used the civil procedure as a tool for their negotiation thus confusing the relationship between

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¹ J S Auerbach, *Justice Without Law? Resolving Disputes Without Lawyers* (Oxford University Press: Oxford, 1983) at 4.

² *Ibid.*

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litigation and settlement. The latter remained virtually invisible and submerged in a framework purposed to bringing a dispute to trial and judgment.

The Constitution of Kenya 2010 has changed all that, Article 159 (2) (c) has elevated ADR to the level of a fundamental right. Read together with Article 48, that provides for access to equitable justice, will fundamentally change the terrain for all those unable to access justice because they are either poor, marginalized, disabled or the mere fact that they are women. Regional governments have not been left far behind as they have passed legislations that are attuned to ADR.

1.0 INTRODUCTION

Kenya is the leading and most advanced economy in the region but inconsistent reforms in the legal sector before 2010, led to a prolonged period of decline in development indicators which had the effect of removing it from the leadership position.³ Ideally this position should have made Kenya the leading choice for investment in Eastern and Southern Africa, however this never happened owing to poor economic policies, corruption and governance while a declining public service discouraged foreign direct investment (FDI) since the 1980's. Delays in the delivery of justice have been identified as a leading impediment to investment especially with respect to arbitration process.⁴ This is because international business transactions and modern day business in general favor arbitration as a speedy method for dispute resolution.⁵

It is not in question that courts have a role to play in arbitration process, but this should be limited to enhancing dispute resolution and not inhibiting it.⁶

³ U.S. State Department, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement – Kenya (Bureau of Economic, Energy and Business Affairs: Washington D.C, 2011).

⁴ Ibid.

⁵ Report of the South African Law Commission, *Arbitration: An International Arbitration Act for South Africa Project 94*, July 1998.

⁶ *Coppee-Lavalin SA/NV-v-Ken-Ren Chemicals and Fertilizers Ltd*, [1994] 2 All ER 465;

However, in Kenya parties have used courts to delay the arbitration process, increased costs of dispute resolution, judicial time, exposure to adverse publicity of business and uncertainty in enforcing legal obligations.⁷ Justice Deverell in the Epsco case said that:

*If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrator(s) to make Constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the courts.*⁸

Our task is to look for ways to enhance the role of courts in arbitration in compliance with the Article 48 of the Constitution. This will ensure that courts will play their rightful role of reducing or eliminating chances of parties misusing the legal process to frustrate arbitration processes. Thus a balance must be struck between proper role of courts and its effects that hinder arbitral processes and hence access to justice.

2.0 BACKGROUND TO ADR

In the last century, it was easy in a common law state to point out at the institution of dispute resolution such as the courts, judges and lawyers as agents of public dispute management both as advisors and champions of litigation.⁹

Kariuki Muigua, *The Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya* Available at:

http://www.kmco.co.ke/attachments/080_role_of_court_in_arbitration_2010.pdf

(accessed on 30/03/2013).

⁷ John Otieno Abwuor, *Role of Courts in Arbitration: A Critical Analysis of the Kenyan Arbitration Act No. 4 of 1995* (LLM Thesis: University of Nairobi, 2012) at 16.

⁸ *Epcos Builders Limited v Adam S. Marjan-Arbitrator & Another*. Civil Appeal No. 248 of 2005 (unreported).

⁹ Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* 2nd ed (Cambridge University Press: Cambridge, 2005) at 1.

Thus formal justice was dominated by a form as state funded justice. Courts thus viewed themselves as providers of trial and judgment. Pre-trial sessions were equally limited to ensuring that the landscape did not drastically differ from the trial itself. The narrow concept of dispute resolution looked at the framework of the civil process as their arena for settling disputes. However very few proceedings that commenced ended up in trial, thus two different modes of decision making developed simultaneously: one was based on litigation and the other on settlement.¹⁰

The two systems became entrenched in dispute management right across the second half of the 20th century. However, thirty years ago 'court' and 'lawyer' were carefully re-assessed and the 'mediator' emerged as major though ill defined figure. This transformation to a 'culture of settlement' came to be known as alternative dispute resolution (ADR). In England, official recognition that the sponsorship of settlement was an explicit, official objective of the public justice system came only in the 1990s as encapsulated in government reports.¹¹ In these reports, 'case management' was prescribed and its overall purpose identified as 'to encourage settlement of disputes at the earliest appropriate stage, and, where trial is unavoidable, to ensure that cases proceed as quickly as possible to a final hearing which is itself of strictly limited duration.'¹² Here 'settlement' is presented as the primary objective of the courts, with adjudication relegated to an auxiliary, fallback position. Therefore in a nutshell 'settlement' becomes the preferred route to justice which amounts to an astonishing reversal.

¹⁰ Ibid. at 3.

¹¹ Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales (Lord Chancellors Department, 1995).

¹² Ibid.

2.1 SHIFTING IDEOLOGY BETWEEN COMMAND AND JOINT DECISION MAKING

Indeed it can be surmised that there has been a shifting of balance between command or litigation and joint decision making or settlement reminiscent of ADR. This is reflected in three closely linked institutional developments. First, in the commonwealth there has emerged a new profession in dispute resolution over the past two decades in public and private sector. In Kenya, the growth in arbitration as a profession by organizations such as the Chartered Institute of Arbitrators (Kenya Branch) is a clear testimony to this phenomenon. Members of these groups are variously called: mediators and arbitrators. They invariably provide services that are in competition with the lawyers.

Second was a move and developments by the courts to extent the limits of litigation and sponsor settlement. This development began in the United States of America motivated by giving value to party decision making and more particularly a reformed way of case management. Third and more importantly, is the arrival of new professional lawyers and the push by the courts to get involved in court sponsored resolution. This encouraged lawyers to include ADR in their practice. This movement that pushed lawyers to go beyond litigation or advisory roles towards non-alignment intervention, made lawyers develop special skills in aid of settlement strategies.¹³

With time, the new professionals who promoted ADR as an alternative method between external, hierarchical, imposed decision and representation by legal practitioners blurred the division between litigation and settlement. This was done through association with public justice, court sponsored mediation schemes and incorporation of ADR in the fast evolving legal practice. This move

¹³ Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision Making* 2nd ed (Cambridge University Press: Cambridge, 2005) at 5.

has been recognized by legal scholars and practitioners as a shift from 'cases' 'litigation' and 'judges' to 'disputes', 'dispute processes' and 'interveners'.¹⁴

3.0 CHALLENGES TO ADR

Legal practitioners should be advising clients of the existence of arbitration, how it works, the likely advantages and disadvantages; and whether it can produce a reasonable result for the client. This is borne by the fact that ADR and arbitration in particular is generally viewed by the public as part of the lawyer's job, while on the other hand lawyers do not completely embrace it for fear of losing clients. However this fear is unfounded as arbitration could lead to increased number of clients and therefore increased turnover and cash flow.¹⁵ A number of firms 'carry' litigants financially in that they recover some or all of their fees when the matter has been completed. Given that the arbitration is much faster than the trial process, disputes should be resolved faster, and lawyers recover their fees earlier. In addition it leads to greater client numbers. As mentioned earlier, there may be a percentage of people who cannot afford to have a lawyer represent them through the entire court process, but could afford to have representation for arbitration. Instead of losing clients to the process, lawyers may in fact gain clients. If a matter is proceeding to trial, arbitration can be used along the way to reduce the number of issues for determination at trial. Arbitration eventually leads to greater client satisfaction and if clients are more satisfied with the process, the cost, the timing of the decision and the overall experience, they are more likely to make referrals to, and positive comments about, their lawyer.¹⁶

3.1 LIMITING COURT REVIEW TO QUESTIONS OF LAW ONLY

¹⁴ R Abel, 'A Comparative Theory of Dispute Institution in Society,' (1973) 8 (2)

Law and Society Review 250 at 267.

¹⁵ Colin Kaeser, 'The emergence of arbitration in family law in Australia,' (2004) 6 (7) *ADR Bulletin* 125 at 128, Available at: <http://epublications.bond.edu.au/adr/vol6/iss7/1>, (accessed on 6 April 2013) Article 1.

¹⁶ *Ibid.* at 129.

There is need for amendment to the law to comply with the new constitutional dispensation, more specifically to reduce incidences when the High Court can intervene in an arbitral process. The effect of such legislation would arguably give an arbitration award less potential to be overturned than a judge's decision. Currently, courts can intervene in an arbitration process in various ways: for example it can inquire into the procedure for the appointment of arbitrator, challenge the arbitration tribunal's powers and duties of an arbitrator, it can grant interim orders, compel a witness to give evidence, set aside an award, recognize and enforce awards as well as recognition of foreign awards. However it is my submission that the role of the court should be limited to only reviewing questions of law, to do otherwise is to defeat the very essence of a swift and cost effective justice system espoused by arbitration.

3.2 PROMOTION AND PUBLICIZATION OF ARBITRATION

The commercial sector must be made to change its perception that justice can only be found in courts of law. This is because statistically, approximately 200,000 cases are bending in the High Court in Nairobi alone, it is not even strange for a litigant to get a verdict after 10 years.¹⁷ Reforms experienced in the judicial sector will help, but still the backlog is still unmanageable. If courts have to be relevant in arbitration, case management will have to change so as to change the perception that 'it is better to enter the mouth of a lion than a Kenyan court of law'.¹⁸

3.3 ENCOURAGE NON LAWYERS TO SETTLE DISPUTES

Traditionally, the practice of dispute resolution in customary law was undertaken without the use of lawyers. The system collapsed in part because of

¹⁷ Brenda Brainch, *The Climate of Arbitration and ADR in Kenya*, Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003 at 1.

¹⁸ *Ibid.* at 2.

a rise in political appointments at district level and a lack of understanding of legal rights by the older, less educated, generation such that our communities have come to believe that litigation provides not only the ultimate, but the only, justice. A former Chief Justice of Tanzania, the Hon Justice Nyalali once said: 'The use of custom, special rules and communal practice to resolve disputes is not a strange idea. It is common in most African communities and in commercial communities the world over'.¹⁹ Thus there is the need to revisit these systems so that disputes that can be settled at that level.

3.4 ADR TO BE MADE A COMPULSORY UNIT IN LAW SCHOOL

Currently law schools around the East African region do not provide alternative dispute resolution as a compulsory and examinable unit. The effect of this is that the adversarial system is still promoted as the most viable form of dispute resolution while the actual practice shows the opposite. This paper submits that for ADR to take its rightful place in legal practice, it would be necessary for law schools in East Africa to consider removing it from the list of elective units. This will ensure that the marginalized, the poor, women and people in remote parts of the country have access to justice.

4.0 ADR IN THE EAST AFRICAN COMMUNITY (EAC)

Although members of the East African Community (EAC), (Burundi, Rwanda, Tanzania and Uganda) have not expressly provided for ADR in their Constitutions, they have strong legislations that support ADR. This is demonstrated by the East African Court of Justice establishing arbitration rules to regulate arbitration processes within the East African Community (EAC) region.²⁰ Individual countries of the EAC have also aligned their legislations to

¹⁹ Ibid.

²⁰ East African Community (EAC), East African Court of Justice, *Arbitration Rules of the East African Court of Justice* (EAC: Arusha, Tanzania, 2004).

provide for ADR. In Tanzania, the Arbitration Act²¹ has incorporated multilateral agreements such as the Geneva Protocol on Arbitration Clauses and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. Uganda has embraced ADR to ensure better access to justice with a sector specific approach. The High Court in Uganda has powers to refer matters for arbitration if in its view it is necessary in the interest of justice.²² In addition, the Civil Procedure Act provides for “scheduling conference and ADR²³ and not to mention the Arbitration and Conciliation Act,²⁴ promotes autonomy and respect by the courts of ADR. However, the Labour Disputes (Arbitration and Settlement) Act, 2006 is specific to employment matters.

5.0 CONCLUSION

Alternative dispute resolution is the most promising method of accessing justice for the poor, the marginalized, gays, lesbians and women among others not only in Kenya but in the wider East African Community region. As opposed to the adversarial system which is expensive, slow and mainly concentrated in urban centers, arbitration is informal and can be quickly changed to suit local circumstances if the parties so wish without having to wait for law reform. ADR, is also faster and cheap because it relies on locally available resources (customs and personnel) other than over reliance on advocates who in most cases reside in towns. A corrupt and inefficient judicial system has been

²¹ Chapter 15 of the Laws of Tanzania.

²² Section 26-32, 41, Judicature Act; Judicial (Commercial Court Division (Mediation) Rules, No. 55 of 2007.

²³ Order XII (12), Rule 1(1): “The court shall hold a scheduling conference to sort out points of agreement...”

²⁴ Chapter 4 of the Laws of Uganda.

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cited as a major drawback to foreign direct investment, ADR circumvents this process and with it an enhanced FDI is envisaged. To beat the challenges experienced with the adversarial system, legal practitioners will need to advise clients on the advantages of ADR that are more home grown and complement the adversarial system.

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REDEFINING "ARBITRABILITY": ASSESSMENT OF ARTICLES 159 & 189 (4) OF THE CONSTITUTION OF KENYA

by **KARIUKI FRANCIS***

1.0 INTRODUCTION

Arbitrability involves a determination of the type of disputes that can be resolved through arbitration and those which are the domain of the national courts. Since not all the disputes that arise between parties are subject to arbitration, the author argues that the application of arbitration as the dispute resolution mechanism to a wide range of disputes under the Constitution of Kenya 2010 and in related legislation may widen the scope of what is arbitrable under the Kenyan legal system. This may have far reaching consequences on both domestic and international commercial arbitrations.

The author notes that whereas the scope of arbitrability is broad under the Constitution of Kenya 2010, the same cannot be said to be the case under the Arbitration Act No. 4 of 1995 (As amended in 2009). Since the scope of arbitrability is not well defined in the Kenyan context, the author argues that it should be defined so as to ensure that sensitive matters of public interest are resolved in the local courts rather than through arbitration and in tandem with the practice in vogue at the international sphere.

This paper therefore seeks to assess the impact of the provisions of the Constitution of Kenya 2010 especially Articles 159 and 189 thereof and the Arbitration Act No. 4 of 1995 (As amended in 2009) on arbitrability. The recognition and applicability of arbitration as the dispute resolution mechanism to a wide range of disputes is expected to enhance access to justice in Kenya. Whereas this may be in tandem with international trade, it may raise juridical questions for instance where the subject matter of arbitration touches on sensitive matters of national importance. This can be

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contentious considering that arbitrators are expected to resolve private disputes with respect to the parties before them and not to preside over disputes that may have public consequences. The paper recommends that there is need to redefine the scope of what is arbitrable in Kenya taking into account developments in international trade, need to enhance access to justice through the use of arbitration and the need to ensure that sensitive matters of public interest are resolved in courts of law rather than through arbitration.

The paper proceeds in three parts. Part I is the Introduction. Part II discusses the concept of arbitrability. Part III examines the provisions of the Constitution and the Arbitration Act No. 4 of 1995 (As amended in 2009) and their impact on the concept of arbitrability in the Kenyan context. Part IV concludes.

2.0 ARBITRABILITY

Arbitrability refers to the question of whether specific classes of disputes are barred from arbitration because of the subject matter of the dispute.¹ It involves a determination of the types of disputes which may be resolved through arbitration and those which cannot be resolved through arbitration but by courts of law. This is the narrow understanding of arbitrability. That is the determination of what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are exempt from arbitration proceedings.²

Since arbitration is a private and consensual process with public consequences there are certain types of disputes that are reserved for courts of law where proceedings are generally in the public domain. Such disputes are

¹ Laurence Shore "Defining 'Arbitrability'-The United States vs. the rest of the world", (*New York Law Journal*, 2009), available at <http://www.gibsondunn.com/publications/Documents/Shore-DefiningArbitrability.pdf> (accessed on 07/04/2013).

² George A. Bermann "The "Gateway" Problem in International Commercial Arbitration", (*The Yale Journal of International Law*, Vol. 37: 1),p.11.

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not "capable of settlement by arbitration."³ Consequently, whereas party autonomy espouses the right of parties to submit any dispute to arbitration, national laws will often impose restrictions on what matters can be referred to arbitration. National laws will therefore provide that certain matters cannot be dealt with by arbitrators as they involve the public interest such as criminal matters and those which affect an individual's status such as bankruptcy/insolvency proceedings. This is the narrow understanding of the concept of arbitrability.

The United States understanding of arbitrability is, however, broader and differs from the one espoused above, as it includes the preliminary question of who determines the arbitrator's jurisdiction: the arbitrator or the court. That is, when is the issue of the arbitral tribunal's jurisdiction arbitrable as opposed to being decided by the court? The US understanding of arbitrability therefore goes further to ascertain who should be the initial decision-maker on issues such as the validity of the arbitration agreement.⁴ In Kenya and in most other jurisdictions arbitrability does not extend to issues of jurisdiction.

Though in principle any dispute should be just as capable of being resolved by an arbitrator as by a judge of the court, the issue of whether a particular type of dispute is arbitrable under a given law is a matter of public policy which varies from one state to another.⁵

³ Redfern & Hunter, "*Law and Practice of International Commercial Arbitration*", (London, Sweet & Maxwell, 2004), p.163.

⁴ Laurence Shore "Defining 'Arbitrability'-The United States vs. the rest of the world", *op.cit.* See also Margaret L. Moses, "*The Principles and Practice of International Commercial Arbitration*", (Cambridge University Press, 2010), pp.68-69. In the US this issue is to be determined by the court unless there is an agreement by the parties to the contrary.

⁵ *Ibid.*

2.1 OBJECTIVE AND SUBJECTIVE ARBITRABILITY

Arbitrability may be either objective or subjective. *Objective arbitrability* arises when the law provides that certain disputes involving sensitive issues of public policy or national interest should be settled by national courts as opposed to arbitration. These are restrictions to arbitration on the basis of the subject matter.⁶ A good example is criminal matters and bankruptcy or insolvency matters which in most states are a preserve of the national courts.

Subjective arbitrability arises when the national laws of a state restrict or limit the scope of matters that can be settled via arbitration.⁷ Subjective arbitrability does not relate to the quality of the subject matter in dispute. This may arise for instance where arbitration is challenged on the basis that one of the parties to the dispute is a state entity which is not allowed to enter into arbitration under national laws. It is not explicitly clear whether we have adopted an objective or subjective attitude towards arbitrability in Kenya.

2.2 NEED OF WIDENING THE SCOPE OF WHAT IS ARBITRABLE

Since it is the national laws that determine what is arbitrable according to political, economic and social policies, it could then be the case that if the national law has a wide range of matters that can be resolved through arbitration, then, enforceability of awards under the New York Convention will be easier. This will promote international trade and investment. This is so because both the Model Law⁸ and the New York Convention do not require the arbitration of disputes that are not "*capable of settlement by arbitration.*"⁹ Further

⁶ Available at www.paneurowni.com/files/sk/fp/ulohy.studentor/2rocnikmgr/arbitrability-students-version.pdf, (accessed on 08/04/2013).

⁷ William Grantham, "The Arbitrability of International Intellectual Property Disputes", (*Berkeley Journal of International Law*, Vol. 14 Issues, 2012), p. 178.

⁸ Articles 34 (2) (b) (i) and 36 (1) (b) (i) of the Model Law.

⁹ Article II (1) of the New York Convention.

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under the Convention an arbitration award need not be recognized if “the subject matter of the difference is not capable of settlement by arbitration under the law”¹⁰ of the country where recognition is sought. This suggests that if the national laws would subordinate domestic notions of arbitrability and widen the scope of what is arbitrable then international commerce and arbitration would blossom. This was the view taken by the US Supreme Court in the *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*¹¹ where it decided that issues of antitrust violations arising out of international contracts were arbitrable under the Federal Arbitration Act despite the public interest in antitrust laws; the significance of private parties seeking treble damages as a disincentive to violation of those laws and the complexity of such cases.

The other reason for widening the scope of arbitrability could be the need to enhance access to justice. The justification could be due to the conventional impediments to accessing justice in courts such as delays, backlog of cases, high filing fees in courts and complex rules of procedure and evidence.¹² One could argue that the recognition of arbitration under the Constitution in Kenya was motivated by the need to enhance access to justice and there is need for legislation to pay particular attention to the question of arbitrability.¹³

2.3 RATIONALE FOR NARROWING THE SCOPE OF WHAT IS ARBITRABLE

¹⁰ *Ibid*, Article V (2) (a).

¹¹ 473 US 614, 105 S.Ct.3346 (1985) at 628.

¹² This could be the reason why the Kenyan Constitution in Article 159 provides that courts and tribunals shall promote arbitration and other ADR mechanisms.

¹³ Consider generally Articles 48, 159 and 189 of the Constitution of Kenya 2010.

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On the other hand, arguments in favour of narrowing the scope of what is arbitrable are based on the view that arbitration is a private and consensual process that should only deal with disputes that do not have public consequences. It is also argued that in the context of developing countries such as Kenya, that they should limit the scope of what is arbitrable especially in respect of disputes involving state agencies as this is the only way that such states can retain some control over foreign trade and commerce, where more economically powerful multinationals may have an unfair advantage over states.¹⁴ It is not explicit whether this is entire correct in light of increased global relations. However, such an argument would demand that we assess the laws establishing the domain of arbitration to ensure that issues of considerable national interest are reserved for courts while maintaining the balance in reserving matters of public interest to courts against the promotion of foreign trade and commerce.

Another reason for narrowing the scope of what is arbitrable is the general weakness of the arbitral procedures compared to court procedures. The argument here is that the fact-finding process of arbitral tribunal's is limited in terms of limited discovery, lack of appellate reviews and informal evidentiary and pleading rules compared to courts.¹⁵ In addition it is asserted that, an arbitrator's task is to effectuate the intent/agreement of the parties rather than the interpretation of enacted legislation which is a preserve of the courts of law.¹⁶

Moreover the fact that arbitrators are not always lawyers militates against certain disputes such as those involving complex legal issues being

¹⁴ Redfern & Hunter, *"Law and Practice of International Commercial Arbitration"*, *op. cit*, p.164.

¹⁵ It is also argued that procedural weaknesses of arbitration may deny citizens constitutional protected guarantees such as procedural due process which is adequately afforded by courts of law.

¹⁶ Gary B. Born, *"International Commercial Arbitration-Commentary and Materials"*, 2nd ed, (Transnational Publishers & Kluwer Law International, 2001), pp.253-254. It should however be noted that in the US statutory claims may be the subject of an arbitration agreement as held in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct; 1652 (1991).

under the domain of arbitration. In most cases such disputes will be resolved to courts of law where the judges are trained in law.

2.4 DISPUTES NOT ARBITRABLE GENERALLY

Certain matters such as criminal matters and those affecting the status of an individual or a corporate entity such as bankruptcy or insolvency are usually considered as not arbitrable.

For example disputes over the grant or validity of patents and trademarks may not be arbitrable. This is because the decision whether to grant a patent or trademark or not is a matter for public authorities in a state. However, disputes over intellectual property rights such as issuance of licences by patent or trademark owners are arbitrable.¹⁷

Moreover, even though fraud issues may not be arbitrable, where there are allegations of fraud in the procurement or performance of a contract it has been said that there is no reason why the arbitral tribunal should decline jurisdiction, implying that fraud matters in a contract are arbitrable. A claim of fraud during the arbitral process may be dismissed by the tribunal. However, if the alleged fraud is not discovered until when an award is made, the award can be annulled if fraud is proved.¹⁸

In relation to bribery and corruption it is now widely agreed under the concept of separability that an allegation of illegality such as corruption does not deprive the arbitral tribunal of jurisdiction.¹⁹ Similarly, disputes relating to antitrust and competition laws²⁰ and securities transactions²¹ which were not arbitrable have been said to be capable of settlement in international commercial

¹⁷ Redfern & Hunter, *"Law and Practice of International Commercial Arbitration"*, *op.*

cit, p.165-171. See also Margaret L. Moses, *"The Principles and Practice of International Commercial Arbitration"*, *op.cit*, pp.216-218.

¹⁸ *Ibid*.

¹⁹ *Ibid*, p.170.

²⁰ See *Mitsubishi Motors Corp v. Soler Chrysler Plymouth Inc*, *supra*.

²¹ *Scherk v. Alberto-Culver*, 417 US 506 (1974).

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arbitration. These examples show that there is a gradual expansion of the scope of matters that can be settled by arbitration among states in most commercial disputes.

3.0 PROVISIONS ON ARBITRABILITY UNDER THE CONSTITUTION AND THE ARBITRATION ACT

Whereas it is the national law that should determine what is arbitrable according to the political, economic and social policy obtaining in a country; the Kenyan Arbitration Act does not lay out clear guidelines as to the requirement of arbitrability.²² 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 law of Kenya.*"²³ 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*²⁴ the court in defining what is arbitrable stated that criminal law issues and tortious 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 tortious issues arising out of the contract the same are to be determined in the arbitral process.

Another pointer to arbitrability in Kenya is the issue of public policy. The Act provides that an award could also be set aside if the High Court is satisfied that it is in "*conflict with the public policy of Kenya.*"²⁵ Public policy is

²² Act No. 4 of 1995 (As Amended in 2009).

²³ *Ibid*, Section 35 (2) (b) (i).

²⁴ [2005] eKLR.

²⁵ Section 35 (2) (b) (ii), *op.cit.*

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a concept with no defined boundaries in Kenya. In discussing what is public policy in Kenya, the court in *Christ For All Nations v. Apollo Insurance Co. Ltd*²⁶ while acknowledging that public policy is incapable of precise definition, stated that an award could be set aside under Section 35 (2) (b) (ii) if it is inconsistent with the constitution or other laws of Kenya whether written or unwritten; or inimical to the national interest of Kenya or contrary to justice and morality. This interpretation of the concept of public policy could exclude matters that are arbitrable from the purview of arbitration.

Further in *Glencore Grain Ltd v. TSS Grain Millers Ltd*²⁷ the court stated as follows concerning public policy:

"A contract or arbitral award will be against public policy, in my view, if it is immoral or illegal or that it would violate in clearly 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 acts that are void. "Against public policy" would also include contracts or contractual acts or awards which would also offend the conceptions of our justice in such a manner that enforcement thereof would stand to be offensive."

This definition of public policy is too wide as it touches on contractual matters which are firmly the province of arbitration. This may limit the scope of what is arbitrable. As stated elsewhere in this paper even if a contract raises issues of illegality such as bribery and corruption, under the doctrine of separability such allegations do not deprive the arbitral tribunal of jurisdiction. This is testament to the fact that Kenyan law is not explicit on the concept of arbitrability.

However, when one looks at the 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.

²⁶ [2002] 2 EA 366.

²⁷ [2002] 1 KLR 606, p.626.

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For example, 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 shall be promoted subject to clause (3).²⁸ Clause (3) provides that the traditional dispute 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.²⁹ 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.

In addition, the Constitution provides that the national legislation shall provide procedures for settling governmental disputes by alternative dispute resolution mechanisms including negotiation, mediation and arbitration.³⁰ 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 remembered 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.

In a nutshell therefore there is need to align the provisions of the Arbitration Act touching on arbitrability with the Constitution. This will have to

²⁸ Article 159 (2) (c) of the Constitution of Kenya.

²⁹ *Ibid*, Article 159 (3).

³⁰ *Ibid*, Article 189 (4).

be done in a rather cautious manner in view of the need to promote international trade and the public interest in reserving certain matters of national importance to courts of law.

3.1 IMPLICATIONS FOR WIDENING THE SCOPE OF WHAT IS ARBITRABLE IN THE KENYAN CONTEXT

In relation to international commercial arbitration, the New York Convention³¹ provides that the subject matter of the claim is the key to arbitrability in the international sphere. This means that if the national law provides a wider scope of what is arbitrable then such a law will encourage international commercial arbitration whether as the law of the place of arbitration or the place where recognition and enforcement of an award is sought. This is the situation envisaged under the Constitution of Kenya as explained above and as stated will promote international trade.

However, it should be realized also that within the context of international commercial arbitration, the doctrine of arbitrability may raise the issue of what law or laws should apply to determine whether a dispute is arbitrable. Though there is no consensus regarding this issue some guidelines have been suggested.³² First, it can be said that the New York Convention establishes a uniform international definition of arbitrability from which no nation can deviate. Secondly, the law governing the arbitration agreement might define arbitrability as envisaged in Articles II (1) and V (1) (a). Thirdly, arbitrability could be defined by the law of the place where the arbitration is conducted and award made as implied by Article V (1) (a) of the Convention. Fourthly, the law of the place where enforcement of an award will be sought might define arbitrability as contemplated by Article V (2) (a) and (b) of the Convention. Fifthly, the law of the judicial forum where an arbitration

³¹ Article II (1) and Article V (2) (a) of the New York Convention.

³² Gary B. Born, *"International Commercial Arbitration-Commentary and Materials"*, 2nd ed, (Transnational Publishers & Kluwer Law International, 2001), pp.244-245.

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agreement is sought to be enforced could govern arbitrability. And finally, arbitrability could be defined by the law that governs the substantive claim.³³

The possibility of the various laws applying to the issue of arbitrability at the international arena complicates the matter since in a decision to enforce an arbitral award the court might look at the law of the enforcement forum without considering whether the subject matter of the difference was capable of settlement by arbitration under foreign law.³⁴ In addition, if arbitrability were to be determined by international public policy there is always the threat of court intervention where the unsuccessful party will attack the public policy when the successful party tries to enforce an award.³⁵

Be that as it may, it could be argued that it is in the interest of international trade that the scope of what is arbitrable under national laws be widened. This would inspire confidence among foreign investors that national courts will not interfere with matters that have been referred to arbitration on the basis of public policy and it will also ensure that foreign awards are easily recognized and enforced in Kenya. This could encourage international trade and commerce and access to justice in the settlement of disputes.

Though there is no consensus as to what law or laws should apply to determine whether a dispute is arbitrable under international commercial arbitration, domestically the lawmakers and courts must ensure that in dealing with the issue of arbitrability, that they balance the domestic importance of reserving matters of public interest to courts against the interest of promoting trade and settlement of disputes.³⁶

³³ *Ibid.* See generally the provisions of Articles II (1) and V (2) (a) of the New York Convention.

³⁴ *Ibid.*

³⁵ Available at www.paneurouni.com/files/sk/fp/ulohy.studentor/2rocnikmgr/arbitrability_students- version.pdf, (accessed on 08/04/2013).

³⁶ Margaret L. Moses, *"The Principles and Practice of International Commercial*

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The Constitution envisages a scenario where the scope of what is arbitrable is too wide. Whereas this is advantageous in relation to international trade and it enhances access to justice, the provision that governmental disputes shall be referred to arbitration may pose some problems due to the public interest involved in the settlement of such disputes.³⁷ For example, disputes that may raise issues of sovereignty such as national security and which are inherently non-arbitrable should be a reserve of the courts of law and tribunals established by written laws.

Widening the scope of what is arbitrable is also advantageous at the domestic level as it will enhance access to justice (because arbitration is a flexible, cheap and expeditious process) in commercial matters and consequently promote trade and commercial transactions.

4.0 WAY FORWARD AND CONCLUSION

It is imperative that we define the scope of what is arbitrable in the Kenyan context. In this regard there is need to ensure that in establishing the domain of arbitration that a balance is struck between the need of reserving matters that are sensitive and of national interest to courts against need to promote international trade and commerce.

There is need to harmonize the provisions of the Arbitration Act with those of the Constitution. In this endeavor caution must be taken in view of the need to promote international trade and the public interest in reserving certain matters of national importance to courts of law. The need to enhance access to justice as envisaged in the Constitution must be taken into account in defining the scope of arbitrability.

There is also need to define what matters are arbitrable in Kenya in view of the fact that what is arbitrable at the international level has greatly expanded, with so many disputes which were considered non-arbitrable being brought under the purview of arbitration. There is need to take into account developments in international trade, need to enhance access to justice through arbitration and ensuring that sensitive matters of public interest and national

Arbitration", op.cit, pp.68-69.

³⁷ See generally, Article 189 (4) of the Constitution.

Redefining "Arbitrability": Assessment Of Articles 159 & 189 (4) of the Constitution of Kenya - Kariuki Francis

importance are resolved in courts rather than through arbitration. For example, the legislation contemplated by Article 189 of the Constitution should expressly state matters that can be settled by arbitration as some may have a public interest component.

The Arbitration Act could be reviewed so as to provide for the requirement of arbitrability and align it with the spirit of the Constitution and international practice of arbitration. This is so since Clause (3) in Article 159 does not limit the scope of what is arbitrable; it only applies to traditional dispute resolution mechanisms to ensure that they conform to the law.

There will also be need to clarify the types of disputes that may be amenable for resolution through the various dispute resolution mechanisms including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. This is so since not all of these mechanisms may be amenable in resolving for example disputes over the grant or validity of patents and trademarks, employment disputes, conflicts over natural resources or governmental disputes. It will also be necessary for parties to an arbitration agreement in Kenya to seek legal advice to ensure that the subject matter they intend to submit to arbitration is arbitrable.

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Alternative Dispute Resolution welcomes and encourages submission of articles focusing on general, economic and political issues affecting alternative dispute resolution as the preferred dispute resolution mechanisms.

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ISBN 978-9966-046-02-4



