

# Alternative Dispute Resolution



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# ALTERNATIVE DISPUTE RESOLUTION

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## Editor's Note

Welcome to the *Alternative Dispute Resolution Journal* Vol. 6 No. 3, a publication of the Chartered institute of arbitrators- Kenya Branch (CIArb-K).

The issue is a **Souvenir Edition** in support of the CIArb-K Conference scheduled for November, 2018 on the theme '*ADR Trends in a Dynamic Legal Environment.*'

The Journal entails scholarly discussions on themes such as: Addressing the Psychological aspects of conflict through Mediation; Enforcement of standards of professional ethics and competence of advocates in Arbitration; Judicial interventions in arbitral proceedings; Unlocking the potential of Appropriate Dispute Resolution mechanisms; Community participation, conflict management and Alternative Dispute Resolution in the extractives industry in Kenya; Role of the National Courts in Arbitration; Public policy in the recognition and enforcement of arbitral awards in Kenya; Use of Alternative Dispute Resolution as a tool for fighting corruption; and Applicability of the doctrine of Sovereign Immunity in investment arbitration, among others.

Alternative Dispute Resolution has witnessed tremendous growth in Kenya over the years and has become a preferred mode of dispute resolution for a wide range of disputes especially commercial disputes.

Debate, however, continues to linger on how Alternative Dispute Resolution can be fully entrenched in the Kenyan legal environment for the country to reap from its benefits.

The Journal offers useful insight to some of these issues and helps the reader appreciate the indispensable value of Alternative Dispute Resolution in the Kenyan Legal Environment.

CIArb-K takes this opportunity to thank the Publisher, Contributing Authors, Editorial Team and Reviewers who have made it possible to come up with this

publication that seeks to empower scholars, ADR practitioners and general readers.

**Dr. Kariuki Muigua**, Ph.D.; FCIArb; Chartered Arbitrator;

Accredited Mediator.

Editor.

**Nairobi, September, 2018.**

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## **Taking Apology Seriously: (Re) Thinking The Place of Apology in Formal and Informal Dispute Resolution Processes**

*By: David Ngira Otieno\**

### **Abstract**

*This paper explores the moral and theoretical foundation of apology as a social-legal response to conflict. The paper examines the formal and informal use of apologies in law and state practices, and identifies the various inadequacies (or potential inadequacies) that may arise from the instrumentalization of apology. It discusses the commodification of apology and argues that the mere use of apology without an examination of its genuineness and foundation may be counterproductive to the interest of justice for the victim. The last section of this paper highlights various corrective strategies that can be employed to enhance the validity of apology in the dispute resolution process.*

### **1. Introduction**

The Scottish National Health Services defines an apology as an encounter between two parties at which one party, the offender, acknowledges responsibility for an offence or grievance and expresses regret or remorse to a second party, the aggrieved.<sup>1</sup> This definition is however contested by many scholars who argue that showing regret doesn't necessarily translate to an actual remorse and that an apology would be incomplete unless characterised by some reparatory mechanisms.<sup>2</sup> Others observe that an admission of guilt is enough to demonstrate goodwill on the part of the offender and that the victim is obligated to accept the apology as a refusal would humiliate and dehumanize the offender.<sup>3</sup> To achieve its goal, an apology must be given by the offender or a

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<sup>1</sup> SNHS, 'The power of an Apology' 2010 Focus, accessed <https://www.nes.scot.nhs.uk/media/6338/Apology%20Spring%20Focus%202010.pdf>

<sup>2</sup> Cheryl Regehr, and Thomas Gutheil 'Apology, Justice, and Trauma Recovery' 2002 (30) *The Journal of the American Academy of Psychiatry and the Law*, pp 425-430.

<sup>3</sup> Reinders Folmer, Chris and Mascini, Peter and Leunissen, Joost, *Rethinking Apology in Tort Litigation Deficiencies in Comprehensiveness Undermine Remedial Effectiveness*



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representative of the offender. The same can be done either in written or oral form.<sup>4</sup> Even when given by a representative of the offender the offender must validate the same through a personal interaction with the victim.

Apology has been used domestically, nationally and internationally as a form of corrective justice. The underlying idea behind apology has been that an admission of guilt and a show of remorse have a general cumulative effect of making the offended party feel better.<sup>5</sup> Hailing the value of apology, the New South Wales Ombudsman famously opined that ‘an apology is the superglue of life. It can repair just about anything.’<sup>6</sup>

## **2. Formal Apology**

One area where apology has remained widespread is in the determination of defamation suits. Disputes on defamation often start with the publication of some libellous information and the demand for apology by the aggrieved party who usually moves to court upon the failure by the offender to offer an (appropriate apology).<sup>7</sup> In determining these disputes, courts generally order offenders to compensate the offended and (or) offer an appropriate apology. Such was the scenario in *Lucy Kagwiria Rutere v Standard Limited & 4 others*<sup>8</sup>, where the respondent was ordered to ‘to apologise, retract and publish the retraction of the defamatory part of the reports contained in the edition of the Standard of 2<sup>nd</sup> and 3<sup>rd</sup> June 2009 within a period of 30 days’. Sometimes, courts may invalidate previous apologies for failing certain legal and validity tests. For instance, in *Musikari Kombo v Royal Media Services Limited*<sup>9</sup> the Court of

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(June 28, 2017). Available at SSRN: <https://ssrn.com/abstract=3113196> or <http://dx.doi.org/10.2139/ssrn.3113196>

<sup>4</sup> SNHS supra note 1 at 11-12.

<sup>5</sup> Ibid.

<sup>6</sup> New South Wales Ombudsman, *Apologies – A practical guide* (2009, 2nd edition).

<sup>7</sup> For such discussion see generally Reinders supra note 3

<sup>8</sup> 2015] eKLR

<sup>9</sup> [2018] eKLR

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Appeal rejected an apology that Royal media services had advanced to Musikari Kombo for defaming him and his wife. The Judges observed that:

*“The said apology did not receive the same magnitude of coverage as the offending broadcasts which were aired at prime time. Both the appellant’s witnesses as well as the respondent’s own witness acknowledged that not many people watch that early morning programme. Consequently, we find that the apology was not adequate in the circumstances.”<sup>10</sup>*

Internationally, apology has been used to express remorse for injustices committed by states in the past. For instance, admitting the moral wrong of the child Migration Programme in which thousands of children were transferred from the UK to former British dominions between 1800 and 1972 allegedly to ‘whiten’ the dominions, the former British Prime Minister, Gordon Brown expressed the British government’s apology to the victims and established a fund to compensate them.<sup>11</sup> Mrs Clark, the CEO of Barnados, one of the children homes that received and housed the children during the programme regretted that;

*“significant and irrevocable damage had done to some individuals by the child migration programme and that although the policy was misguided and wrong it was not seen as wrong at the time”, and was done with good intentions and in accordance with government policies.”<sup>12</sup>*

Similarly, the Prime minister of Australia in apologising for the mistreatment of the aboriginal Australians by the incoming Europeans observed that:

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<sup>10</sup> Ibid

<sup>11</sup> See Child Migration Programme investigative Report accessed from <https://www.iicsa.org.uk/keydocuments/4265/view/Child%20Migration%20Programmes%20Investigation%20Report%20March%202018.pdf>

<sup>12</sup> Ibid at 42

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*“The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future. We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians. We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country...”<sup>13</sup>*

Following the case of *Ndiku Mutua & Others v The Foreign and Commonwealth Office*<sup>14</sup> in which members of the Mau Mau movement who were tortured by British Colonial Authorities sought compensation from the British government, the then British foreign Secretary, William Hague apologised to the Mau Mau for the atrocities. In his apology, he observed that:

*“The British government recognises that Kenyans were subject to torture and other forms of ill-treatment at the hands of the colonial administration...The British government sincerely regrets that these abuses took place and that they marred Kenya's progress towards independence.”<sup>15</sup>*

Domestically, apology has been used by government to address historical injustices against members of specific groupings.<sup>16</sup> In the aftermath of the

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<sup>13</sup> Government of Australia, ‘Apology to Australia's Indigenous peoples’ accessed from <https://www.australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>

<sup>14</sup> HQ09X02666 of 2012.

<sup>15</sup> See BBC ‘Mau Mau torture victims to receive compensation – Hague’ (6<sup>th</sup> June,2013) accessed from <https://www.bbc.com/news/uk-22790037>

<sup>16</sup> See for instance, President Kenyatta’s apology for historical injustices during his state of the Nation address in 2015 accessible from <https://www.ijmonitor.org/2015/04/kenyan-president-and-chief-justice-apologize-for-past-injustices/>. See also the President’s apology to the Makonde community, accessible from [https://www.the-star.co.ke/news/2016/10/15/president-says-sorry-stateless-makonde-to-get-ids-by-december\\_c1438419](https://www.the-star.co.ke/news/2016/10/15/president-says-sorry-stateless-makonde-to-get-ids-by-december_c1438419)

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contested 2017 elections, the president of Kenya issued an apology to all those that he had wronged during his campaign. He posed;

*“If there was anything I said last year that hurt or wounded you, if I damaged the unity of this country in any way, I ask you to forgive me, and to join me in repairing that harm... We need change now, in this generation, so that our children grow to adulthood in a totally different Kenya. We must demonstrate we are truly Kenyan citizens. We must do this for our country, not for self...”<sup>17</sup>*

### **3. Informal Apology**

Informal apologies often take place between two individuals, either directly through a negotiated process or through the intervention of a third party, often a mediator.<sup>18</sup> One avenue where informal apologies are prevalent is in the domain of Alternative Dispute Resolution or Appropriate Dispute Resolution as argued elsewhere.<sup>19</sup> The offering and acceptance of apology by the offender and offended parties respectively, is seen as an integral part of the dispute resolution process. Unlike the formal apology processes where the victim plays very little or no role in the apology, aggrieved parties in informal apology processes generally have more leeway in the apology discourse and may reject or ask them to be modified.<sup>20</sup> A rejected apology in informal dispute processes is often seen as a failure in the dispute resolution and efforts are often directed at ensuring that the apology is given in the appropriate language to enhance chances of acceptance by the offended. This explains why informal justice processes, such as traditional dispute resolution often have several sessions which tend to become less severe overtime.

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<sup>17</sup> See Daily Nation ‘Uhuru Kenyatta’s State of the Nation speech in full’ (May 3<sup>rd</sup> 2018) accessed from <https://www.nation.co.ke/news/politics/Uhuru-full-state-of-the-nation-address/1064-4541100-gqbp50z/index.html>

<sup>18</sup> Joanna Shapland, ‘Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?’ 2016 (5) Oxford Journal of Law and Religion pp 94–112.

<sup>19</sup> For Reflections on Appropriate Dispute Resolution see, Ngira David, ‘Reconfiguring Alternative Dispute Resolution as Appropriate Dispute Resolution, 2018 6 (2) Alternative Dispute Resolution pp 194–214

<sup>20</sup> See generally Joanna supra note 18

Informal apologies through ADR systems, have been hailed as being more sincere and subtle and therefore likely to restore relationships and minimize the chances of revenge. In fact scholars have argued that due to the absence of direct interaction between the aggrieved and the offender, formal apologies aren't an apology at all, but rather a fulfilment of public or legal obligations by the public officials.<sup>21</sup>

#### **4. The Problem with Apology**

Formal Court ordered apologies have received the highest level of criticism from scholars. According to Carrol, Allan and Halsmith, legal apologies are problematic because their sincerity is difficult to determine. They observe that;

*“There is a danger that the law will encourage insincere, non- authentic and instrumental apologies by affording legal protection to apologies which might otherwise be an admission and therefore evidence of fault for purposes of legal liability.”<sup>22</sup>*

A similar concern has been raised by Tomlinson. According to him, sincerity is highly valued by victims. Offended parties generally feel better if they believe that the apology is voluntary and sincere.<sup>23</sup> He opines that legal apologies are generally insincere because the offender apologizes as part of fulfilling his obligation under a court order or policy requirement.<sup>24</sup> The offender's body language, actions, ideology and gestures, which are extra legal issues may essentially be inconsistent with the text of the apology. This commodification and instrumentalization of apology by the formal legal processes has eroded the moral and normative foundation of apology. Accordingly, scholars like Taft have

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<sup>21</sup> Zohar Kampf, 'Public (non-) apologies: The discourse of minimizing responsibility' 2009 (41) *Journal of Pragmatics* pp 2257–2270

<sup>22</sup> Robyn Carroll, Alfred Allan and Margaret Halsmith, 'Apologies, Mediation and the Law: Resolution of Civil Disputes 2017 7 (3) *Onati Social Legal Series* pp 569-600 573

<sup>23</sup> Tomlinson, E.C., Dineen, B.R., and Lewick, R.J. The road to reconciliation: antecedents of victim willingness to reconcile following a broken promise 2004 30(2) *Journal of Management*, pp 165-187

<sup>24</sup> *Ibid*

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argued that the assumption that apology is crucial for the healing of the aggrieved party is intelligible but problematic, in so far as the law doesn't define what constitutes the healing of the offended.<sup>25</sup>

These concerns and challenges are perhaps best reflected in Kenya's socio-political space. In the face of runaway hate speech in Kenya, the National Cohesion and Integration Commission has, on several occasions, ordered individuals to apologise for their utterances in return for the discontinuation of legal actions against them. However, a review of the apologies issued by these individuals indicates that these apologies are often instrumental endeavours made to fulfil legal and policy requirements. The same parties often engage the Commission in a vicious circle of apology and a repeat of the offences resulting into a vicious cycle of prosecution.<sup>26</sup>

Notwithstanding the above weaknesses, Taft has argued that apology is important because it restores the moral balance between the victim and the offender. He opines;

*"The offender demonstrates regard in his willingness to apologize, and the offended reflects regard when he chooses to forgive. In law, this is a process that would often occur between strangers, so I do not envision that the restoration of regard would necessarily lead to a close interpersonal relationship. Rather, I envision a process in which the offender and the offended would each see and embrace the other's humanity and would recognize that each occupies a place in the wider circle we call life."*<sup>27</sup>

Although Taft highlights the positive elements of apology, he fails to explore the underlying question of how the interest of the victim and the offender can be balanced during the process of apology. Since the perpetrators are often at a

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<sup>25</sup> Lee Taft, 'Apology Subverted: The Commodification of Apology 2000 109 (5) The Yale Law Journal, 1135-1160

<sup>26</sup> See for instance the Republic v Moses Kuria [2016] eKLR

<sup>27</sup> Taft supra note 25 P 1137

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higher standpoint relative to the victims within the context of the violations, they have the capability to misuse apology to their advantage. Secondly, apology ignores the socio-economic and psychological gaps between the offender and the offended. Take, for example, a conflict between a parent and a child or a teacher and student. Social norms stratify people in such a way that junior persons in any relationships are expected to respect the senior (or older) parties. It is therefore socially disapproved for the senior partners in the relationship to be seen to be apologising to the junior one as this is considered as a form of humiliation. Additionally, in many instances, the weaker person may be so dependent on the stronger party that an apology from the latter would receive instant acceptance due to the fear of the withdrawal of benefits. Within this context, an apology can be used as a tool of domination.

Another concern has to do with the increasing elevation of forgiveness into a matter of right. Many governments across the world, including the ones cited above, consider forgiveness as a right of the government that it can invoke to shirk responsibility over corrective justice.<sup>28</sup> Although violators may have a right to apologise (as part of their freedom of expression), they do not have a right to be forgiven. It is therefore within the victim's discretionary purview to accept or reject an apology. Since violators (especially those involved in formal apologies) often assume that their moral responsibilities are fulfilled once they apologise, they rarely seek for any feedback from their victims on the acceptance of their apology. Within this context, victims are often left with very few options; either accept the apology and elevate the moral status of the violator or reject it and get nothing in return. The discretionary nature of forgiveness is therefore extinguished.

As opposed to court based orders for apology which are usually characterised by monetary compensation, government apologies often recognise and appreciate the damage and promise a better future for the victims and their descendants but do not at least in all instances, guarantee any compensation for

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<sup>28</sup> For such an argument see generally Kampf *supra* note 21

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the previous wrongs.<sup>29</sup> In many instances, the apologies are fashioned in the language of forgiveness rather than apology, and to the extent that no effort is made to determine the extent to which healing has occurred, formal apologies are based on the presumption that an apology by the state (or offending private citizen) automatically generates forgiveness from the offended. Even when redress is offered, the same is often fashioned more as a privilege or moral deed by the offender and not as a corrective obligation.

The disconnect between redress and apology especially in government apologies is a phenomena that has attracted immense scholarship.<sup>30</sup> For instance, researchers have argued that apologies must be individualised. Since government apologizers are rarely the actual individuals who committed the wrongs, statements read by government officials and considered as apologies do not meet the test of the term.<sup>31</sup>

Apology as a means of correcting a wrong also raises a moral problem. Picture a scenario where individual A wrongs individual B and apologises to B during the dispute resolution process. What options does B have? Can B reject the apology given by A? Will theorists will argue that B has the right to accept or reject the apology given by A but at what cost is this acceptance or rejection? Let us return to the apologies cited earlier and assume that the descendants of the aborigines, the Mau Mau or opposition supporters are unwilling to accept the apology given by the Australian Prime Minister, the former British Foreign secretary or the Kenyan President respectively, what options do the victims have? Or put differently, can the apologizer withdraw his apology if the same is rejected? Does an apology carry with it the added responsibility of persuading the victims to

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<sup>29</sup> Ibid. For an example of such an apology, see supra note 16, the apology offered by the President of Kenya to the Makonde.

<sup>30</sup> See Isabelle Auguste, 'Rethinking the nation: Apology, treaty and reconciliation in Australia' 2010 12 (4) National Identities pp 425-436

<sup>31</sup> Tony Barta, 'Sorry, and not sorry, in Australia: how the apology to the stolen generations buried a history of genocide' 2008 (10) 2 Journal of Genocide Research pp 201-214.



accept the apology? What are the moral and legal repercussions of rejecting an apology? Answering these questions requires much more than this paper can offer. However, there will be an attempt to respond to the last question.

An apology generally puts pressure on the victim to consent.<sup>32</sup> Failing to consent often implies that the victim is vengeful, unforgiving and generally stubborn, characters that collectively erode his moral status in societies. In fact, the Kalenjin of Kenya have an adage that says 'you cannot skip an apology'. It is contended in this paper, that this pressure on the victim is unjustified. Since dispute resolution processes, be they adversarial or restorative have the overarching goal of making the victim feel better, any process that imposes an obligation on the victim (to forgive) is manifestly unjust. Just like it is difficult to know whether an apology is genuine or not, establishing the genuineness of forgiveness is equally problematic because it is impossible to determine whether the victim is forgiving out of social duress (emerging from external players such as mediators) or internal duress emerging from a feeling that he/she has an obligation to forgive.<sup>33</sup> This concern is not farfetched. Gender based Violence researchers have long opined that restorative justice, to the extent that is anchored upon apology and compensation, is unsuitable for domestic violence because they put undue pressure on the woman and in some cases the children to forgive the offender (often the man).<sup>34</sup>

It has been argued that unless care is taken by the dispute resolver (or by the victim), an apology can actually be used as an instrument of moral manipulation.<sup>35</sup> Experts point out that there is a constant interflow of moral

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<sup>32</sup> Zechmeister, J.S., et al, Don't apologise unless you mean it: a laboratory investigation of forgiveness and retaliation 2004 (4) *Journal of Social and Clinical Psychology*, pp 532-564.

<sup>33</sup> Ibid

<sup>34</sup> Julie Stubbs, 'Beyond apology? Domestic violence and critical questions for restorative justice' 2007 *Criminology & Criminal Justice* pp 169 - 187

<sup>35</sup> Ibid

capital between the offender and the victim.<sup>36</sup> From a moral standpoint, an apology is therefore seen as a good thing in and of itself regardless of the ulterior goals.<sup>37</sup> Thus by apologizing to the victim, the offender gains moral capital. On the other hand, the victim, who stands at a higher moral position due to his status, gains more moral capital by accepting an apology and loses the same by rejecting it. Due to the value attached to moral capital by the society, many aggrieved parties often opt to accept the apology (and gain moral capital) even if the same is not fashioned in the appropriate language or characterised by appropriate reparatory mechanisms. Such a situation often leaves the victim in a worse off situation than his pre-apology status and creates more resentment against the offender.

### **5. So how can Apology be taken Seriously?**

It has been argued that a botched apology not only fails to effectively communicate the offender's repentance, remorse, and regret but also creates further harm that can strain relationships or create vengeful sentiments.<sup>38</sup> Accordingly, the process of taking apology seriously is just one among the many steps that are crucial in revitalizing victim centred restorative justice. Chiesa has opined that real justice only occurs when the victims of an injustice takes an active part in the dispute resolution process.<sup>39</sup> He observes that dispute resolution systems that relegates the victim to the periphery and focuses on an instrumental application of laws only serves to further victimize the victim.<sup>40</sup> Similarly, Taft has suggested that;

*"...the offender must first take time before initiating the communication with the offended party-to " name" the offence, that is, to become clear about the norm that*

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<sup>36</sup> Kathleen Gill, 'The Moral Functions of an Apology' 2000 (31)1 *The Philosophical Forum* pp 11-27

<sup>37</sup> Ibid

<sup>38</sup> For such an argument see Lee Taft supra note 25 at 1141

<sup>39</sup> See Luis Chiesa. *Taking victims seriously: A Dworkinian Theory of Punishment* (2007) 76 *Revista Juridica* PP 117-128 P 123

<sup>40</sup> Ibid

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*has been violated and about what it is that calls the offender to apologize. During this time, the offender is engaged in an internal process in which he comes to terms with his error, names it, and identifies himself with the action. In this process, the offender moves to a willingness to admit his wrong and to express remorse for the result of his act.”<sup>41</sup>*

The Process of taking apology seriously must therefore start from Chiesa’s and Taft’s underlying principle. To this end it must:

Recognise the legitimacy of the violated moral rule. All societies are organised around some moral standards that exist to protect members. Accordingly, harm to a member of the society often directly results into the violation of a moral rule. Since moral rules are often the acceptable standards of behaviour and may (or may not) be reflected in the laws, an individual who offends another individual indirectly offends the society by virtue of having offended one of its members and its moral rule. The apologizer must therefore start by recognizing the legitimacy of the moral rule, acknowledge its value and express regret and remorse to the society for violating it. S/he must, as a matter of principle, explain the circumstance under which the moral rule was violated. Thus, apologies that target victims but exclude the society, such as the ones issued by the British Prime Minister and the Australian Prime Minister or which question the legitimacy of the moral rule such as the one issued by Mrs Clark, the director of Barnados Children home are socially and morally inadequate. Their main weakness lies in the fact that they ignore the society (which is offended when its members are offended and its moral rules broken). Equally, apologies that are couched in general terms and which fail to identify the social norm(s) that had been broken, such as the ones issued by the Kenyan president (cited earlier) and would generally do very little to facilitate the healing of the victims. An apology must, in its very nature, be couched in the language of the victim, and not that of the offender. All technicalities must be waived in favour of a simple victim oriented language.

Secondly, an apology must encompass corrective and preventive mechanisms. Orenstein has observed that reparations, a promise to reform and a strategy for

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<sup>41</sup> Ibid.

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the prevention of the future occurrence of the same wrong is an inherent element of an apology.<sup>42</sup> However, scholars like Tavuchis have opined that the words 'I'm sorry' or any other words used in apology imply a promise to reform and therefore such an express promise to reform would be a repetition.<sup>43</sup> Tavuchis' contention is unintelligible because it makes an untenable assumption. It is important to note that most people who apologise do not use the words 'I'm sorry'. Instead they ask for forgiveness, an approach which has previously been rejected in this paper due to its immense possibility of socially and psychologically manipulating the victim. Since violations often lower the moral, physical, economic or social status of the victim relative to the offender, an apology must encompass means of returning the victim to his/her pre conflict status or even beyond. An express commitment not to repeat the offence thus goes a long way in curing any doubts that the victim may have about the genuineness of the offender (and the dispute resolution process).

Thirdly, the apologizer (or the dispute resolver) must seek the opinion of the victim over his interest in an apology. The assumption that the victim is interested in an apology must be discarded since research has shown that many victims of violations may be interested in; compensation and no verbal apology, apology without compensation, both apology and compensation or none. The challenge for the dispute resolvers therefore lies in identifying the true interest or wish of the victim. It must be noted (as Chiesa already told us) that victims must be taken seriously in dispute resolution processes. Part of this process involves seeking their opinion on what should be done to make them feel better and in what form the same should be done.

It must also be pointed out that contrary to the positive image reflected in socio-legal circles, an apology may have the negative consequence of bringing up the

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<sup>42</sup> Orenstein, Aviva "Apology Excepted: Incorporating a Feminist Analysis into Evidence Policy Where You Would Least Expect It"(1999) South Western University Law Review 221-279, 239

<sup>43</sup> See *Mea Culpa: A sociology of Apology and Reconciliation*.

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memories of past ordeals that the victim may not want to revisit.<sup>44</sup> Additionally, as observed by Justice Aburili in *Abdi Mohamed Farah v Nairobi Star Publication Ltd & another*<sup>45</sup>, an apology that takes too long to come by often negates the very value of an apology and is therefore unsuitable in healing the damage done to the victim. Accordingly, victims in such cases may be disinterested or altogether hostile to the apology. Imposition of apologies on victims, without seeking their consent or informing them of the intention to do so, not only raises questions about the genuineness of the apology but also reflects an instrumentalization of an apology to achieve consequentialist results which may as well, be in the interest of the violator (and therefore further violate the victim's moral status and personhood). To address this weakness, the victim must be given the chance to determine the mode, nature and wording of the apology and the right to reject it altogether. As highlighted earlier, botched apologies often result from a belief by the victim that the apology is not genuine or that it doesn't go far enough to cure his condition.

Lastly, the process of taking apology seriously must be communicative. It must incorporate an apology discourse in which there is prior communication and correspondence between the victim and the perpetrator. Such forums enable the victims to express themselves on the apologies. The state apologies cited earlier, to the extent that they excluded victims and didn't give them an opportunity to reject or accept the apologies, failed the test of a meaningful apology. Additionally, the rejection of an apology should not in any way compromise the status of the victim in the society or in the eyes of the apologizer. Instead, the offender must work with the victim and dispute resolver to address the underlying reasons for the rejection of the apology and abstain from reoffending the victim.

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<sup>44</sup> For such an argument see Tony Barta *supra* note 31

<sup>45</sup> [2015] eKLR

## **6. Conclusion**

This paper set out to map the scope, nature and limitations of apology. It must be admitted, although this has already been said, that court based apologies are fairly irreconcilable with the above tests. Since court based apologies are part and parcel of formal adversarial systems, their nature, timing and location are often predetermined by law, or in the words of realists, predetermined by the judge.<sup>46</sup> Accordingly, any modification of the prescribed form and structure of apology may be considered to be a violation of a court order and therefore rejected. The apology envisioned through these strategies are public apologies offered by state officers and interpersonal apologies conducted through interpersonal negotiation or mediation processes. It is hoped that this paper has mapped out intelligible strategies for meaningful apology in this respect. If not, then an apology is hereby offered.

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<sup>46</sup> Realists believe that law is that which the judge pronounces the law to be and not that which is written in law books and statutes.

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**“Community Participation, Conflict Management and Alternative Dispute Resolution in the Extractives Industry in Kenya: Mechanisms to Promote Foreign Direct Investment for Sustainable Development”**

**By: Alvin Gachie\*, Evelyne Mbula Nzuki\*, Dr. Wachuka Njoroge\* & Dr. Steve Gachie\***

***Abstract***

*This paper makes a case for strengthening community participation in the extractives industry in Kenya, to promote conflict management and also dispute resolution. Through community participation, projects funded through foreign direct investment can contribute to achieving sustainable development, through stimulating sustainable financial flows. The paper argues that existing dispute resolution mechanisms under the legal framework for the extractives industry do not sufficiently provide for community participation. While trends indicate that business enterprises have over the years adopted international principles to take into account the need for meaningful community participation including through establishing grievance processes, further attention needs to be laid on collaborative design of community participation and alternative dispute resolution mechanisms to support efforts of the extractives industry to contribute to sustainable development.*

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### List of Abbreviations and Acronyms

ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Treaty
CSI	Corporate Social Investments
CTF	Community Trust Fund
EIA	Environmental Impact Assessment
FDI	Foreign Direct Investment
HRIA	Human Rights Impact Assessments
ICSID	International Centre for the Settlement of Investment Disputes
NEMA	National Environmental Management Authority
SDG	Sustainable Development Goal
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

## 1. Background

In 1996, Canadian-based Tiomin Resources Inc. acquired an 80% stake in licensed minerals rights to carry out reconnaissance exploration along the Kenyan coast.<sup>1</sup> Pangea Goldfields Inc. retained 20% of the interest.<sup>2</sup> This was the beginning of the Kwale titanium mining project. In 2010, Australian-based Base Resources Limited acquired Tiomin and the mining licenses it owned.<sup>3</sup> The project has been riddled with delays including legal battles initiated by the local community.<sup>4</sup> The

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<sup>1</sup> John J McKetta Jr (ed), *Encyclopedia of Chemical Processing and Design: Volume 68 - Z-Factor (Gas Compressibility) Errors to Zone Refining* (CRC Press 1999) 46, 47.

<sup>2</sup> Ibid.

<sup>3</sup> Jim Onyango, 'Titanium Mining Venture Gets Shot in the Arm' *Business Daily* (Nairobi, Kenya, 20 April 2010) <<http://www.businessdailyafrica.com/Corporate-News/Titanium-mining-venture-gets-shot-in-the-arm/-/539550/902566/-/111cdngz/-/index.html>> accessed 17 May 2016; Kennedy Senelwa, 'Base Iron Acquires Tiomin Mines' *Daily Nation* (Nairobi, Kenya, 5 August 2010) <<http://www.nation.co.ke/business/Base-Iron-acquires-Tiomin-mines/-/996/971728/-/w1kw1c/-/index.html>> accessed 17 May 2016; Nation Correspondent, 'Kenya Approves Transfer of Titanium Project' *Daily Nation* (Nairobi, Kenya, 31 May 2010) <<http://www.nation.co.ke/business/Kenya-approves-transfer-of-titanium-project/-/996/929274/-/7ud6iq/-/index.html>> accessed 17 May 2016.

<sup>4</sup> Nityanand Jayaraman, 'Titanium or Water? Trouble Brews in Southern India'



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reasons for opposition included displacement of over 5,000 community members, contamination of the soil and aquifers with heavy metals, noise pollution, biodiversity loss, and environmental degradation.<sup>5</sup>In one case, the local community opposed the project on the claim that among other impacts, the mining activities negatively affect the health of the people living in the surrounding areas.<sup>6</sup>

Conflict and the need for conflict management and Alternative Dispute Resolution (ADR) also emerge from other areas of the extractives industry. In July 2018, Tullow Oil PLC, a business enterprise engaged in oil extraction and production in Turkana, Kenya, shut down operations due to issues with the local community threatening progress of the project.<sup>7</sup> Deep-seated issues of insufficient inclusion in extraction projects elevates risks of discontent among the local community if grievances are unresolved, or if existing conflict management or dispute resolution systems are inefficient. Protests from as early as 2013 have plagued the Tullow oil extraction project, with issues such as demands for jobs and benefits insufficiently addressed, and proposals for local development

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(*CorpWatch*, 24 October 2007) <<http://www.corpwatch.org/article.php?id=14768>> accessed 17 May 2016.

<sup>5</sup> Environmental Justice Atlas, 'Titanium Mining in the Kwale District, Kenya' (*Environmental Justice Atlas*, 30 December 2015) <<http://ejatlas.org/conflict/titanium-mining-in-the-kwale-district-kenya>> accessed 31 March 2016; Joria Sudi Mwakwambirwa, 'Influence of Mining Related Factors on the Livelihoods of Resettled Communities in Kenya: The Case of Titanium Mining in Msambweni Division, Kwale County, Kenya' (Master of Arts (Project Planning and Management), University of Nairobi 2015).

<sup>6</sup> *Rodgers Muema Nzioka & 2 others v Tiomin Kenya Limited* [2001] High Court of Kenya at Mombasa Civil Case No. 97 of 2001, eKLR.

<sup>7</sup> Reuters, 'Tullow Has Stopped Kenya Oil Fields Due to Security Issues' *Reuters* (London, United Kingdom, 25 July 2018) <<https://uk.reuters.com/article/uk-tullow-kenya/tullow-has-stopped-kenya-oil-fields-due-to-security-issues-idUKKBN1KF0PD>> accessed 25 July 2018; David Herbling and Paul Burkhardt, 'Tullow's Kenya Oil Operations Threatened as Impasse Endures' *Bloomberg* (17 July 2018) <<https://www.bloomberg.com/news/articles/2018-07-17/tullow-oil-may-halt-turkana-operations-in-kenya-over-impasse>> accessed 25 July 2018.

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projects failing to sufficiently incorporate the community's needs.<sup>8</sup> The latest concerns of the local community include insecurity in the area, where interference with Tullow's trucking operation appeared to Tullow to be "a lever really to demonstrate to the national government that the security situation on the ground had to improve".<sup>9</sup>

## **2. Alternative Dispute Resolution and Sustainable Development**

The Constitution of Kenya provides for promotion of ADR including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>10</sup> In the context of the mining sector, disputes relating to mining agreements may be settled either by the Cabinet Secretary in accordance with the Mining Act of 2016, through mediation or arbitration, or through the court system.<sup>11</sup> However, in an evaluation of the status of the legal framework for mining in Kenya presented to the African Union in 2017 under the auspices of the African Mining Vision, the Ministry of Mining of Kenya acknowledged that gaps include lack of a framework for ADR on matters related to land and sustainable land management relating to mining activities as there is no guideline or regulation on substance or procedure of such mechanism.<sup>12</sup>

Agenda 2030 and the Sustainable Development Goals (SDGs) map out a plan for the future of humankind and planet earth. In the 17 SDGs are embedded the ideals for development, including economic, social, political and environmental concerns. While the whole is made up of distinct elements, they all feed in to the goal of 'meeting the needs of the present without compromising the ability of future generations to meet their own needs'. According to SDG 16.3, Kenya

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<sup>8</sup> David Herbling and Paul Burkhardt (n 7).

<sup>9</sup> Reuters (n 7).

<sup>10</sup> Constitution of Kenya 2010, art 159(2) (c).

<sup>11</sup> Mining Act 2016 s 154.

<sup>12</sup> Government of the Republic of Kenya, 'Report of Sub-Committee on Country Mining Vision Gap Analysis: African Union African Mining Vision' (Ministry of Mining 2017) 40 <<http://www.ke.undp.org/content/dam/kenya/docs/Poverty%20Reduction/Revised%20Gap%20Analysis%20Report.pdf>> accessed 24 July 2018.

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alongside all other United Nations (UN) Member States strive to “promote the rule of law at the national and international levels and ensure equal access to justice for all”. Access to justice includes not only formal legal systems, but also ADR systems through which, for example, communities near large-scale economic projects can seek redress for violations and abuses of their rights. If there are no viable avenues for resolving conflicts, alternatives such as violence or conflict avoidance (which could later lead to violence) may result.<sup>13</sup> Conflict management and ADR contribute to achieving sustainable development through strengthening the rule of law and advancing efforts to achieve equal access to justice for all.

### **3. Community Participation, Conflict Management and ADR to Promote Sustainability of Extractives Projects**

The term “community” generally refers to a group of interacting people living in a common location, organized around common values, acknowledging a sense of social cohesion within a shared geographical location,<sup>14</sup> and usually in social units larger than a household. It is theorized that the modern society, in Kenya as in the rest of world, transitioned from simple states such as band-type societies (organized at the level of the individual and the clan or ethnic community), to more complex states such as modern societies.<sup>15</sup> Community resilience over time

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<sup>13</sup> Ewa Wojkowska, ‘Doing Justice: How Informal Justice Systems Can Contribute’ (United Nations Development Programme 2006) 14. EwaWojkowska, ‘Doing Justice: How Informal Justice Systems Can Contribute’ (United Nations Development Programme 2006) 14.

<sup>14</sup> World Health Organization (WHO), ‘A Glossary of Terms for Community Health Care and Services for Older Persons’ (2004) Technical Report WHO/WKC/Tech.Ser./04.2 16; World Health Organization (WHO), ‘Community Empowerment’ (WHO, 2018) <<http://www.who.int/healthpromotion/conferences/7gchp/track1/en/>> accessed 30 July 2018.

<sup>15</sup> Jonathan Turner, Leonard Beeghley and Charles Powers, ‘The Sociology of Auguste Comte’, *The Emergence of Sociological Theory* (7th edn, Sage Publications Inc 2012) <[https://us.sagepub.com/sites/default/files/upm-binaries/44173\\_3.pdf](https://us.sagepub.com/sites/default/files/upm-binaries/44173_3.pdf)> accessed 30 July 2018; Alain de Benoist and Tomislav Sunic, ‘“Gemeinschaft and Gesellschaft”: A Sociological View of the Decay of Modern Society’ (1994) 34 *Mankind Quarterly* <<https://s3-eu-west>

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is illustrated in that this transition was only peaceful when it happened without disrupting basic ties between the individual and the society through a common history, culture and kinship.<sup>16</sup> The sense of “belonging” to the modern society in Kenya through these common links is theorized to contribute to cooperation, altruism and respect for other members.<sup>17</sup> Theories of change for interventions at the community level vis-à-vis the society or national level should take into account this transition of communities in Kenya from the simple state to the more complex state of the sense of community,<sup>18</sup> and should also include the position of the community in an assessment of the country situation, global challenges and international commitments to be achieved.

Countries such as Kenya have increasingly considered Foreign Direct Investment (FDI) as a source of economic development.<sup>19</sup> However, drawbacks of FDI include lack of positive linkages with the local communities, as well as potential negative environmental and health impacts such as with extractive industries.<sup>20</sup> An ideal legal framework for FDI should not only facilitate economic

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1. [amazonaws.com/alaindebenoist/pdf/gemeinschaft\\_and\\_geellschaft.pdf](https://www.amazonaws.com/alaindebenoist/pdf/gemeinschaft_and_geellschaft.pdf) accessed 30 July 2018; Muhammad Dhauadi, ‘The Concept of Change in the Thought of Ibn Khaldun and Western Classical Sociologists’ (2006) 16 *Islam Arastirmalari Dergisi* 43.

<sup>16</sup> Carmit Rapaport and others, ‘The Relationship Between Community Type and Community Resilience’ (2018) 31 *International Journal of Disaster Risk Reduction* 470, 476; Alain de Benoist and Tomislav Sunic (n 15).

<sup>17</sup> Alain de Benoist and Tomislav Sunic (n 15).

<sup>18</sup> Practice Institute of Medicine (US) Committee on Health and Behavior: Research, *Organisations, Communities, and Society: Models and Interventions* (National Academies Press (US) 2001) <<https://www.ncbi.nlm.nih.gov/books/NBK43742/>> accessed 30 July 2018.

<sup>19</sup> Wairimu Karanja and Agnes Gitau, ‘Special Report on International Arbitration in Kenya’ (GBS Africa 2017) <<http://www.eaarbitration.com/wp-content/uploads/2018/05/Arbitration-Special-Report.pdf>> accessed 25 July 2018. Wairimu Karanja and Agnes Gitau, ‘Special Report on International Arbitration in Kenya’ (GBS Africa 2017) <<http://www.eaarbitration.com/wp-content/uploads/2018/05/Arbitration-Special-Report.pdf>> accessed 25 July 2018.

<sup>20</sup> Organisation for Economic Cooperation and Development, ‘Foreign Direct Investment for Development’ (OECD 2002) 6.

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development,<sup>21</sup> but also promote sustainable development through including provisions that fulfil obligation of all States for protection of the rights to life, health, and to a safe and healthy environment.<sup>22</sup>

There have been instances of promotion of FDI inflows without regard for people or the planet, with conflicts emerging through human rights abuses, environmental hazards and tax evasion related to the foreign investors' activities in developing countries.<sup>23</sup> Without including environmental and social welfare safeguard in the legal framework for FDI in Kenya, the development of the mining sector in the country would not be sustainable, elevating the risk of conflict and necessitating efficient conflict management systems. There is global recognition of the need for 'sustainable investment flows', denoting a situation when FDI inflows take into account a sustainable development approach, to 'leave no one behind'.<sup>24</sup>

Community participation is crucial for development projects as well as in ADR mechanisms for legitimacy of the processes, preventing and mitigating impacts

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<sup>21</sup> Organisation for Economic Co-operation and Development (OECD), *OECD Benchmark Definition of Foreign Direct Investment* (4th Edition, OECD 2008) 3 <<https://www.oecd.org/daf/inv/investmentstatisticsandanalysis/40193734.pdf>> accessed 18 May 2016.

<sup>22</sup> Pascale Hatcher, 'Local Communities and Multilateral Safeguards: The Mining Regime of Lao PDR' Working Paper 19 <[http://lkyspp.nus.edu.sg/cag/wp-content/uploads/sites/5/2013/05/NATBMA\\_WP12-41.pdf](http://lkyspp.nus.edu.sg/cag/wp-content/uploads/sites/5/2013/05/NATBMA_WP12-41.pdf)> accessed 19 May 2016.

<sup>23</sup> Michiel van Dijk and Myriam Vander Stichele, 'Is Foreign Investment Good for Development?: A Literature Review' (Stichting Onderzoek Multinationale Ondernemingen (SOMO) (Centre for Research on Multinational Corporations) 2008) SOMO Paper 1.

<sup>24</sup> Nick Mabey and Richard McNally, 'Foreign Direct Investment and the Environment: From Pollution Havens to Sustainable Development' (WWF-UK 1999) 8.

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of conflicts,<sup>25</sup> evading eruption of violence,<sup>26</sup> and therefore contributing to attracting FDI for sustainable development. Methodologies for community engagement in the extractives industry, throughout the project lifecycle include impact assessments and ADR among others.<sup>27</sup>

#### **4. Community Participation through Impact Assessments**

An Environmental Impact Assessment (EIA) is required for programmes, activities or projects likely to have a negative environmental impact<sup>28</sup> these include mining and extraction projects. The business enterprise should ensure that the project report has a plan to ensure the health and safety of the workers and neighbouring communities,<sup>29</sup> and the economic and socio-cultural impacts to the local community and the nation in general;<sup>30</sup> and that in consultation with the National Environmental Management Authority (NEMA) being the government agency with a regulatory mandate over EIAs, the views of the community are sought through posting posters, publishing notices in newspapers, and conducting public meetings with the community, with an aim to take the comments into consideration.<sup>31</sup> Through EIAs, communities have an entry point to have their interests and concerns incorporated in the project, to mitigate potential negative effects on their health and the environment.

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<sup>25</sup> Catherine Macdonald, 'The Role of Participation in Sustainable Community Development Programmes in the Extractives Industries' (United Nations University World Institute for Development Economics Research 2017) Working Paper WIDER Working Paper 2017/28 5.

<sup>26</sup> Government of the Republic of Kenya (n 12) 41.

<sup>27</sup> Norwegian Church Aid, 'Local Communities in Kenya's Extractive Sector: From Paternalism to Partnership' (Norwegian Church Aid 2015) 9  
<[https://www.kirkensnodhjelp.no/contentassets/2a28ebbac27d47e1bf647844633586d4/local-communities-in-kenya\\_s-extractive-sector-from-paternalism-to-partnership-0..pdf](https://www.kirkensnodhjelp.no/contentassets/2a28ebbac27d47e1bf647844633586d4/local-communities-in-kenya_s-extractive-sector-from-paternalism-to-partnership-0..pdf)> accessed 25 July 2018.

<sup>28</sup> Environmental Management and Coordination Act 1999 s 2.

<sup>29</sup> Environmental (Impact Assessment and Audit) Regulations 2003, clause 7.

<sup>30</sup> *Ibid*, clause 7.

<sup>31</sup> *Ibid*, clause 17.

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Yet there are a number of instances where companies in Kenya have commenced projects without an EIA license,<sup>32</sup> or with insufficient detail provided on the EIA report of risks to health and the environment including exposure to toxic chemicals. EIAs are limited tools of community participation because they are only entry points at the project stage, and members of the public including the community do not participate in the formulation of the public policy and guidelines, or during vetting of projects, where community participation would be useful.<sup>33</sup> There is therefore need to explore further mechanisms for community participation throughout the project lifecycle. The risk for conflict persists not only at the project stage where the conflict may be anticipated, but also at other points of the project including upon closure of the project where environmental degradation and contamination of a closed mine may still present negative effects to the health and environment of the community.

EIAs have also been criticized for a focus on biophysical impacts,<sup>34</sup> and HRIA is increasingly emerging as a tool to assess and address the impacts of extractives projects on the rights of communities.<sup>35</sup> Business enterprises are progressively implementing the UN Guiding Principles on Business and Human Rights,<sup>36</sup> through putting in place human rights policies with commitments including meaningful and broad community support from impacted communities

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<sup>32</sup> *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2017] Court of Appeal of Kenya at Nairobi Civil Appeal 105 of 2015, eKLR; *Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others* [2015] High Court of Kenya at Nairobi Environment and Land Case 195 of 2014, eKLR.

<sup>33</sup> Kariuki Muigua and Paul Musyimi, 'Enhancing Environmental Democracy in Kenya' 10-11.

<sup>34</sup> Andreas Jacobs, 'Assessing Local Impacts', *Responsible Mining and Local Development in Kenya*, vol 32 (1st edn) <<https://www.nomos-elibrary.de/10.5771/9783845274478-51/assessing-local-impacts?page=1>> accessed 27 July 2018.

<sup>35</sup> Nora Götzmann and Tulika Bansal, 'Human Rights Impact Assessment in the Extractive Industries: Taking a Human Rights-Based Approach' (2015).

<sup>36</sup> United Nations, 'UN Guiding Principles on Business and Human Rights' (Office of the UN High Commissioner for Human Rights 2011) <[https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 25 July 2018.

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throughout the project lifecycle, and ensuring access of the community to non-judicial grievance mechanisms.<sup>37</sup> Through HRIA, the impacts of the extraction activities on the rights to life, health, and to a safe and healthy environment, alongside the rights of children, women of childbearing age, persons with disability, and other members of the community may be evaluated and put into consideration in the conduct of the project.

## **5. Arbitration in the Extractives Industry**

The Mining Act of 2016, the Petroleum (Exploration and Production) Regulations<sup>38</sup> under the Petroleum (Exploration and Production) Act,<sup>39</sup> Bilateral Investment Treaties (BITs) and some government model investment contracts recognize international arbitration for agreements between the government and investors in relation to extraction projects.<sup>40</sup> For example, according to the Mining Act of 2016, mineral agreements are required to provide for the procedure for settlement of disputes,<sup>41</sup> which may include resolution of disputes through an international arbitration or a sole expert.<sup>42</sup> The Petroleum (Exploration and Production) Regulations provide for arbitration in accordance with the arbitration rules adopted by the United Nations Commission on International Trade Law (UNCITRAL).<sup>43</sup>

BITs, for example the BIT between Kenya and the United Kingdom, invoked in the arbitration between *Cortec Mining Kenya Limited, Cortec (Pty) Limited and*

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<sup>37</sup> Tullow Oil PLC, 'Human Rights Policy Statement' <[https://www.tulloil.com/Media/docs/defaultsource/1\\_About\\_us/policies/tulloil-oil-human-rights-policy-2017.pdf?sfvrsn=14](https://www.tulloil.com/Media/docs/defaultsource/1_About_us/policies/tulloil-oil-human-rights-policy-2017.pdf?sfvrsn=14)> accessed 27 July 2018.

<sup>38</sup> Petroleum (Exploration and Production) Regulations 1984.

<sup>39</sup> Petroleum (Exploration and Production) Act 1984.

<sup>40</sup> Wairimu Karanja and Agnes Gitau (n 19) 6.

<sup>41</sup> Mining Act (n 11).

<sup>42</sup> Ibid 117(2)(i).

<sup>43</sup> Petroleum (Exploration and Production) Regulations (n 38), clause 41.



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*Stirling Capital Limited v, Republic of Kenya*,<sup>44</sup> makes reference to international arbitration at the International Centre for the Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States<sup>45</sup> (ICSID Convention) at the request of the investor.<sup>46</sup> While international arbitration at ICSID is the standard for many BITs and model investment contracts around the world, there is increasingly a global move towards reforming investment dispute settlement to include a sustainable development-oriented approach.<sup>47</sup>

While appropriate for disputes between the government and business enterprises, international commercial arbitration may not be a favourable dispute resolution mechanism for disputes between the local community and the government or the business enterprise. For example, the amicable settlement of disputes and arbitration provided for in the situation of a production sharing agreement or participation agreement between the government and a business enterprise, is only available to parties to the contract,<sup>48</sup> therefore excluding the

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<sup>44</sup> *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v Republic of Kenya* International Centre for Settlement of Investment Disputes ICSID Case No. ARB/15/29.

<sup>45</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966.

<sup>46</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments 1999, art 8; United Nations Conference on Trade and Development (UNCTAD) (ed), *Investment Policy Review: Kenya* (United Nations 2005) 26.

<sup>47</sup> 'The Changing World of Investment Negotiations: From Bilateral Protection To...?', *11th Annual Forum of Developing Country Investment Negotiators* (Kenya Investment Authority (KenInvest), the International Institute for Sustainable Development (IISD) and the South Centre 2018)

<<https://www.iisd.org/sites/default/files/meterial/11th-annual-forum-reporten.pdf>> accessed 26 July 2018; United Nations Conference on Trade and Development, *World Investment Report 2017: Investment and the Digital Economy* (United Nations 2017)123-124.<[https://www.un-ilibrary.org/international-trade-and-finance/world-investment-report-2017\\_e692e49c-en](https://www.un-ilibrary.org/international-trade-and-finance/world-investment-report-2017_e692e49c-en)> accessed 26 July 2018.

<sup>48</sup> Kariuki Muigua, 'Resolving Environmental Conflicts through Mediation in Kenya' (PhD Thesis, University of Nairobi 2011) 96-97

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community which has an interest in the extraction project but interests which are not as a norm included in the agreement.

## 6. Community Participation in Alternative Dispute Resolution

Community participation is essential in ADR in the extractives industry to address underlying concerns including inequality. FDI in developing nations has been plagued by a problem concerning a shift in bargaining power to the detriment of the host country.<sup>49</sup> Power and relational inequality between the company and the local community further contribute to the risk of disputes, with members of the community publicly opposing projects as an expression of deep rooted issues.<sup>50</sup> ADR plays a role in empowerment of communities, through enabling the parties - in this situation the community which often has less bargaining power - to take charge of their situation and relationships, exercise control over processes and outcomes, and where applicable achieve a resolution to the conflict or reconciliation.<sup>51</sup> There is need for improved environmental and social impact assessments<sup>52</sup> and strengthening of the legal and policy

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<<http://erepository.uonbi.ac.ke/bitstream/handle/11295/16130/MUIGUA%20D.%20KARIUKI%20PH.D%202011.pdf?sequence=3>> accessed 27 July 2018.

<sup>49</sup> Bjørn Letnes, 'Foreign Direct Investment and Human Rights: An Ambiguous Relationship' [2002] *Forum for Development Studies* 38. Bjørn Letnes, 'Foreign Direct Investment and Human Rights: An Ambiguous Relationship' [2002] *Forum for Development Studies* 38.

<sup>50</sup> Seth Opoku Mensah and Seth Asare Okyere, 'Mining, Environment and Community Conflicts: A Study of Company-Community Conflicts over Gold Mining in the Obuasi Municipality of Ghana' (2014) 5 *Journal of Sustainable Development Studies* 64, 66.

<sup>51</sup> Kariuki Muigua, 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms' (2015) 12-15.

<sup>52</sup> Biruhe Eshete and Thomas Gebre, 'Foreign Direct Investment (FDI) Development between the European Union (EU) and Least Developed Countries (LDCs) - Business Opportunities in Ethiopia' (Bachelor's Thesis, Haaga-Helia University of Applied Sciences 2012) 93-95. Biruhe Eshete and Thomas Gebre, 'Foreign Direct Investment (FDI) Development between the European Union (EU) and Least Developed Countries (LDCs) - Business Opportunities in Ethiopia' (Bachelor's Thesis, Haaga-Helia University of Applied Sciences 2012) 93-95.

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frameworks to create an enabling environment for conflict management and ADR, to take into account community concerns.

ADR mechanisms through which community participation may be promoted include traditional dispute resolution mechanisms (TDRM) such as negotiation, reconciliation, and mediation among others. To address the imbalance in bargaining power, there is need for improved community engagement to build capacity for negotiation not only when a dispute arises, but also to present the community's interests clearly forward during agreement-making, and project planning and implementation.<sup>53</sup> Where power imbalances may prejudice negotiation, mediation is another form of ADR through which community engagement may be promoted. In a situation of a dispute between a business enterprise and the community, the mediator may raise cases directly with the business enterprise, assist the community members in understanding their rights, and either assist the parties to arrive at a fair resolution or advise on other ADR mechanisms that may be better suited for the dispute.<sup>54</sup>

Although under a different setting, there are examples where community-based conflict surrounding issues such as unauthorized grazing, cattle rustling, arms trafficking, and others have been resolved through setting up peace committees,

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<sup>53</sup> World Bank, 'Mining Community Development Agreements: Source Book' (World Bank Group 2012) 7

<[http://siteresources.worldbank.org/INTOGMC/Resources/mining\\_community.pdf](http://siteresources.worldbank.org/INTOGMC/Resources/mining_community.pdf)> accessed 14 August 2018.

<sup>54</sup> Mining, Minerals and Sustainable Development Project (MMSD) project, 'Breaking New Ground: Mining, Minerals and Sustainable Development' (International Institute for Environment and Development (IIED) 2003) 217

<<http://pubs.iied.org/pdfs/G00901.pdf>> accessed 15 August 2018; Liadh Troy, 'Company-Community Conflict: How Can Mediation Help?' (*Centre for Effective Dispute Resolution*, 19 December 2017)

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as part of TDRM.<sup>55</sup> Local peace dialogues, negotiations, reconciliation meetings, and other mediation mechanisms drawing from local customs of Kenyan communities recognize the importance of community participation and contribute to addressing underlying causes of the conflict which if presented before the formal justice system may not be uncovered.<sup>56</sup>

Community participation in mining activities should involve establishment of grievance management channels and dispute resolution mechanisms to deal with emerging conflicts, grievances, and disputes.<sup>57</sup> Non-judicial grievance mechanisms are important alongside judicial mechanisms as part of a comprehensive State-based system for remedy of human rights violations and abuse, including those related to interactions with business enterprises.<sup>58</sup>

Business enterprises involved in the extractives industry in Kenya often have internal processes in place to address grievances.<sup>59</sup> However, these processes seldom take into account the community's interests, and as a result the outcomes have in some instances still been unsatisfactory for the community.<sup>60</sup> There is a tendency for such grievances to be dealt with in an adversarial manner through the business enterprise's legal department, without a focus on dialogue and

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<sup>55</sup> Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms Under Article 159 of the Constitution of Kenya 2010' 6-7

<<http://www.kmco.co.ke/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>> accessed 24 February 2016.

<sup>56</sup> Ibid 10.

<sup>57</sup> International Finance Corporation, 'Addressing Grievances from Project-Affected Communities: Guidance for Projects and Companies on Designing Grievance Mechanisms' (World Bank Group 2009) Good Practice Note

<<https://www.ifc.org/wps/wcm/connect/cbe7b18048855348ae6cfe6a6515bb18/IFC%2BGrievance%2BMechanisms.pdf?MOD=AJPERES&CACHEID=cbe7b18048855348ae6cfe6a6515bb18>> accessed 15 August 2018.

<sup>58</sup> United Nations (n 36), Part III: Access to Remedy.

<sup>59</sup> Norwegian Church Aid (n 27) 185-186.

<sup>60</sup> Ibid.

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resolution,<sup>61</sup> key approaches to dealing with community concerns. Even where corporate expenditure on community development including dispute resolution is envisioned, this does not in many cases improve conditions for the community because the programmes are often designed and executed without community participation, and therefore do not take into account the community's needs and priorities.<sup>62</sup>

There is a need for collaborative design of community participation and ADR mechanisms for the extractives industry at a macro level, involving not only the business enterprises and the community, but also the government. Economic and political power imbalances should be considered in designing these mechanisms to factor in the relative bargaining power of all parties. There is recognition of the key role of ADR in the legal framework in Kenya, with recognition including at the constitutional level. Yet, there are no guidelines under the legal framework governing the mining sector, on effective, just and prompt compensation of communities and affected persons where mining and mineral development take place.<sup>63</sup>

The result of conflict resolution processes involving large-scale developments may not only be through financial compensation, but also through development of social and environmental projects in the local community. These may include developing infrastructure ranging from educational institutions to health institutions. For example, while a medical laboratory at primary health care level augments both clinical diagnostic and public health activities, and the use of simple laboratory tests significantly alters diagnosis and treatment<sup>64</sup> of health

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<sup>61</sup> Shift, 'Stakeholder Engagement and the Extractive Industry Under the OECD Guidelines for Multinational Enterprises' (2013) Discussion Paper 17 <[https://mneguidelines.oecd.org/global-forum/2013\\_WS2\\_1.pdf](https://mneguidelines.oecd.org/global-forum/2013_WS2_1.pdf)> accessed 27 July 2018.

<sup>62</sup> Catherine Macdonald (n 25) 14.

<sup>63</sup> Government of the Republic of Kenya (n 12) 39.

<sup>64</sup> Wachuka Njoroge, 'Assessment of the Quality of Medical Laboratory Service Provision in Kenya' (PhD Thesis, Kenyatta University 2014) 2.

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impacts of FDI projects, inclusion of such initiatives as a remedy for negative health impacts, and to address community health, is often overlooked. Such community development language may be used in the sustainable development and corporate social responsibility policies of various business enterprises, but regrettably entities are often reluctant to cede control over the programmes, rarely go beyond execution of agreements with community representatives, and in many instances do not extend to adopting the trend of gaining a social license to operate through meaningful participation.<sup>65</sup>

Natural resources are essential to sustaining people's livelihoods and for economic development. While offering the opportunity for growth, their exploitation often does not occur in a framework of capable and accountable institutions that manage natural wealth in a transparent and inclusive way. Conflict has emerged in a number of circumstances as a result of multiple and unresolved stakeholder interests not only in extractive industries, but also in other areas where FDI is characteristic. Indeed, transparency, accountability, and equity in the governance of natural resources strengthen the rule of law, empower marginalized communities, and rebuild social ties; these values also underscore the quick and sustainable resolution of conflicts.<sup>66</sup>

## **7. Conclusion**

This paper has made a case for strengthening community participation in the extractives industry in Kenya, to promote conflict management and also dispute resolution. Through community participation, projects funded through FDI can contribute to achieving sustainable development, through promoting sustainable financial flows. The paper argues that existing dispute resolution mechanisms under the legal framework for the extractives industry do not sufficiently provide for community participation. While trends indicate that business enterprises have over the years adopted international principles to take

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<sup>65</sup> Catherine Macdonald (n 25).

<sup>66</sup> Kariuki Muigua and Kariuki Francis, 'ADR, Access to Justice and Development in Kenya' (Strathmore University 2014) 23.

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into account the need for meaningful community participation including through establishing grievance processes, further attention needs to be laid on collaborative design of community participation and alternative dispute resolution mechanisms for the extractives industry to promote sustainable development.

Community participation may be promoted through various areas including TDRMs such as negotiation, reconciliation, and mediation among others. Especially with regard to conflict between business enterprises and the community, this would contribute to addressing the power imbalances and improve capacity of the community members to negotiate agreements; if this fails, mediation with proper community participation would ensure the interests of the community are adequately communicated and reflected in resolutions; and through reconciliation with adequate community participation the sense of ownership and control over the community's interests may be restored. Community engagement and participation in extractives projects, including through exploring conflict management and ADR options, are essential for development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>67</sup> Without adequate safeguards in place, an increase of FDI in extractives projects, a priority area in Kenya for economic development, may lead to a situation where violations of human rights and instances of environmental degradation might regrettably be considered to be allowable collateral damage.

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<sup>67</sup> World Commission on Environment and Development, 'Report of the World Commission on Environment and Development: Our Common Future (Brundtland Report)' (World Commission on Environment and Development 1987).

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*Community Participation, Conflict Management and Alternative Dispute Resolution in the Extractives Industry in Kenya: Mechanisms to Promote Foreign Direct Investment for Sustainable Development:  
Alvin Gachie, Evelyne Mbula Nzuki, Dr. Wachuka Njoroge & Dr. Steve Gachie*

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments 1999

Constitution of Kenya 2010

Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966

Environmental (Impact Assessment and Audit) Regulations 2003

Environmental Management and Coordination Act 1999

Mining Act 2016

Petroleum (Exploration and Production) Act 1984

Petroleum (Exploration and Production) Regulations 1984

## **Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation**

*By: Kariuki Muigua\**

### **Abstract**

*This paper offers a reflective discussion on the psychological aspects of conflict and how Alternative Dispute Resolution (ADR) practitioners involved in mediation can effectively identify and address the psychological aspects of conflicts as a way ensuring that the process achieves lasting outcomes for the parties. This is because in almost all conflicts, there are usually underlying needs of the parties to have the root causes of the conflict fully addressed to avoid recurrence of the problem. Arguably, the ability of any mediator to identify and address these aspects will not only boost their reputation as competent mediators but will also go a long way in helping parties negotiate meaningfully and achieve outcomes that are win-win and long lasting. The author thus offers some thoughts on how mediators can achieve this.*

### **1. Introduction**

It has rightly been pointed out that the integration of modern dispute resolution processes into legally pluralistic African justice systems has been accomplished through multiple mechanisms, including in some cases, merging traditional conflict processes with modern Alternative Dispute Resolution (ADR).<sup>1</sup> In others, there have been varied adaptations of western ADR models.<sup>2</sup> The latter arguably captures Kenya's approach to incorporation of ADR mechanisms into the mainstream justice system. The current Constitution of Kenya 2010 under article 159 now provides that alternative forms of dispute resolution including

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<sup>1</sup> Haley, J.N., 'Mediation and Access to Justice in Africa: Perspectives from Ghana,' *Harvard Negotiation Law Review*, Vol. 21, 59, Fall 2015, pp. 59-106, p. 68.

<sup>2</sup> *Ibid*, p.68.

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reconciliation, mediation, arbitration and traditional conflict resolution mechanisms should be promoted as long as they do not contravene the Bill of Rights and are not repugnant to justice or inconsistent with the Constitution or any written law.<sup>3</sup>

Sometimes, parties in litigation can engage in mediation outside the court process and then move the court to record a consent judgment.<sup>4</sup> This procedure exists as a remote form of court-annexed mediation<sup>5</sup>. On the other hand, parties in a conflict that is not before a court may undergo a mediation process and conclude the mediation agreement as a contract *inter partes* enforceable and binding as between them, so long as it abides by the provisions of the Law of Contract Act.<sup>6</sup>

On a more practical level, mediation is also applied to the resolution of environmental conflicts, like land boundary conflicts, at a very informal level. Parties with such a conflict will bring it, for instance, to a panel of elders who are respected members of the society. They will listen to the parties and encourage them to come to a consensus on those matters. This ensures access to justice for the aggrieved parties, as the consensus reached is binding and the society has widely accepted internal enforcement mechanisms. This process has been widely

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<sup>3</sup> Constitution of Kenya 2010.

<sup>4</sup> Civil Procedure Rules, former Order XXIV Rule 6 (now order 25 rule 5(1) and section 3A of the Act.

<sup>5</sup> The Pilot Project on Court Annexed Mediation in Kenya commenced on 4th April, 2016 at the Family Division and Commercial and Admiralty Division of the High Court in Nairobi. The Pilot Project was entrusted to the following bodies: Mediation Accreditation Committee (MAC); Alternative Dispute Operationalization Committee (AOC); and the Secretariat (Technical Working Group (TWG). The Mediation Accreditation Committee (MAC) is a committee established under section 59A of the Civil Procedure Act, Cap 21, Laws of Kenya. The *Mediation (Pilot Project) Rules, 2015* were enacted to guide the process. The project has since been rolled out to the rest of the country beginning May 2018.

<sup>6</sup> Law of Contract Act, Cap 14, Laws of Kenya Revised Edition 2012 [2002]. *Government Printer, Nairobi*.

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applied by many communities in Kenya. It is a safe method as it preserves the relationship of the parties as it was before the conflict.<sup>7</sup>

In recognition of the important role of mediation in conflict management, there have been efforts by the Judiciary to accredit mediators to facilitate the Judiciary's Court Annexed Mediation program. While it is appreciated that there are different training bodies in the country and different approaches to mediation, this paper explores the *psychological facets of a conflict* that emerge in mediation to help mediators become more effective in discharging their duties as mediators (emphasis added). This is because, while the mediators are assigned matters by the Judiciary based on their qualifications, there are no guidelines on how they should approach the same. The focus is on the outcomes. They are expected to rely on their professional training which is as diverse as their backgrounds in training. As such, most of the professional skills, tactics and approaches to mediation are expected to be picked along the way as they gain experience and interact with different matters.

This paper therefore helps them understand some of the psychological aspects that they should pay attention to as they discharge their duties as mediators, based on the parties involved, model of mediation adopted and the type of disputes at hand. The paper first looks at the advantages and disadvantages of engaging in mediation, highlights the different models of mediation and finally explores the role of mediators which includes identifying the different psychological aspects of the conflict that are likely to arise, with the aim of helping mediators, both nascent and experienced, appreciate these aspects whenever they are called upon to resolve conflicts through mediation.

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<sup>7</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, no. 7. UNESCO, 2003, p. 25.



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According to the American Psychological Association, psychology is the study of the mind and behavior; it is the study of the mind, how it works, and how it affects behaviour.<sup>8</sup>

## **2. The Advantages and Disadvantages of Mediation**

Mediation process is associated with the advantages of being, *inter alia*, a fast process compared to the other processes. The timing of the process is within the control of the parties, is informal, cost-effective, flexible, efficient, confidential, preserves relationships, provides a range of possible solutions and there is autonomy over the process and the outcome. On confidentiality it is generally agreed that any admissions, proposals or offers for solutions do not have any consequences beyond the mediation process and cannot, as a general rule, be used in subsequent litigation or arbitration.<sup>9</sup>

Regarding its expeditious and time saving nature, the American Bar Association<sup>10</sup> notes that it is often possible to schedule mediation around work schedules or on the weekend. Mediation is thus often marketed as being both economically and time efficient. However, that marketing assumes that both parties are honestly willing to mediate the dispute. If one party (or both parties) do not enter the mediation with the intention to make concessions and reach a compromise then the mediation is likely to fail. While mediations are less

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<sup>8</sup> Nordqvist, C., "What is psychology and what does it involve?" *Medical News Today* Last updated Thu 1 February 2018 (Reviewed by Timothy J. Legg, PhD, CRNP). Available at <https://www.medicalnewstoday.com/articles/154874.php> [Accessed on 1/08/2018].

<sup>9</sup> World Intellectual Property Organization, "Mediation: Frequently Asked Questions," available at <http://www.wipo.int/amc/en/mediation/guide/> [Accessed on 1/08/2018]. This is also captured in the *Mediation (Pilot Project) Rules, 2015* which provide under Rule 12 that 'all communication during mediation including the mediator's notes shall be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings'.

<sup>10</sup> American Bar Association, "Beyond the Myths; Get the Facts about Dispute Resolution", Washington DC, 2007, p. 8. *Published by the American Bar Association Section of Dispute Resolution with the generous support of the JAMS Foundation.* Sourced from [www.abanet.org/dispute](http://www.abanet.org/dispute), [Accessed on 1/08/2018].

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expensive and take less time than court cases, they still cost money and can last anywhere from a few hours to a few days. The cost of the mediation, and obviously the time it took, are not refundable and the parties to a failed mediation typically need to incur the costs of litigation after the failed mediation is over.<sup>11</sup>

Mediation is also non-coercive in that parties have autonomy over the forum, the process, and the outcome. There are no sanctions such as are applied in courts and in arbitration.

In summary, mediation is associated with the following positive aspects: It helps to identify the true issues of the dispute; It resolves some or all of the issues; Agreement can be reached on all or part of the issues of the dispute; The needs and interests of the parties are met (in part or in full); The parties reach an understanding of the true cause of the dispute; The parties reach an understanding of each other's needs and interests; It provides the possibility of preserving the relationship; and an improved relationship may result.<sup>12</sup>

Despite possessing the above positive attributes mediation has some drawbacks.<sup>13</sup> Firstly, there is the issue of 'power imbalance'. Power is a major concern in mediation. Where there is a significant power difference, the concern is that one party may dominate the process and the resulting outcome such that the agreement reflects largely only that party's needs and interests. Power also has broader repercussions in mediation as it may affect the legitimacy of the process itself. For a mediation process to be legitimate, it must be able to deal

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<sup>11</sup> LawInfo, "The Pros and Cons of Mediation," available at <https://resources.lawinfo.com/alternative-dispute-resolution/mediation/> [Accessed on 1/08/2018].

<sup>12</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, no. 7. UNESCO, 2003, p. 25.

<sup>13</sup> See generally Owen M. F., "Against Settlement," *Yale Law Journal*, Vol.93, no. 1073 (1984).

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fairly with disputes involving significant power differences.<sup>14</sup> A power differential may originate from a variety of sources which include those derived from financial resources, knowledge and skill in negotiating, access to decision makers, personal respect and friendships.<sup>15</sup> Rarely, if ever, will power be equally balanced between the parties to a dispute. Even if it were desirable, there is no way a mediator would accurately measure the distribution of power between parties, and then intervene to redistribute power more equally.<sup>16</sup>

Secondly, mediation suffers from its non-binding nature. This means that, even though parties have agreed to submit a dispute to mediation, they are not obliged to continue with the mediation process after the first meeting. In this sense, the parties remain always in control of the mediation process. The continuation of the process depends on their continuing acceptance of it.<sup>17</sup> It is a process that requires the goodwill of the parties. The non-binding nature of mediation also means that a decision cannot be imposed on the parties.<sup>18</sup>

Thirdly, mediation may lead to endless proceedings. Moreover, and unlike in litigation, there are no precedents that are set in mediation hence creating uncertainty in the way decisions will be made in future. Lastly, mediation may not be suitable when one party needs urgent protection like an injunction and hence viewed against litigation this could be a demerit.<sup>19</sup>

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<sup>14</sup> Baylis, C. & Carroll, R., "Power Issues in Mediation", *ADR Bulletin*, Vol.7, No.8 [2005], Art.1, p.135.

<sup>15</sup> Manning, C., "Power Imbalance in Mediation," p. 2. Available at <http://dialmformmediation.com.au/> [Accessed on 1/08/2018].

<sup>16</sup> Power Imbalances in Mediation, SCMC Briefing Papers, *Scottish Community Mediation Centres*, Edinburg. Available at [www.scmc.sacro.org.uk](http://www.scmc.sacro.org.uk), [Accessed on 1/08/2018].

<sup>17</sup> World Intellectual Property Organization, "Mediation: Frequently Asked Questions," available at <http://www.wipo.int/amc/en/mediation/guide/> [Accessed on 1/08/2018].

<sup>18</sup> *Ibid.*

<sup>19</sup> Findlaw, "Alternative Dispute Resolution: Which Method Is Best For Your Client," available at

### 3. Models of Mediation: An Overview

Mediators are generally free to use a variety of strategies and techniques during mediation, which often vary from one mediator to the other depending on their personality, experience, and beliefs in the role of mediation.<sup>20</sup>

It has rightly been pointed out that there is considerable diversity in the practice of mediation internationally and within countries. Furthermore, mediation is used for various purposes and operates in a variety of social and legal contexts. As such, the mediator usually possesses different types of training, cultural backgrounds<sup>21</sup>, skills levels and operational styles. These factors all contribute to the challenge of trying to define and describe mediation practices.<sup>22</sup>

There are various models of mediation that are used in different jurisdictions and subject areas: *Facilitative mediation*- where the parties are encouraged to negotiate based upon their needs and interests instead of their strict legal rights; *Settlement mediation*- where parties are encouraged to compromise in order to settle the disputes between them; *Transformative mediation*- where the parties are encouraged to deal with underlying causes of their problems with a view to repairing their relationship as the basis for settlement; and *Evaluative mediation*- where parties are encouraged to reach settlement according to their rights and

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<https://corporate.findlaw.com/litigation-disputes/alternative-dispute-resolution-which-method-is-best-for-your.html> [Accessed on 1/08/2018].

<sup>20</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, no. 7. UNESCO, 2003, p. 26.

<sup>21</sup> Some scholars have argued that 'the pre-conceived expectations of the mediation process, which are a synthesis of culture and power relationships, create the greatest challenges a mediator faces when working with parties from other cultures.' De Voe, P.A. & Larkin, C.J., 'Cultural Challenges to Mediation,' *ACResolution*, A Quarterly Magazine, Fall-Winter 2007, pp. 30-31, at p. 30. Available at [https://law.wustl.edu/faculty\\_profiles/documents/larkin/CulturalChallengesMediation.pdf](https://law.wustl.edu/faculty_profiles/documents/larkin/CulturalChallengesMediation.pdf) [Accessed on 1/08/2018].

<sup>22</sup> Drews, M., 'The Four Models of Mediation,' *DIAC Journal- Arbitration in the Middle East*, Vol.3, No. 1(1), 2008, p.44.

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entitlements within the anticipated range of court remedies. Some mediators utilise a number of models in the same mediation.<sup>23</sup>

Despite the foregoing, it should be noted that scholars have summarised about five elements of a successful mediation process that would work in various approaches: First, there needs to be ‘an impartial third party facilitator’ who helps the parties explore the alternatives and find a satisfactory resolution; Second, the mediator must ‘protect the integrity of the proceedings’ by setting ground rules that all parties must follow and protecting the confidentiality of the proceedings; Third, there must be ‘good faith from the participants’ or the process will soon be frustrated and fail; Fourth, those with full authority to make decisions must attend the proceedings to show true commitment to the process. If one side lacks full authority, the other side can easily become frustrated when approval from superiors must continually be obtained; and finally, the mediator must choose an appropriate neutral location, so that both sides will feel relaxed and the process will be less intimidating.<sup>24</sup>

It is also true that ‘practitioners are likely to be influenced by their professional background, their training, skill level and their framework for practice. They may have different perspectives that influence their style and may not always be consistent in every case. This influence most often comes from their initial training, their mentors, literature, ongoing professional and personal

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<sup>23</sup> Ibid; See also Fenn, P. *Introduction to Civil and Commercial Mediation*, Part 1 (Chartered Institute of Arbitrators), p. 42:

Para. 4.12 provides for *contingency approach* to mediation, which means that there is no set procedure but the procedure is tailored to suit the parties and the dispute in question. This often means that mediation is conducted without joint meetings and the mediators play a variety of roles.

<sup>24</sup> Marsh, Stephen R. 1997a. What is mediation? Available at <http://members.aol.com/ethesis/mw1/adr1/essayi.htm>, (As quoted in Smith, C.R., ‘Mediation: The Process and the Issues,’ (Industrial Relations Centre, Queen’s University Kingston, Ontario, 1998), p.3.

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development, membership of professional bodies and their organisational or agency standards and accreditation requirements.<sup>25</sup>

#### **4. Making Mediation Work: The Role of Mediators in the Mediation Process**

The mediator's role is considered to be multiple, that is: to help the parties think in new and innovative ways, to avoid the pitfalls of adopting rigid positions instead of looking after their interests, to smooth discussions when there is animosity between the parties that renders the discussions futile, and in general to steer the process away from negative outcomes and possible breakdown towards joint gains.<sup>26</sup> In addition, it has been observed that the mediator not only facilitates but also designs the process, and assists and helps the parties to get to the root of their conflict, to understand their interests, and reach a resolution agreed by all concerned.<sup>27</sup>

In summary, this role is believed to incorporate the following: Help to coordinate the meetings; introduce the parties; explain the process to the parties; set the agenda and rules; create a cease-fire between the parties; open communication channels; gain the confidence and trust of the parties; gather information and identify obstacles; allow the parties to express feelings and vent emotions; help the parties to identify and understand their interests and priorities; help the parties with brainstorming creative options and solutions; help in defining acceptable objective criteria; help the parties understand the limitations of their demands through what is known as "a reality test"; help in evaluating alternatives; allow the process to move forward according to the needs and pace

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<sup>25</sup> Brandon, M. & Stodulka, T., 'A Comparative Analysis of The Practice Of Mediation And Conciliation In Family Dispute Resolution In Australia: How Practitioners Practice Across Both Processes,' *Queensland University of Technology Law and Justice Journal*, Vol. 8 No 1, 2008, pp. 194-212, at p. 209.

<sup>26</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, no. 7. UNESCO, 2003, p. 24.

<sup>27</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, op cit., p. 24.

of the parties; help in crafting the agreement; and help in validating the agreement by the courts (if there is a court that has jurisdiction).<sup>28</sup>

#### 4.1 Psychological Aspects

It has been argued that realization of the right of access to justice can only be as effective as the available mechanisms to facilitate the same. The same should also be achieved through 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* (emphasis added).<sup>29</sup> Arguably, part of achieving party satisfaction involves addressing the psychological facets that may arise in the mediation process.

Mediation can be viewed from a psychological lens rather than merely as an alternative to litigation and arbitration. At mediation, the psychology of the parties is at play. The mediators' psychology is also relevant. Scholars have argued that all disputes are affected and influenced by psychological or emotional principles or what is referred to as psychological barriers.<sup>30</sup> All disputes/conflicts involve injury to feelings. This is so because conflicts do occur within individuals, as well as between individuals, groups, departments, organizations and nations.

In discussing negotiation, some authors have argued that it involves individual-level psychological processes: cognition, emotion, and motivation; it involves multiple social processes: persuasion, communication, cooperation, competition and powers; and it is always socially situated and thus can involve a wide range

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<sup>28</sup> Shamir, Y., "Alternative dispute resolution approaches and their application," in *Technical documents in hydrology*, op cit., pp. 25-26.

<sup>29</sup> See Maiese, M., "Principles of Justice and Fairness," in Burgess, G. and Heidi Burgess, H. (Eds.) —Conflict Information Consortium, *Beyond Intractability*, University of Colorado, Boulder (July 2003).

<sup>30</sup> Strasser, F. & Randolph, P., "*Mediation: A Psychological Insight into Conflict Resolution*", (Continuum International Publishing Group London, New York, 2004), at pp. 2-30.

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of social contextual factors.<sup>31</sup> The mediator must, therefore, be aware of the psychological dimensions of the conflict in order to be able to effectively assist the parties to conclude negotiating and reach mutually acceptable solutions.

Every conflict, by definition, contains an indispensable emotional element. The discipline that is most familiar with these emotional dynamics is psychology. Therefore, mediation can learn from psychology how to be more effective in resolving conflicts.<sup>32</sup> Each person's attitudes, intentions, intuitions, awareness, context and capacity for empathetic and honest emotional communication have a significant impact on their experience of conflict and capacity for resolution.<sup>33</sup>

Some fundamental tenets on conflict have been suggested as follows: that conflict is ever present and cannot be eliminated but can be worked with; that the attitude and stance of the mediator can be of significance to the outcome; and above all that the use of psychotherapeutic tools can facilitate a paradigm shift in the parties approach to conflict. They demonstrate how the mediator can move parties in a dispute from a position of intransigent adversity to a working alliance, thereby achieving a "good enough" resolution.<sup>34</sup>

The mediator has to consider the emotional needs of a party at a mediation table. At the very basic level there is a need to be heard. There is a need for accurate empathy, validation and a respectful, appropriately paced process of dealing with the conflict. The parties may have suffered loss, which is financial,

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<sup>31</sup> Gelfand, M.J., Fulmer, C.A. and Severance, L., "The psychology of negotiation and mediation," *Handbook of industrial and organizational psychology*, Vol.3 (2010), pp. 495-554 at p.498; See also the idea about self-help mediation, that most conflicts are manageable or preventable automatically by every individual through the use of social skills learned throughout life at <http://www.mediationworks.com/>, [Accessed on 1/08/2018].

<sup>32</sup> Cloke, K., "Building Bridges between Psychology and Conflict Resolution–Implications for Mediator Learning." Retrieved online from <http://www.mediate.com/articles/cloke7.cfm> (2008), p.77. [Accessed on 1/08/2018].

<sup>33</sup> Ibid.

<sup>34</sup> Strasser, F. & Randolph, P., "Mediation: A Psychological Insight into Conflict Resolution", op. cit.



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reputational or market share related. It may be the loss of certain hopes and dreams, aspects of relationships and meaningful parts of their identity. These losses are in the realm of psychology and should be dealt with delicately.<sup>35</sup>

The clinical skills and experience used in assessment, diagnosis and treatment by psychologists are relevant in the mediation context.<sup>36</sup> Seminal writers on mediation and psychology have over time come up with certain approaches that can be employed in a mediation situation to address the psychological dimensions at play. Some of these approaches are discussed hereunder.

#### **a. Understanding the Parties**

The mediator should carry the agenda of assisting the parties to continue with the negotiations with a view to resolving the conflict. It has rightly been argued that the unanimously accepted roles of the mediator are those of a facilitator/catalyst of the communication and of a facilitator of the negotiation.<sup>37</sup> Their powers are summarised as persuasion and communication skills.<sup>38</sup> They are also seen as negotiators who clarify issues, identify alternatives, and help disputants come to a mutual agreement, without making a decision for them.<sup>39</sup> Thus, mediation is based on communication principles, negotiation, providing information and problem solving.<sup>40</sup>

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<sup>35</sup> See generally, Diamond, I., "The Value of a Psychologist Mediator", March 2011. Available at <https://www.mediate.com/articles/diamondi1.cfm> [Accessed on 1/08/2018].

<sup>36</sup> Diamond, I., "The Value of a Psychologist Mediator". Available at <https://www.mediate.com/articles/diamondi1.cfm> [Accessed on 1/08/2018].

<sup>37</sup> Stoica, S., 'The Role and The Techniques Used by The Mediator in The Mediation Process,' *Challenges of the Knowledge Society*, Vol. 2011, No.1, 1986-1995, p. 4.

<sup>38</sup> See generally Bahr, S.J., "An evaluation of court mediation: A comparison in divorce cases with children," *Journal of Family Issues*, Vol.2, no. 1 (1981): 39-60, p. 41.

<sup>39</sup> Ibid, p. 41.

<sup>40</sup> Committee of Accrediting Organizations in Family Mediation (COAMF) (ed.), *Standards of Practice in Familial Mediation*, (Committee of Accrediting Organizations in Family Mediation (COAMF), Montreal, 2016), p.6. Available at <https://www.barreau.qc.ca/pdf/mediation/familiale/guide-pratique-meditation-familiale-an.pdf> [Accessed on 1/08/2018].

It has also been pointed that it is possible for mediators to become targets of one or both parties' anger and frustration, which should not be taken personally.<sup>41</sup> It is even suggested that it is good to let the parties relieve their frustrations, and experienced mediators will be able to facilitate the release of these emotions without themselves getting emotionally involved and compromising their role.<sup>42</sup>

The mediator should understand that the parties are governed by their own outlook and their own 'self-concept' and 'self-esteem'.<sup>43</sup> Emotional or psychological obstacles are created because we are people first and litigants second. People get angry, depressed, fearful, hostile, frustrated and offended. They have egos that can easily be threatened.

It has been argued that the mediator will first need to explore how these people exist as persons prior to being litigants. By examining how these persons 'function' the mediator can reveal and determine the strategies they have adopted to extricate themselves from the conflict situation.<sup>44</sup> Understanding what the problem is, the thinking, feelings and emotions of the parties by asking them open-ended questions is essential if resolution is to be achieved in mediation. This is because understanding the opponent's position does not mean that you agree with it but may help a party revise its own position.<sup>45</sup>

### **b. Proposals by the Mediator**

There is a prevalent view among scholars that a proposal from a mediator often allows both parties to save face, and enter an agreement that neither is willing to

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<sup>41</sup> Smith, C.R., 'Mediation: The Process and the Issues,' p.6.

<sup>42</sup> Smith, C.R., 'Mediation: The Process and the Issues,' op cit., p.6; See also generally, Duffy, J., "Empathy, Neutrality and Emotional Intelligence: A Balancing Act for the Emotional Einstein," *Queensland U. Tech. L. & Just. J.* Vol.10, No.1, 2010, p.44.

<sup>43</sup> Diamond, I., "The Value of a Psychologist Mediator", op cit.

<sup>44</sup> Ibid.

<sup>45</sup> Jacobs-May, J., "The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution*", available at [www.jamsadr.com/files/Uploads/Documents/Articles/Jacobs-May-Recorder-04-04-11.pdf](http://www.jamsadr.com/files/Uploads/Documents/Articles/Jacobs-May-Recorder-04-04-11.pdf), [Accessed on 1/8/2018].

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propose. This may happen where there is trust and rapport between the mediator and the parties, and if the mediator's proposal is in striking range of both parties.<sup>46</sup>

It has also been contended that issues of self-identity and self-esteem play an important role in mediation. Sometimes they are spoken of in terms of a party's need to "save face" or of a person's 'ego' clouding his thinking. Most people take the conflict personally and the outcome of the mediation is a reflection of who they are.<sup>47</sup>

The "IDR Cycle," that is, the cycle of narcissistic inflation, deflation and realistic resolution also typically occurs in mediation. The mediator's ability to deal with issues of self and identity is thus a key ingredient of a successful mediation. These issues arise not only for the parties but also for the mediator as well.<sup>48</sup> The mediator uses interventions such as 'looping' and reframing.<sup>49</sup> The term 'looping' has been used to describe the process of the mediators reciting back or neutrally paraphrasing the statements of the parties in order to demonstrate understanding.<sup>50</sup>

### **c. Meeting the Parties' Needs**

Other tools available to the mediator include empathy which helps parties to reconnect with a deeper sense of reflective functioning and capacity for insight.<sup>51</sup>

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<sup>46</sup> Ibid; Strasser, F. & Randolph, P., "Mediation: A Psychological Insight into Conflict Resolution", op. cit, pp.43-44.

<sup>47</sup> Bader, E., "The Psychology of Mediation: Issues of Self and Identity and the ADR Cycle", *Pepperdine Dispute Resolution Law Journal*, Vol. 10, No.2, 2010, p. 180. Parties in mediation typically pass through a cycle of psychological *inflation* (overconfidence), *deflation*, and, finally, if the dispute settles, *realistic resolution*. This is often referred to as the IDR cycle.

<sup>48</sup> Ibid., pp. 189-200.

<sup>49</sup> Friedman, G.J. & Himmelstein, J., "Resolving Conflict Together: The Understanding Based Model of Mediation, 2006, *Journal of Dispute Resolution*, pp. 523-529.

<sup>50</sup> Ibid.

<sup>51</sup> Bader, E., "The Psychology of Mediation: Issues of Self and Identity and the ADR

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The mediator should bear in mind that issues of self-identity are implicated in all aspects of human conflict. The mediator must come up with ways of satisfying basic human needs such as security, status, autonomy, love, fairness and economic well-being.<sup>52</sup>

From the space created by the release of expectation and identity the resolution has had room to emerge. Sometimes a party just wants to be apologized to. Hearing “I am sorry” may soften the ego of a party who had taken a hard-line stand in a mediation. Not all mediations require one party to forgive the other; yet in some mediations, an apology from one side and forgiveness on the other can play an important role in resolving the conflict.<sup>53</sup>

#### **d. Creative Solutions**

It has already been noted elsewhere in this paper that mediation as a process allows for creative solutions. Creative solutions are arrived at if the parties actually participate in the generation of outcomes that are mutually acceptable. Where parties have voluntarily participated in the generation of options to their conflict, the likelihood of coming to a creative solution are very high. The contention here is that parties generally see things from different angles when they are actively involved in the creation of solutions to their problems and may end up making allowances they otherwise might not make. Participation by the parties in *generating options* and deciding on how to meet needs makes them own the process and the outcome (emphasis added). Involving parties in creating solutions to their problems is, thus, essential in ensuring that the outcome of a mediation process is acceptable to the parties.<sup>54</sup>

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Cycle”, op. cit, p. 207.

<sup>52</sup> See generally, Fisher, R. & Ury, W., *Getting to Yes: Negotiating Agreement Without Giving In*, (Penguin Books, New York, 1981).

<sup>53</sup> See generally, *The Psychology of Mediation*, Pretice Mediation LLC, available at <http://www.mediator.seattle.com>, [Accessed on 1/8/2018]; Jacobs-May, J., “The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution*”, op.cit.

<sup>54</sup> Jacobs-May, J., “The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution*”, op.cit.

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As already stated, in every conflict there are certain emotions, feelings and other psychological matters at play. If these psychological aspects can be harnessed by mediators in the course of conflict management, then mediation can become a more effective mechanism in resolving conflicts.<sup>55</sup> Each person's attitudes, intentions, intuitions, awareness context and capacity for empathetic and honest emotional communication have a significant impact on their experience of conflict and capacity for resolution.<sup>56</sup>

Further and as earlier indicated, there are certain fundamental tenets: that conflict is ever present and cannot be eliminated but can be worked with; that the attitude and stance of the mediator can be of significance to the outcome; and above all that the use of psychotherapeutic tools can facilitate a paradigm shift in the parties approach to conflict. The mediator can move parties in a dispute from a position of intransigent adversity to a working alliance, thereby achieving an outcome that is acceptable to the parties.<sup>57</sup>

Consequently, the need by a mediator to consider the emotional needs of the parties at a mediation table is of utmost importance if a resolution is to be achieved. For example, at the very basic level parties need to be heard, they need accurate empathy, validation and a respectful, appropriately paced process of dealing with the conflict. Whether the parties have suffered loss, which is

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<sup>55</sup> Cloke, K., "Building Bridges between Psychology and Conflict Resolution-Implications for Mediator Learning, American Institute of Mediation, available at [www.americaninstituteofmediation.com](http://www.americaninstituteofmediation.com), p.77. [Accessed on 1/8/2018].

<sup>56</sup> Ibid. See also Diamond, I., "The Value of a Psychologist Mediator", available at [www.mediate.com](http://www.mediate.com)[Accessed on 1/8/2018]; who argues that a mediator who understands the psychological imperatives will engage with the parties during caucuses to ensure they open up about their lives or even vent out. Through such caucuses the mediator gets wider possibilities of understanding the conflict context; and where there is trust and good rapport between the mediator and the parties, the parties will be satisfied with both the process and the outcome of the process because of the creative options generated by parties.

<sup>57</sup> Strasser, F. & Randolph, P., "Mediation: A Psychological Insight into Conflict Resolution", op. cit.

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financial, reputational, market share related, or they have lost certain hopes and dreams or aspects of relationships and meaningful parts of their identity, such losses are in the realm of psychology and should be dealt with delicately. For that reason, in a dispute involving such losses the mediator cannot ignore the clinical skills and experience used in assessment, diagnosis and treatment by psychologists in unraveling the emotions and feelings of the parties to realize a resolution in the conflict.<sup>58</sup>

#### **e. Fairness in Mediation**

Fairness is one of the abstract concepts influencing mediation. Some scholars have argued that it is inherent for every human being to react to unfairness. The hardwired reaction to perceived *unfairness* can be a particular source of trouble in mediation (emphasis added).<sup>59</sup> In addition, when a disputant is cooperative, generous and trustworthy, the reward centers of the brain are activated, and the other will generally reciprocate in kind.<sup>60</sup> Whereas when a disputant feels that the opponent is distrustful he may think that he is being treated unfairly and retaliate, causing the same reward centers of the brain to be activated as he punishes the opponent.<sup>61</sup> In such an event the negotiations come to a standstill.

Consequently, the mediation process requires us to recognize the hardwired nature of fairness and employ approaches that address the psychological questions at play. Approaches that can be employed to address psychological features of a conflict and guarantee fairness in mediation include understanding the parties, meeting their needs, assessing values, coming up with creative solutions and proposals from the mediator to allow parties to save face.<sup>62</sup>

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<sup>58</sup> Diamond, I., "The Value of a Psychologist Mediator", op.cit.

<sup>59</sup> Jacobs-May, J., "The Psychology of Mediation: *An atmosphere that instills fairness and understanding is more likely to lead to resolution*", op.cit.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Smith, C.R., 'Mediation: The Process and the Issues,' *Current Issues Series*, (IRC Press, Industrial Relations Centre, Queen's University, Ontario, 1998), p. 6. Available at <http://irc.queensu.ca/sites/default/files/articles/mediation-the-process-and-the-issues.pdf> [Accessed on 1/08/2018].

A successful mediation can result in resolution of a conflict. This means that the parties agree on an outcome that they can live with. The conflict is resolved and does not come back. Resolution comes about as a result of a process that addresses all the aspects of the conflict including its psychological dimensions. It is as a result of these outcomes that are mutually acceptable that both parties feel that the solutions arrived at are legitimate. It has been postulated that when a problem is defined in terms of the parties' underlying interests, it is often possible to find a solution which satisfies both parties' interests. Indeed, it has been observed that information is the life force of negotiation. The more you can learn about the other party's target, resistance point, motives, feelings of confidence, and so on, the more able you will be to strike a favourable agreement with parties focusing on their interests while at the same time remaining open to different proposals and positions.<sup>63</sup>

A process is likely to meet each party's expectations and achieve justice if it demonstrates a procedurally and substantively fair process of justice. This is because access to justice also includes how parties feel about the process. It is essential that a party not only accesses justice but feels satisfied by the outcome at the psychological level.<sup>64</sup>

## 5. Conclusion

Article 159 of the constitution of Kenya aims at easing access to justice through the use of reconciliation, mediation and traditional conflict resolution mechanisms. It is essential that a party not only accesses justice but feels satisfied by the outcome at the psychological level. A party must be able to have his feelings of anger, recognition, satisfaction and sense of justice addressed. A successful mediation has the capacity to restore a party's hopes, dreams and self-

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<sup>63</sup> See Chapter 2 'Strategy and Tactics of Distributive Bargaining' p. 23, Available at [http://highered.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960\\_chapter02.pdf](http://highered.mcgraw-hill.com/sites/dl/free/0070979960/894027/lew79960_chapter02.pdf) [Accessed on 1/08/2018].

<sup>64</sup> Fisher, R., *et al*, *Getting to Yes: Negotiating an Agreement without Giving In*, *op cit*, p.21; See also D. Carneiro, *et al*, 'The Conflict Resolution Process,' *Law, Governance and Technology Series*, Vol. 18, 2014, pp. 163-186.

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confidence. These characteristics of mediation should be exploited by Kenyans in appropriate cases.

Some of the cases where mediation can be effectively applied include those relating to the environment, communities, commercial matters, workplace issues, restorative justice, family disputes, among others.<sup>65</sup> In all these disputes the psychological processes at play are fairly similar. There is a need for the mediators to continually engage in continuous professional development seminars to enable them appreciate the relevant skills that they must acquire in their journey to becoming effective mediators. These skills include the ability to identify and address any psychological dimensions of the conflict in the mediation process. This is the only way that access to justice through mediation can be fully realised as a result of the satisfactory outcomes for the parties. The more satisfied the parties are with the process, the better and easier it will become for the integration of the use of mediation in conflict resolution in Kenya to ensure parties access justice as envisaged under Article 159 of the Constitution.

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<sup>65</sup> Interagency ADR Working Group Steering Committee, 'Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators' (April 2006); Stone-Molloy, M.S., "Mediating Environmental Conflicts: A Practical Manual", available at <http://www.law.ufl.edu/conservation/pdf/mediating.pdf> [Accessed on 1/08/2018]; Caratsch, C., *Resolving Family Conflicts: A Guide to International Family Mediation*, (International Social Service, Geneva, 2014). Available at <http://www.iss-usa.org/uploads/File/Guide%20to%20IFM.pdf>; Cornes, D., "Commercial Mediation: the Impact of the Courts", *Arbitration* Vol. 73, No.1, 2007, p.12.



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## **Enforcement of Standards of Professional Ethics and Competence of Advocates in Arbitration under the Kenyan Arbitration Act, 1995**

*By: Christopher Oyier Ogweno\**

### **Abstract**

*Most alternative dispute resolution mechanisms including arbitration have the key element being party autonomy. Party autonomy in arbitration has been elevated by statute and practice as it allows great flexibility in the conduct of the proceedings and encourages cooperation for faster resolution of the dispute. In essence, parties retain substantial control over the appointment of the arbitral tribunal, their representation and the modes of discovery, presentation of evidence and other aspects of the conduct of the arbitration. Despite this degree of autonomy enjoyed by the parties, arbitral practice in Kenya evinces a lopsided representation of parties by advocates before the arbitral tribunals. While the reasons for this phenomenon are not the subject of examination of this paper, the conduct of the arbitration and its success rely heavily on the parties' representatives before the tribunal and the ability of the parties to exercise control over them. While the Arbitration Act, 1995 clothes the arbitral tribunal with certain powers, the power to enforce professional ethics and competence of the advocates before it has not been clearly provided for. This paper therefore examines the need for, relevance, manner and extent of the arbitral tribunal's enforcement of these standards during the proceedings.*

### **1. Introduction**

Apart from a properly drafted arbitration clause, the conduct of the parties and their representatives during an arbitration is key in determining the success or failure of the arbitration. As noted in the later parts of this paper, most parties prefer to be represented by advocates during arbitrations for various reasons. However, the engagement of advocates in an arbitration potentially sets up a

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stage for an adversarial conduct of the arbitral proceedings. The duties, rights, privileges, and obligations of an advocate issue from his or her relationship with a client despite the forum of representation. Thus, an advocate is expected to observe professional standards before the arbitral tribunal as before ordinary courts. Beyond the duties owed to the client, an advocate has an overriding duty to the court, to the standards of his profession and to the public, which may and often does lead to a conflict with his client's wishes.<sup>1</sup> What then happens if a party's advocate is guilty of professional misconduct or of persistent breach of the directions of the arbitral tribunal? What happens if the advocate is unable to uphold the fair administration of justice as per his calling? Is the tribunal sufficiently empowered to regulate the conduct of the advocates that appear before it? This paper therefore seeks to examine the need for the arbitral tribunal to oversee the discipline of the advocates that appear before it, the desirability of such powers and what it would mean for the arbitration process.

## **2. Why Parties opt to be represented by Advocates in Arbitration**

While there is no requirement that a party has to be represented by an advocate or someone with a background in law in the arbitration, in practice most parties prefer to be represented by advocates. Section 25 (5) of the Arbitration Act preserves this autonomy by allowing parties to appear in person or by a representative of their choice during the conduct of the arbitration proceedings.<sup>2</sup> The culture of being represented by advocates during arbitration is a as result of several reasons. A few of these include, one, other professions have not embraced arbitration practice compared to advocates. A considerable number of advocates enroll for trainings in arbitration regularly compared to other professionals.

Secondly, arbitration largely relies on assistance from court and court related processes that parties feel advocates would easily handle. Since arbitration is quasi-judicial, parties are reluctant to take the chance to be represented by persons without a legal training or background.

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<sup>1</sup> *Rondel v. Worsley* [1969] 1 AC 191; See also *Arthur J.S Hall and Co. v. Simons and Barratt v. Ansell and Others v. Scholfield Roberts and Hill* [2000] UKHL 38.

<sup>2</sup> Arbitration Act, 1995, section 25(5).

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Thirdly, advocates become involved in the arbitration process at a relatively early stage, that is, when drafting the arbitration clause in the contracts. Most contracts that include arbitration clauses or refer to arbitration as a means of dispute resolution are drafted by advocates. Parties therefore feel more comfortable with the advocates dealing with a process for which they advised in the first place. Similarly, parties become confident that an advocate sufficiently understands the interplay between the law, the facts of the dispute and the parties' personal circumstances to offer effective representation before the tribunal.

Finally, despite its private nature, arbitration is largely adversarial and parties choose parties with the strongest combinations to help them win, and who is more trained in adversarial processes than advocates. Adversarial proceedings are based on the assumption that the truth of the controversy between the parties stands a fair chance of coming out when each side fights as hard as it can to offer the most favourable evidence to the arbiter.<sup>3</sup>

### **3. Some of the Ethical Issues and Concerns that arise from the Practice of Arbitration by Advocates**

The sources of ethical obligations and guidance for advocates in Kenya include the Constitution, the Arbitration Act, 1995, various statutes that regulate the legal profession and the rules of professional conduct set by the Law Society of Kenya. Despite the existence of ethical standards for advocates, little practical guidance on ethics is specifically available for advocates in arbitration proceedings. Much of the current controversy in arbitration is the existence of major ethical standards prescribed for the arbitral tribunal such as the duty to disclose conflict of interest, not to be induced by corruption or fraud, not to be impartial and the like, but no corresponding express obligations for the advocates that appear

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<sup>3</sup> Edward F. Barrett, "Adversary System and the Ethics of Advocacy" (1962) 37 Notre Dame L. Rev. 479.

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before the tribunal.<sup>4</sup> Some of the ethical issues that ought to be observed by counsel in arbitration are discussed below.

### **3.1 Disclosure Requirements and Confidentiality**

The advocate bears the duty to disclose to the tribunal a variety of financial, personal, and prior case history relationships with all parties to a current arbitration.<sup>5</sup> This is a continuing obligation during the arbitration. Parties should be able to agree from the onset on what information and documents the duty of disclosure extends.<sup>6</sup>

One of the reasons the parties resort to arbitration is to avoid making disclosures of private information to the public. The advocate should maintain in confidence information gained in the professional relationship with a client in the course of the arbitration. This duty may extend to the existence of the arbitration, the documents which used or referred to in the course of the arbitration, or the award as may be agreed by the parties.<sup>7</sup> If however, a party later seeks to vacate an award in court, part or all of the arbitration proceedings may become part of the public court record and cease to be confidential.<sup>8</sup>

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<sup>4</sup> Carrie Menkel-Meadow, "Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not" (2002)56 U. Miami L. Rev. 949. See also Section 13 of the Arbitration Act- the duty of the arbitrator to make appropriate disclosure, to be independent and impartial.

<sup>5</sup> Jacquelin F. Drucker, "Emerging Issues in Arbitration Ethics" (American Bar Association Labor and Employment Law Section Annual Meeting, August 11, 2003 San Francisco, California).

<sup>6</sup> Hew R. Dundas, "Confidentiality in English Arbitration: The Final Word? Emmott v Michael Wilson & Partners Ltd," 74 The International Journal of Arbitration, Mediation and Dispute Management 4, 458.

<sup>7</sup> Katie Chung, "Defining the Indefinable – Practical Problems of Confidentiality in Arbitration" in Michael Hwang, *Selected Essays on International Arbitration* (Academy Publishing, Singapore International Arbitration Centre, 2013), 90.

<sup>8</sup> Dundas, 460.



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### **4.2 Quality and Competence of Services**

It is rare, but not unheard of, for advocates to be sued for incompetence. Advocates should not represent a client in an arbitration in matters beyond their level of competence. In highly technical areas of the law and technology, an advocate should have sufficient knowledge of the technical aspects of the case to be able to render a fair and efficient representation of his client before the tribunal. The implication here is that advocates who are inexperienced in arbitrations should either do everything they can to familiarize themselves with the process to the extent necessary to effectively represent their clients or refer the matter to another advocate whom they know to be competent in arbitration procedures.<sup>9</sup> Mere court litigation experience is not sufficient to make an advocate competent in arbitration.

### **4.3 Ex Parte Communications**

Advocates must ensure that communication with all parties to the arbitration is in writing and that any communication that is received by the arbitrators from a party is to be forwarded to the other party unless that document has also been served or provided to the other party directly.<sup>10</sup> Any ex parte communication with the arbitral tribunal may be interpreted as seeking to improperly influence or disrupt the tribunal and may lead to challenge of the tribunal on the ground of impartiality.

### **4.4 Candor toward the Tribunal**

This duty requires the advocate to not knowingly make a false statement of material fact or law to a tribunal in the same manner as required by conventional courts.<sup>11</sup> The advocate should therefore ensure to the greatest extent possible, the integrity of pleadings and other documents prepared for the tribunal and

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<sup>9</sup> John A. Sherrill, "Ethical Considerations in Arbitration" (December 2011) 17 Georgia Bar Journal 4, 17.

<sup>10</sup> The International Chamber of Commerce, "Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration" (30<sup>th</sup> October 2017) at <<https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf>> accessed on 30/07/2018.

<sup>11</sup> David A. Ipp, "Lawyers Duties to the Court" (1998) 114 Law Quarterly Review, 65.

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where applicable, inform the tribunal of all material facts necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse and regardless of the client's wishes.<sup>12</sup>

#### **4.5 Fairness and to Opposing Party and Counsel**

Like the observance of other rules, fair play by the parties to the arbitration determines the success thereof. Unscrupulous advocates will try and exploit the procedural rules for their own advantage, seeking to delay the hearing and ultimately to derail the arbitration so it becomes abortive or ineffective.<sup>13</sup> They will adopt a raft of strategies such as technical objections to the tribunal's jurisdiction, asking for unnecessary adjournments on a variety of grounds, non-compliance with procedural orders and actively provoking the tribunal into making orders that will give an excuse to walk out of the proceedings on one or other of these grounds. Additionally, the advocate should not during discovery in arbitration, unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document having potential evidentiary value.<sup>14</sup>

The ethical and professional duties highlighted above are not in any way exhaustive of the obligations of advocates to the tribunal. However, advocates in arbitrations are bound by the established rules of professional conduct to the same extent as they would be if representing parties in litigation.

Ethical concerns are more pronounced in international arbitration where the counsel are bound only by their respective individual bar standards, therefore making international arbitration an "ethical no-man's land."<sup>15</sup> The unequal

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<sup>12</sup> Sherrill, 18.

<sup>13</sup> Michael Hwang, *Selected Essays on International Arbitration* (Academy Publishing, Singapore International Arbitration Centre, 2013), 21.

<sup>14</sup> M. Hansen, "Hand It Over" (December 2005) *American Bar Association Journal* at [http://www.abajournal.com/magazine/article/hand\\_it\\_over/](http://www.abajournal.com/magazine/article/hand_it_over/) accessed on 30/07/2018.

<sup>15</sup> Monique Sasson, "Ethics in International Arbitration" (February 5, 2016, 1:51 PM ET) *Law360*, New York.

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standards “may undermine the fundamental fairness and integrity of international arbitral proceedings,” and could encourage clients to choose lawyers from a jurisdiction with “lower” standards.<sup>16</sup> However, attempts have been made to have uniform ethical standards for lawyers in order to police international arbitration. The International Bar Association’s (IBA) Guidelines on Party Representation in International Arbitration include standard ethical obligations, such as the representatives being required to act with integrity and honesty and further invoking representatives not to engage in activities designed to produce unnecessary delay or expense, or use tactics aimed at obstructing the arbitration proceedings.<sup>17</sup> Guidelines 26 and 27 set remedies for misconduct by the representatives which include admonishment, apportionment of party costs and any other appropriate measure to preserve the fairness and integrity of the proceedings.

The IBA example should be embraced by domestic arbitral institutions. Rule 21 of the Nairobi Centre for International Arbitration (Arbitration) Rules for instance provides that, ‘*the conduct of a party's representative shall be in accordance with the code, standards or guidelines as the Centre may issue from time to time*’. The Rules further empower the arbitral tribunal to issue any orders necessary to achieve a fair, efficient and economical resolution of the case, including ‘*in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, or making special allocations of costs or an interim award of costs arising from such non-compliance*.’<sup>18</sup> The potential problem with the exemplified Rule is that absent a specific code to guide advocates’ conduct in the arbitration, the parties will suffer the penalties for personal default of their advocates.

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<sup>16</sup> Ibid.

<sup>17</sup> IBA Guidelines on Party Representation in International Arbitration (As adopted by a resolution of the IBA Council on 25<sup>th</sup> May 2013), Guidelines 12-17.

<sup>18</sup> Nairobi Centre for International Arbitration (Arbitration) Rules, 2015, Rule 25 (4),

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#### **4. Existing Mechanisms for Enforcing Discipline by Advocates during Arbitration in Kenya**

The Advocates Act under section 60 implicitly defines professional misconduct of an advocate to include ‘disgraceful or dishonourable conduct incompatible with the status of an advocate.’ This definition is wide and applies to various categories of behaviour which are currently summarised under the Law Society of Kenya’s ‘Code of Conduct and Ethics for Advocates’ published in January 2016. Some of the standards set for advocates include the requirement for a practicing certificate, restrictions on advertising and marketing, competence and diligence in handling of a client’s brief, keeping client communications confidential and the duty to represent the client in adversarial proceedings and non-contentious proceedings by fair and honourable means and without illegality or subversion of the due processes of the law.<sup>19</sup>

There exists laid out disciplinary procedures for advocates under the Advocates Act and the professional rules and standards of conduct. The arbitral tribunal relies on discipline enforcement by unilateral actions by a party and may not act *suo moto* as this would pit private parties against each other. Whereas parties in a suit may move the court to enforce an advocate’s conduct by way of contempt proceedings, the arbitral tribunal cannot punish for contempt. Even where the tribunal awards courts as a punitive measure, this may unjustly punish the client and serves limited deterrent value.

The Advocates Act defines “contentious business” of an advocate to mean any business done by an advocate in any court, civil or military, or relating to proceedings instituted or intended to be instituted in any such court, or any statutory tribunal or *before any arbitrator or panel of arbitrators*.<sup>20</sup> Going by the definition in section 3 of the Arbitration Act an ‘arbitral tribunal’ means a sole arbitrator or a panel of arbitrators. Therefore, where an advocate appears before

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<sup>19</sup> Law Society of Kenya Code of Conduct and Ethics for Advocates, January 2016.

<sup>20</sup> Advocates Act, Cap 16, Section 2.

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the tribunal to represent a party, they are expected to observe the relevant professional standards.

Parties to the arbitration as interested persons in the matter may decide to report professional misconduct of their advocates to the Complaints Commission established under section 53 of the Advocates Act. The Commission receives and considers complaints made by *any person*, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof.<sup>21</sup> Although any person may lodge a complaint against an advocate, the arbitral tribunal may well qualify but is not proximately placed to make such a complaint for the reasons discussed in the ensuing sections. Other options for enforcing professional conduct of advocates are under sections 57 and 58A of the Advocates Act that establish the Disciplinary Tribunal and the Regional Disciplinary Committees respectively.

For the arbitral tribunal, its hands are tied for no matter how desirous it may be in ensuring advocates before it conducts the arbitration in accordance with the existing professional rules, it may not be appropriately interested to pursue the matter privately as against the offending advocate. Since, any adverse conduct by the advocate may only affect the party appointing him or the opposing party but not the tribunal directly, the party's only remedy is to pursue the matter outside the arbitration setting by invoking their contract with the advocate or other tortious provisions. Given the glaring incapacity of the arbitral tribunal to ensure professional standards are enforced by advocates before it, what resort does it have when the offending conduct fundamentally hinders the conduct of the arbitration? Thus, the argument for the tribunal to have powers to enforce professional standards against advocates.

#### **5. Reasons for Empowering the Arbitral Tribunal to Regulate Conduct of Advocates in Arbitration**

A well-structured arbitration can be cheaper and faster than litigation and can ensure solutions that are best suited to the parties underlying interests and needs.

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<sup>21</sup> Ibid, Section 53 (4).

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Nonetheless, the arbitral tribunal should not assume goodwill from every party. Others may not be keen on having the arbitration succeed and may employ dilatory tactics through their representatives to the tribunal. Where the parties are represented by advocates, the issue of their discipline becomes critical to the conduct of the arbitration. While the parties to the arbitration by exercise of their private choice summons and empowers the arbitral tribunal to decide matters in dispute between them, it is not straightforward if this authority extends to regulating the discipline of the advocates that appear before the tribunal to represent the parties.<sup>22</sup>

First, various ethical and professional duties are placed on advocates' practice by the professional bodies mandated to do so by statute. As is the case with other professions locally and abroad, the legal profession in Kenya is substantially self-regulated to ensure the enforcement of these standards.<sup>23</sup> The Law Society of Kenya (LSK) is the principal regulatory authority over the legal profession.<sup>24</sup> Despite the self-regulation, certain offending conduct that show open disrespect or disregard to the arbitral tribunal may need prompt intervention by the sitting tribunal.

Secondly, it may further be argued that ignoring undesirable conduct by counsel may in itself upset the entire arbitral process. Under section 19A of the Arbitration Act, the parties have a general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings. This duty can be interpreted to extend to their advocates. Consequently, the arbitral tribunal has a duty to insist on conduct of the parties that will facilitate the process and spurn those that hinder the faster resolution of the dispute. In *Equity Bank Limited v*

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<sup>22</sup> American Bar Association, "Arbitration Advocacy" at <<http://apps.americanbar.org/labor/lel-aba-annual/papers/1999/annual34.pdf>> accessed on 03/08/2018.

<sup>23</sup> Law Society of Kenya, 'Code of Conduct and Ethics for Advocates' (January 2016),3.

<sup>24</sup> Section 4 of the Law Society of Kenya Act lists the objects for which the LSK is established inter alia to maintain and improve the standards of conduct and learning of the legal profession in Kenya.

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*Adopt a Light Limited*,<sup>25</sup> the court held that courts would, “...accept a genuine attempt by a Tribunal to breathe efficiency into a contract, without purporting to re-write the same on behalf of the parties.” The foregoing position by the court, stretched to its limits, may be persuasive on allowing the arbitral tribunal to intervene when advocates before it act unprofessionally.

Thirdly, the tribunal may invoke the need for regulating the conduct of advocates before it by virtue of its immunity under section 16B of the Arbitration Act. The section provides that:

An arbitrator shall not be liable for anything done or omitted to be done in good faith in the discharge or purported discharge of his functions as an arbitrator.

The basis for invoking this section is that the tribunal will be seeking to further the parties’ interests by ensuring that their respective advocates do not act in any manner prejudicial to the resolution of the dispute. Further, by being allowed to exercise judicial authority by the Constitution and statute, it is in the interest of the public that the like conventional courts, the tribunal is incapacitated by failing to reign in misconduct by counsel for fear of being privately liable for acts done in good faith. The end result will be to guarantee to the parties an efficient process that saves on time, money and the parties’ interests.

Fourth, it is apparent that the powers of the arbitral tribunal granted under the Arbitration Act are insufficient to deal with offending conduct by advocates before it. Under section 18, an arbitral tribunal may, on the application of a party make orders for interim measures of protection or security for costs. Section 26 of the Act empowers the arbitral tribunal to punish parties for default by taking measures such as continuation of the proceedings in default, an award on costs for noncompliance, drawing of an adverse inference or the dismissal of a party’s claim. However, these remedies are as against the parties themselves and not

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<sup>25</sup> [2014] eKLR.

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advocates who represent the parties and who may be guilty of certain misconduct.

Fifth, as per section 29 of the Act, in the absence of an express choice of law by the parties, the arbitral tribunal is only allowed to decide matters of substance in the dispute accordance with the terms of the particular contract taking into account the usages of the trade applicable to the particular transaction. Relatedly, in such default, the arbitral tribunal is empowered to decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law, only if the parties have expressly authorized it to do so. Two points in the foregoing section deny the tribunal the requisite powers to regulate the conduct of advocates before it. First, that the question of conduct of advocates before the tribunal does not run to the substance of the dispute hence not amenable to the default powers of the tribunal; and second, that the parties have to authorize the tribunal to decide on such matters as the conduct of the advocates before it.

Finally, the duties and powers conferred on the arbitral tribunal are in reality owed to the larger community which have a vital public interest in the proper administration of justice and efficient resolution of disputes.<sup>26</sup> Under Article 159 of the Constitution, judicial authority '*is derived from the people and vests in, and shall be exercised by, the courts and tribunals...*' Thus, the tribunal, in enforcing conduct by advocates for the efficient resolution of the dispute between the parties, essentially safeguards the public interest which is the source of its powers. It would be contrary to the public policy to allow certain conduct by advocates to stand uncorrected and the absence of the tribunal's intervention would undermine confidence in arbitration as an effective and fair means of dispute resolution.

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<sup>26</sup> David A. Ipp, 65.



## **6. Reasons against Empowering the Arbitral Tribunal to Regulate the Conduct of Advocates during Arbitration**

Arbitrators have a duty to act fairly and impartially in arbitration proceedings.<sup>27</sup> Parties are likely to conclude that the arbitral tribunal is unfairly targeting them if disciplinary action is taken against their appointed advocates. The role of a neutral arbiter is much more likely to be compromised leading to further difficulties in honouring the terms of the award and even subjecting it to challenge on constitutional grounds. Although such action by the arbitral tribunal may be taken only as a last option, it is in the public interest that the arbitral tribunals are able to function properly and have their orders complied with by the parties and their advocates. Further, Article 18 of the Model Law provides that: “The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”<sup>28</sup> The balance of such equality may be perceived to be tilted if the arbitral tribunal decides to punish one party’s advocate for certain professional misconduct.

It is relatively easy to find a clear case of overreaching its jurisdiction where the arbitrator purports to ensure the observance of professional standards of advocates before it. For one, parties would be reluctant to grant such authority to the tribunal as it is likely to compound compliance questions while the arbitration is ongoing. Secondly, it is normal for the parties to capitalize on the arbitration process as a voluntary dispute resolution scheme and ignore ‘trifling’ diversions such as advocates’ discipline in order to focus on the key contractual issues in dispute.

Perhaps the biggest impediment to the arbitral tribunal regulating the conduct of the advocates before it is finding the right mechanism to ensure compliance. The moment the tribunal attempts to ensure parties act in a particular way, it wades into unfamiliar waters that may be the decisive stroke to end the arbitration. There are really not many options for the arbitral tribunal where the

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<sup>27</sup>Arbitration Act, 1995, section 29 (4).

<sup>28</sup> Article 18 of the UNCITRAL Model Law on International Commercial Arbitration (1985).

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advocate's conduct is incongruous to the objectives sought by the parties. The problem may be escalated where the appointing party is the beneficiary of the advocate's misconduct. Unlike a judge or magistrate who, being agents of the State, sit with the authority of the State behind them, the arbitrator has no such authority and has to resort to the court or relevant professional bodies to enforce the conduct of advocates before it.

Whereas section 55 of the Advocates Act specifies that an advocate is an officer of the Court and shall be subject to the jurisdiction thereof and also to the jurisdiction of the Disciplinary Tribunal, there is no corresponding provision under the arbitration Act 1995. Further preservation of the courts' powers over advocates' conduct finds expression under section 56 of the Act.<sup>29</sup>

By virtue of the foregoing provisions and legal practice, courts command more respect from advocates and parties and its directions are therefore usually more strictly complied with than directions issued by an arbitrator.<sup>30</sup> For example, directions from an arbitrator as to filing documents by a certain date are often ignored by one party or the other, whereas that is less likely to occur in litigation because parties know that failure to meet filing deadlines can result in sanctions being imposed.<sup>31</sup> The arbitral tribunal draws its authority from the law and from the agreement of parties and unless the parties or their advocates respect the process, the tribunal may not have the ability to impose necessary sanctions on conduct.

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<sup>29</sup> Section 56 of the Advocates Act provides that, "Nothing in this Act shall supersede, lessen or interfere with the powers vested in the Chief Justice or any of the judges of the Court to deal with misconduct or offences by an advocate, or any person entitled to act as such, committed during, or in the course of, or relating to, proceedings before the Chief Justice or any judge."

<sup>30</sup> Michael Hwang, *Selected Essays on International Arbitration* (Academy Publishing, Singapore International Arbitration Centre, 2013), 11.

<sup>31</sup> *Ibid.*

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In addition, it would be unimaginable for advocates to allow their clients to empower the arbitral tribunal to the extent of ensuring compliance with professional standards. At what point does the individual cede control over his appointed party to the tribunal? In the absence of clear statutory guidelines, advocates would be reluctant to surrender their professional autonomy in the conduct of their matters to a private process with no guarantee of impartiality or fairness to the advocates.

Finally, a number of inconsistencies will arise as a result of allowing arbitrators to enforce professional conduct of advocates before them. One reason for this is that not all arbitration tribunals will be constituted by persons well versed in law to properly apply the applicable professional rules for advocates. Similarly, since the process is privately initiated, some parties may opt not to allow the arbitral tribunal discipline advocates appointed by them and disregard such conduct if these do not affect the outcome of the arbitration. This will occasion varying applications of the professional standards to advocates since the need for intervention depends on the threshold of the misconduct alleged during the arbitration.

#### **7. The role of Kenyan Courts in Upholding Advocates' Discipline in Arbitrations**

While the arbitration process is intrinsically linked to the court in the constitution of the tribunal, regulating its powers, recognition and enforcement, parties prefer that even where the court intervenes, the process should lead to faster resolution of the dispute between them at the least cost. Generally, the court *'has a right and duty to supervise the conduct of those appearing before it, and to visit with penalties any conduct of a lawyer which is of such a nature as to defeat justice in the very cause in which he is engaged professionally.'*<sup>32</sup> The essence of this right and duty is ingrained in various statutes some of which have been highlighted. Further, section 18 of the Arbitration Act recognises the necessity of court intervention and empowers the arbitral tribunal or a party with the approval of the arbitral tribunal, to

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<sup>32</sup> *Myers v. Elman* [1940] A.C. 282 at p. 302 per Lord Atkin.

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assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under the Act.<sup>33</sup>

The extent of court intervention in arbitrations is provided for under section 10 of the Arbitration Act, which excludes courts from the arbitral process except in the limited circumstances set out in the Act. This provision seeks to accord the parties the greatest autonomy possible over the conduct of the arbitration. Nonetheless, instances of court intervention are necessary at various stages in the arbitral process. National courts play a collaborative role in the arbitration process that may be facilitative or prohibitive. The prevailing jurisprudence in Kenya on the issue of court intervention in arbitration is sufficiently captured in *Nyutu Agrovet Limited v Airtel Networks Limited*,<sup>34</sup> where the court observed that, “...in keeping with the UNCITRAL Model Law to which Kenya is a signatory and so in keeping with its international obligations, it must uphold, respect and enforce the arbitral process; that the intervention of the court must be in furtherance, and not in hindrance of the arbitral process...”

Despite this carefully circumscribed role of the court under section 10 of the Arbitration Act, there has emerged a divergent view that favours more robust involvement of courts in arbitrations especially where constitutional provisions are at play. An example was in *Evangelical Mission for Africa & another v Kimani Gachuhi & another*<sup>35</sup>, where the court pronounced itself as having the duty to, “...at all times to uphold the provisions of the Constitution to the uttermost, and to robustly apply the same within the law.” Thus, where a party’s advocate engages in professional misconduct during the arbitration to such an extent that prejudices the constitutional rights of the adverse party, the court will readily find in favour of an arbitral tribunal that penalizes such conduct.

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<sup>33</sup> Arbitration Act, 1995, section 18 (2).

<sup>34</sup> Civil Appeal (Application) No. 61 of 2012.

<sup>35</sup> [2015] eKLR.

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The essence of court intervention as regards the discussion in context is that the parties to the arbitration or the arbitral tribunal itself have the courts as a backup means for enforcing conduct by advocates during arbitration.

**8. Conclusion**

It emerges from the brief discussion in this paper that arbitral tribunals constituted and empowered under the Arbitration Act 1995 are not sufficiently empowered to regulate discipline of advocates appearing before it. In the absence of statutory powers, it remains debatable if the arbitral tribunal would be able to enforce such standards if the subject parties were to grant it such powers. While the arbitral tribunal's lack of powers to regulate conduct by counsel may be viewed as a deficiency in the arbitral process, the arguments fronted by this paper have attempted to shed some light on the existing dilemma. On the one hand, it may be argued that the existing rules of professional conduct of advocates and the means of their enforcement are sufficiently clear in their reach and enforcement means to ensure parties to an arbitration get relief against professional misconduct by their appointed advocates. On the contrary, certain conduct by the advocates before an arbitral tribunal may be fatal to the arbitral process if not handled with immediacy. The latter position will ensure that the parties to the arbitration benefit from the private process for which they settled without dishonest, disruptive and inefficient practices by their appointed advocates. Nonetheless, as officers of the court, advocates are expected to conduct themselves before arbitral tribunals in the same manner as they would before regular courts. This is justified by the arbitral tribunal being the representative of public interest in the administration of justice under Article 159 of the Constitution of Kenya 2010. In sum, ethical conduct is the responsibility of all parties in the arbitration process and it is central to managing effective proceedings and ensuring enforceable awards.

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## **Judicial Intervention in Arbitral Proceedings (Perceptions and Reactions): The Civil and Common law Approaches in Africa**

*By: Justice Geoffrey Kiryabwire\**

### **1. Introduction**

The law and practice of judicial intervention in arbitral proceedings has defined the struggle for dispute resolution space between the courts and private arbitration for a long time. At the heart of this situation appears to be a “tug of war” between public/state provided justice in the courts of law on the one hand, and private justice using a party agreed neutral on the other. When parties decide to avoid the courts and instead use arbitration as their preferred mode of dispute settlement, this is said to be an exercise of party autonomy. However, the exercise of party autonomy notwithstanding, the question remains: whether the courts and arbitration can co-exist as dispute settlement mechanisms or not? Put differently, can a party to a dispute in the exercise of party autonomy elect to have his or her dispute settled by arbitration instead of the courts? A similar question that would then arise is whether all disputes that would ordinarily go to the courts for adjudication also, in the exercise of party autonomy, also be arbitrated upon? This is the principle of arbitrability. It is possible that public policy and expectations would expect that certain types of disputes cannot be allowed to be resolved by private arbitrators who are not clothed with public powers.

Another issue that is at the centre of this “tug of war” is the perception that it is only the courts which are clothed with public power that can see to it that any decision arrived at when a dispute is resolved is enforced and or orders of the court are complied with; using the said state power. On the other hand,

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arbitrators in arbitrations are said not to be clothed with public power and therefore cannot see to it that their orders and decisions are enforced using state power. The result of any order and or decision of an arbitral tribunal therefore is incomplete until it is converted into a court order so that it is enforceable. The courts, however, have been reluctant to covert awards and orders of an arbitral tribunal unless the court itself is satisfied that the said award or order is lawful and if it determines that it is unlawful or is erroneously procured, then the said award or order should be quashed.

It therefore follows that there is raging a debate as to whether the courts should be supportive or disruptive of the arbitral process especially when the court can see that it would not have come to the same conclusion as the arbitral tribunal.

This paper shall explore how countries in Africa and especially Uganda have dealt with this balance of power between the courts and the arbitral process. The paper will also make a few comparisons of the practice of court intervention in common law and civil law countries and see if there are any common trends and positions in this respect.

## **2. The Origin of Judicial Intervention in Arbitral Proceedings**

According to Dr. Kariuki Muigua<sup>1</sup>, the common law right from the Saxon times tended to loath arbitration which was largely informal. For one therefore to initiate arbitration, it was necessary to launch a suit in court requesting a reference to arbitration. In this way, court maintained a firm grip over the arbitration process as it was essentially an optional part of the court process itself. In this regard, the arbitrator was seen as acting on behalf of the court and or judge. Indeed, arbitration only achieved partial liberation under the English Arbitration Act of 1698, which had as its objective:

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<sup>1</sup> Kariuki Muigua, "The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya vis a vis Arbitration Act 1996 of the United Kingdom" [page 21], unpublished 2010, given at the Chartered Institute of Kenya Branch entry course.

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*“...rendering the award of the arbitrator more effectual...for determination of controversies referred to them...”<sup>2</sup>*

In effect, reference to arbitration under an arbitration agreement had the same effect as if the reference had been made by the order of the court. The courts would then enforce arbitral awards provided that they were not obtained through corruption. Later, the Common Law Procedure Act of 1854<sup>3</sup> empowered courts to stay legal proceedings pending reference to arbitration and remit awards back to arbitrators for reconsideration when the award was found to be defective. Clearly, the courts maintained a hawk eye over the arbitral process while at the same time leaving open the possibility to support the arbitral process. Subsequent legislation in England relating to arbitration, like the Acts of 1889, 1934 and 1950<sup>4</sup>, continued to develop this pendulum swing between courts providing hawk eye supervision over arbitration ready to intervene at any moment and supportive role to assist in the arbitral process through the orders like stay of litigation; the appointment of arbitrators in default; the removal of arbitrators and the enforcement of arbitral awards. At the core of this interventionist approach was the instinct of self-preservation that arbitration agreements should not oust the inherent jurisdiction of the courts in favour of a private process.

The position in Uganda was not different from that in England. This is not surprising considering that much of the initial laws relating to arbitration were received from England during the colonial times. The Civil Procedure Act of Uganda of 1929<sup>5</sup> (which is still in force to date in Uganda) provided for

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<sup>2</sup> English Arbitration Act of 1698.

<sup>3</sup> Common Law Procedure Act, England: notes, forms, and rules relating to common law procedure, or the trial of issues of fact, in the Courts of Common Law Chancery, or Probate, with the rules of each court respectively.

<sup>4</sup> Kariuki Muigua, “The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya vis a vis Arbitration Act 1996 of the United Kingdom” pg.21.

<sup>5</sup> Chapter 71 of the Laws of Uganda 2000 Edition.

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arbitration under its rules. The Civil Procedure Rules<sup>6</sup> provided for “Arbitration under the order of court”<sup>7</sup>. To initiate an arbitration, the Rules envisaged that parties who were not under any form of disability would apply to court for an order of reference to arbitration. The Rules specifically provide:

*“...Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in the suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference...”<sup>8</sup>*

The Court would also under the Rules be at liberty to fix the time within which an award should be made<sup>9</sup>; modify and correct the award<sup>10</sup> and set aside the award<sup>11</sup>. Clearly, the Rules provided for a regulatory function of the courts over the arbitral process with a wide possibility for judicial intervention. However, the same Rules also provided a supportive role to arbitration where there was no perceived problem. Such a supportive role could be in the areas of summoning witnesses for the arbitral tribunal<sup>12</sup> and entering judgment in accordance with the award<sup>13</sup> for the purpose of enforcement.

The first stand-alone Arbitration Act (1930) in Uganda<sup>14</sup> also maintained this fairly tight regulatory environment over arbitration. The Court was at liberty to intervene to have an award remitted for reconsideration<sup>15</sup> and also set aside for

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<sup>6</sup> Statutory Instrument No 71-1.

<sup>7</sup> The Civil Procedure Act. Statutory Instrument 71 – 1. Order 47- Arbitration Under Order of a Court.

<sup>8</sup> Ibid.

<sup>9</sup> Order 47 Rule 3 of the Civil Procedure Rules.

<sup>10</sup> Ibid. Rule 12.

<sup>11</sup> Ibid. Rule 15.

<sup>12</sup> Ibid. Rule 7.

<sup>13</sup> Ibid. Rule 16.

<sup>14</sup> Chapter 55 of the Laws of Uganda 2000 Edition.

<sup>15</sup> Order 47 Rule 14 of the Civil Procedure Rules.

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misconduct by the arbitrator.<sup>16</sup> There evolved in the courts a lot of uncertainty as to the meaning of “misconduct”. Furthermore, the court’s language while carrying out its regulatory role tended to be harsh and strict as can be seen in the 1965 case of *NUCC&TE v Uganda Bookshop*<sup>17</sup> where it was held that:

*“It is trite law that it is the duty of an arbitrator to decide neither more nor less than the dispute submitted to him, to comply strictly with his terms of reference.”*

This state of affairs did not endear the process of arbitration to the resolution of disputes and especially so commercial, trade and investment disputes where parties preferred non-interventionist jurisdictions.

However, over the years the courts started to loosen their grip on the arbitral process by increasingly becoming more liberal when a party decided to challenge the arbitrations in courts of law. A good example of this change is the 1982 case of *NIC v Arconsults Architects*<sup>18</sup> where it was held that:

*“As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous eye endeavouring to pick holes, inconsistencies and faults in awards and with the objectives of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it.”*

Evidently, this liberal approach and break away from a hawk eyed supervisory approach called for reform in the law of arbitration in Uganda and many of the other African jurisdictions that held to the old English law approach to arbitrations.

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<sup>16</sup> Ibid. Rule 15.

<sup>17</sup> Sir Udo Udoma, CJ, [1965] EA 539.

<sup>18</sup> Tsekooko J, [1982] KALR 112.

### **3. Reforming the Law on Judicial Interventions in Arbitral Proceedings**

Perhaps the boldest statement on the need to change the relationship between the courts and arbitration came from UNCITRAL<sup>19</sup>, which drafted the Uncitral model law on international commercial arbitration<sup>20</sup>. This model law has been used by many countries in Africa to reform their arbitration laws. UNCITRAL reports that out of 106 countries that have adopted the Model law on arbitration, 8 are from Africa<sup>21</sup> [Uganda, Kenya Egypt, Nigeria Rwanda, Madagascar, Zambia and Zimbabwe]. Almost all of these are common law countries including Uganda which adopted the model law in 2000<sup>22</sup>. Other countries like South Africa, while also reforming their arbitration legislation, decided not to adopt the Uncitral Model Law wholesale but rather picked up a few aspects of the said model law. The Explanatory Note by the Uncitral on the model law on international commercial arbitration<sup>23</sup> raises the need to limit court interventions in arbitral proceedings. The Explanatory note observes that there is now a trend in favour of limiting court interventions in international commercial arbitration. It further observed that this trend was justified by the principle of party autonomy where parties to an arbitration agreement consciously agree to exclude the jurisdiction of the court in resolving their dispute. The reasons why parties may prefer to limit court intervention include the need to have expediency and finality as opposed to protracted court battles. The Explanatory

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<sup>19</sup> United Nations Commission on International Trade Law. Created 17 December 1966 "to promote the progressive harmonization and unification of international trade law."

<sup>20</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 (Amended in 2006), United Nations

<sup>21</sup> "Status, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006," UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html), (accessed 16/07/16).

<sup>22</sup> Chapter 4, Revised Laws of Uganda, 2000, which can be accessed at [http://www.ugandalawlibrary.com/ull/lawlib/chapter\\_1\\_364\\_revised\\_edition.asp?oColumn=chapter](http://www.ugandalawlibrary.com/ull/lawlib/chapter_1_364_revised_edition.asp?oColumn=chapter).

<sup>23</sup> See Para 14, "Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration," UNCITRAL, <https://www.mcgill.ca/arbitration/files/arbitration/ExplanatoryNote-UNCITRALSecretariat.pdf>, (accessed 16/07/17).

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note then goes on to outline the instances where the court's intervention may come in. These include interventions in the area of appointment, challenge and termination of the mandate of an arbitrator like:

1. Challenge and termination of the mandate of an arbitrator <sup>24</sup>;
2. Jurisdiction of the arbitral tribunal<sup>25</sup>;
3. Setting aside of the arbitral award <sup>26</sup>; and,
4. Instances listed in article 6 as functions which should be entrusted, for the sake of centralization, specialization and acceleration, to a specially designated court or, as regards articles 11, 13 and 14, possibly to another authority (e.g. arbitral institution, chamber of commerce).

#### **A second group comprises court assistance in**

1. Taking evidence,<sup>27</sup>;
2. Recognition of the arbitration agreement, including its compatibility with court-ordered interim measures of protection<sup>28</sup>; and
3. Recognition and enforcement of arbitral awards.<sup>29</sup>

The explanatory note then provides that, outside the above two groups, "no court shall intervene, in matters governed by this Law". <sup>30</sup>This is provided in what is termed as an "innovative article 5." The actual role of court in all this is detailed the UNCITRAL model law which provides certainty as to all possible court interventions, except for matters not regulated by it (e.g. consolidation of arbitral proceedings, contractual relationship between arbitrators and parties or arbitral institutions, or fixing of costs and fees, including deposits). <sup>31</sup>

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<sup>24</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 (Amended in 2006), United Nations. Articles 11, 13, and 14.

<sup>25</sup> Ibid. Article 16.

<sup>26</sup> Ibid. Article 34.

<sup>27</sup> Ibid. Article 27.

<sup>28</sup> Ibid. Articles 8 and 9.

<sup>29</sup> Ibid. Articles 35 and 36.

<sup>30</sup> Explanatory Note Par. 16.

<sup>31</sup> Ibid. Par. 17.

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The position under Ugandan law on court intervention in the arbitral process is exactly the same as that provided for under the Uncitral Model law on arbitration. This includes the adoption of the no-intervention article 5.<sup>32</sup>

A very important departure from court intervention came with the new dispensation for setting aside arbitral awards under Section 34 of the Arbitration and Conciliation Act of Uganda which mirrors Article 34 of the Uncitral Model Law and provides:

*“... (1) Recourse to the court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).*

*(2) An arbitral award may be set aside by the court only if –*

*(a) the party making the application furnishes proof that –*

- (i) a party to the arbitration agreement was under some incapacity;*
- (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, if there is no indication of that law, the law of Uganda;*
- (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his or her case;*
- (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration; except that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside;*
- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless*

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<sup>32</sup> Section 9, Arbitration and Conciliation Act, 31 December 2000

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- that agreement was in conflict with a provision of this Act from which the parties cannot derogate, or in the absence of an agreement, was not in accordance with this Act;*
- (vi) the arbitral award was procured by corruption, fraud or undue means or there was evident partiality or corruption in one or more of the arbitrators; or*
  - (vii) the arbitral award is not in accordance with the Act; (b) the court finds that –*
    - (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Uganda; or*
    - (ii) the award is in conflict with the public policy of Uganda...”*

There has still been some disquiet as to when an arbitral award may be set aside if found to be in conflict with public policy. The provision relating to public policy in Uganda is in pari material with that in Kenya and this matter was addressed in the Kenyan case of *Macco Systems India PVT Limited V Kenya Finance Bank Limited*<sup>33</sup>. The Court in that case held that even though public policy is a broad concept and therefore incapable of a precise definition, its application is limited to matters that are contrary to the constitution or laws of the country; matters contrary to the interests of the country and matters that are contrary to justice and morality. This shows that the courts are still willing to allow arbitral awards to stand even in the face of broad exceptions like public policy.

The above limitations notwithstanding, provisions for setting aside an arbitral award are now clearer and more limited than under the previous legislation thus providing for greater certainty in the process of enforcement.

#### **4. Reactions of the Courts to the Reform under the New Arbitration Laws**

The Ugandan courts have now greatly reduced their interventionist policy as far as arbitrations are concerned. A good example of this is the case of *Tropical Investments Ltd v Jimmy Mukasa*<sup>34</sup> where the Court held as follows:

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<sup>33</sup> Ringera J, HCCC (Milimani No. 173 of 1999).

<sup>34</sup> Justice James Ogoola, MA 45 of 2004 (arising from Arb Cause 34 of 2002).



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*“...bona fide mistake made by an arbitrator whether of fact or law and whether he admits it or not affords no ground for a court to set aside his award such a mistake cannot be conceived as “misconduct” but if the mistake is so gross or obvious that it could not have been made without some degree of misconduct the award may be set aside not on the ground of mistake but on the ground of misconduct. The mistake merely amounts to evidence of misconduct...”*

Increasingly the swing of the pendulum is now moving to the side of the judicial intervention as being supportive and not disruptive of the arbitral process.

#### **5. Comparisons with Arbitration Reforms in Civil Countries under the OHADA Arrangement**

OHADA<sup>35</sup> (The Organisation for the Harmonisation of Business Law in Africa), comprising 17 African States which came together in 1999 mostly from West Africa (with a civil law inclination), adopted the Uniform Act on Arbitration. Though this Act is not listed on the Uncitral website as complying with the Uncitral Model Law, there is consensus that the said law is based on the Model Law<sup>36</sup>. OHADA countries can have both ad hoc and institutional arbitration under the Common Court of Justice and Arbitration (CCJA) based in Ivory Coast. Enforcement by court of an arbitral award under the OHADA Arbitration Rules of the Common Court of Justice and Arbitration<sup>37</sup> is by way of “*exequatur*” and Art 30.6 thereof specially provides:

*“...An exequatur may not be refused and the application to set aside shall be admissible only in the following cases:*

*1 - if the arbitrator has ruled without an arbitration agreement or on the basis of an arbitration agreement, which is null and void or has expired;*

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<sup>35</sup> OHADA was created to facilitate economic development in West and Central Africa by creating a desirable investment climate.

<sup>36</sup> Annet van Hooft, “OHADA Arbitration,”

[https://www.twobirds.com/en/news/articles/2016/france/20160525\\_arbitrage-en-droit-ohada](https://www.twobirds.com/en/news/articles/2016/france/20160525_arbitrage-en-droit-ohada), (accessed 17/07/17).

<sup>37</sup> Completed: 11/03/1999

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- 2 - if the arbitrator has not ruled within the scope and terms of his mission;
- 3 - where the principle of adversary proceeding has not been respected;<sup>[1]</sup><sub>SEP</sub>
- 4 - if the award is contrary to international public policy..."

This provision shows the limited grounds on which an arbitral award may be set aside, thus providing a supportive framework for judicial intervention. It would appear therefore that when looking at the reasons for setting aside an arbitral award there is some degree of convergence between the common law and civil law jurisdictions in Africa.

## **6. Summary and Conclusion**

The above review shows that the tug of war for dispute resolution space between the courts and arbitration has reduced. The judicial considerations for intervention in arbitral proceedings are now more in favour of supporting the process than disrupting it. A lot of this change has come as a result of the reform of the laws of arbitration in Africa, thus moving away from colonial legislation. Several African countries have adopted the Uncitral Model law on International commercial arbitration (for both domestic and international arbitration) as their basis for the reform of their domestic arbitration laws. However, the number of African countries which have not done so is still high. This means that those countries which have yet to reform most likely will still have a high level of judicial intervention that is disruptive of the arbitral process and therefore do not make their countries desirable destinations for arbitration. The big disadvantage in this regard would be the loss of commercial, trade and investment opportunities for the countries that have not reformed in this area.

Accordingly, African nations that support high levels of judicial intervention in arbitration should consider reforming their laws and move towards a more supportive and less restrictive approach. Traditionally, courts have looked at arbitration with scrutiny and criticism for any standards that differ from litigation. The courts have seen arbitration as violating the space of the courts. However, arbitration is not a foe but a friend of the courts. Arbitration is not trespassing on judiciary territory, but rather housekeeping: keeping frivolous

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lawsuits at bay and reducing case backlog. This allows courts to address more interesting and sophisticated matters that courts are specially equipped to address. Dispute resolution will be served by the courts all the more if it is given the tools and trust necessary to achieve its goals: efficient justice guided by the desires of the parties.

This principle of party autonomy should allow parties to fashion resolution of disputes how they wish. If parties desire to reduce evidentiary standards, limit representation by counsel, appoint outside experts as arbitrators, or resolve issues on paper without formal meetings, they should be allowed by courts to do so.

We live in an era of fast moving commerce, industrialisation and information technology, to mention but a few. It is therefore not farfetched to argue that society now also desire faster justice systems that address substance over procedure. It is therefore necessary for the law and the courts to support modern arbitration practice. As the old adage goes, “justice delayed is justice is denied.”

Therefore, African nations in which the courts maintain a firm controlling judicial grip over arbitral processes should follow the lead of their facilitative counterparts. This can be achieved by adopting the Uncitral Model Laws in full like Uganda, selecting provisions and drafting country specific legislation like South Africa, or by creating their own laws driven by the principles supported in these publications.

## **The Place of Mediation in Conflict Management in Kenya**

By: **James Ndungu Njuguna\***

### **Abstract**

*Mediation is a well-established process for resolving disputes in which parties in a dispute are assisted by a mediator to come to a mutually acceptable outcome. The parties engage the third party, a mediator who usually facilitates mediation process but never decides for the parties. In the recent past, there have been many conflicts that have arisen in Kenya some of which have not been resolved. These disputes and conflicts must be managed expeditiously.*

*The objectives of this paper are, to first shed some light on the best way in which conflicts in Kenya ought to be resolved so as to foster development in the country, and also to explore mediation as a viable and workable mechanism of conflict management. The paper will also explain why mediation may be one of the most appropriate mechanisms to manage these conflicts.*

*Secondly, the paper has examined the importance of using mediation as a method of managing conflicts thereby being an essential instrument for the protection of human rights in Kenya. It also demonstrates that courts may not always be the most appropriate avenue for the expeditious resolution of disputes. It then looks at the reality of the current Kenyan situation whereby there are a number of obstacles to the realization of access to justice in the country such as, undue delay in the administration of justice, high cost of litigation, reliance on technical rules, and illiteracy, among others.*

*Finally, the paper has inquired as to the prospects for improvement of the practice of mediation and opines that if it is encouraged and properly put in place, with less emphasis on technical rules, there would be meaningful delivery of justice which will impact positively on the quest for the management of conflicts and the protection of human rights in the country.*

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## 1. Introduction

In our society today, conflict arises everywhere, be it in the household among family members, or between a corporation and another or with its employees. They arise among people in relation to all the aspects of their lives including their personal life, economic life and political life. A possible explanation for this is because we do not live in a perfect world as there would be no conflict, but the world today is far from perfect. The notion of conflict is that one person is right and one person is wrong; the question is usually who is right and who is wrong. Nobody would want to believe they are wrong, for as human beings, everybody has their own opinion and interests. How would one then solve a conflict which arises and nobody will yield to that fact that they are wrong?<sup>1</sup> Human conflicts are thus inevitable and consequently, disputes are equally inevitable.<sup>2</sup> The fact that disputes are inevitable creates a need to find a quick, cost effective and easy method of resolving them.<sup>3</sup>

People look to the Courts as a way to solve their conflicts. It is an institution which stands out as one that seeks to provide justice and promote equality. It is true that the Courts should strive for justice and promote equality but in reality, they do not always meet this expectation. It should be noted that the courts should be the last resort forums in which disputes are referred to, upon unsuccessful attempts to resolve them through mediation and the other forms of Alternative Dispute Resolution mechanisms.<sup>4</sup>

Kenya has experienced internal conflict, cross border conflict and suffered the effects of conflict occurring in neighboring states.<sup>5</sup> As a result, a number of interventions exist to address conflict at community, national, regional and

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<sup>1</sup> B. Laurence, "A History of Alternative Dispute Resolution," ADR Bulletin: Vol. 7: No. 7, Article 3, 2005. p. 1. Available at:

<http://epublications.bond.edu.au/adr/vol7/iss7/3> [Accessed on 26/06/2015].

<sup>2</sup> Ibid.

<sup>3</sup> K. Muigua, "*Settling Disputes through Arbitration in Kenya*", (Glenwood Publishers, Kenya 2012) page 1.

<sup>4</sup> Owen Fiss, "Against Settlement", 93 Yale Law Journal 1073 (1984).

<sup>5</sup> Ibid, (n 3) page 6.

international levels. These interventions include the use of mediation and the next section of this paper discusses the main reasons why mediation is preferred as a suitable means of conflict management.

## 2. The Concept of Mediation

Mediation is essentially a negotiation process facilitated by a third party. Putting it in simpler terms, mediation refers to the resolution of a dispute through active participation of a third party, referred to as a mediator, who only facilitates the process to find points agreeable to the disputants in the conflict.<sup>6</sup> It differs from arbitration and conciliation in the roles of the third parties. An arbitrator acts much like a judge, save for the fact that it is an out of court settlement that is less formal setting based on party autonomy.<sup>7</sup> Also, the process of conciliation closely resembles mediation save for the fact that the third party, called the conciliator, takes a more interventionist role in bringing the parties together and suggests possible solutions to help the parties achieve an agreed settlement.<sup>8</sup>

The reason why mediation is one of the best modes of conflict management is the party-centred attributes/advantages it has over all other processes. These attributes have been the reason why mediation is the most preferred form of conflict management. The following are some of the attributes associated with the process of mediation as a form of appropriate conflict management in Kenya.

## 3. Advantages of Mediation in conflict management

Mediation is deemed to be a **voluntary process**. This is so because both parties in the dispute get to make real and free choices based on their effective participation in the mediation, open willingness and the desire to accept a compromise. This aspect of mediation is also evident in the parties' willingness to refer the matter to a mediator for resolution through a principle called party

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<sup>6</sup> A.V. Gichuhi, "Court Mandated Mediation: The final solution to expeditious disposal of cases" 1(2) *The Law Society of Kenya Journal* 106 (2005).

<sup>7</sup> K. Muigua, "Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya" *CI Arb (K), Alternative Dispute Resolution Journal*, Vol 1, No. 1, (Glenwood Publishers Limited, 2013), page 63.

<sup>8</sup> *Ibid.*

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autonomy. This refers to the situation whereby parties to the dispute get to choose the mediator of their choice, the venue of the mediation and how the process ought to be carried out. It also involves the ability of the parties to choose the procedural aspects of the process and the arrival at an agreement which is consensual to both parties.<sup>9</sup>

In mediation, there is an aspect of satisfaction for both parties when they are more committed to the mediation process and outcome. Parties' autonomy to choose a mediator, venue and persons to attend the mediation enhances the possibility that the parties will be satisfied with the outcome.<sup>10</sup>

Matters in mediation processes are resolved expeditiously without any unreasonable delays. It is generally known that some of the main reasons why court processes suffer from delays and are unable to resolve many cases at the convenience of the parties is due to high caseload and lack of flexibility. Mediation on the other hand can be scheduled at the convenience of the parties and mediator as it is coupled with the informality and flexibility of mediation which makes it an expeditious process.<sup>11</sup>

Alternative Dispute Resolution mechanisms enjoy the attribute of confidentiality which serves to encourage openness in the process by assuring the parties that any admissions or proposals will not have any consequences beyond the mediation process.<sup>12</sup>

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<sup>9</sup> K. Muigua, *Resolving Conflicts through Mediation in Kenya*, op cit pp. 23-26; see also A.A. Theresa, 'Methods of Conflict Resolution in African Traditional Society,' *Indexed African Journal Online*, vol. 8(2), Serial No. 33, April, 2014: pp. 138-157 at pp. 151-152.

<sup>10</sup> Ibid.

<sup>11</sup> Kariuki Muigua, *"Legitimizing Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework"* Available at <File:///C:/Users/KARIUKI%20MUIGUA/Desktop/LEGITIMISING%20ALTERNATIVE%20DISPUTE%20RESOLUTION%20MECHANISMS%20IN%20KENYA.Pdf> (Accessed on 27/08/2018).

<sup>12</sup> Ibid.

Another attribute is that mediation focuses on interests and not rights. It empowers and fosters parties' relationship because the values and needs of each party are addressed. Parties to the mediation process engage each other so as to fight the dispute and not each other. The potentially non-binding nature of mediation also allows parties to always remain in control of the mediation process. It equally means that a decision cannot be imposed on the parties thus an agreement is only concluded when the parties have voluntarily agreed to accept it. In the event parties reach a settlement, the mediation solutions last longer for the reason that it is the parties themselves who get involved in making the final decisions.<sup>13</sup>

As earlier stated, mediation is a voluntary process. It is a non-coercive mechanism whereby parties create their own solutions that do not require enforcement by state agencies like police unless parties agree to adopt the same as enforceable by courts. Mediation ought to be Flexible and an informal process that does not follow any structure since it is consensual and voluntary. The parties can therefore define and design the course that the process will take such that all arrangements can be changed if necessary.<sup>14</sup>

Mediation is deemed to be a cost-effective process which is also one of the reasons why it is mostly the preferred form of dispute resolution mechanisms. This is because of its informal nature and speed of the process.<sup>15</sup>

#### **4. Disadvantages of using Mediation in Conflict Management**

Mediation has been associated with a few disadvantages which may hinder the effectiveness of its practice in Kenya. The first one is the fact that mediation outcomes are potentially non-binding in the sense that a party cannot enforce the content of the settlement against the other upon failure to perform by the other party unless they agree on the same beforehand. In such a scenario, the parties may feel like the mediation process lacks finality for the reasons that such

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.



outcomes lacks court ordered solutions.<sup>16</sup> The need to overcome this disadvantage may therefore explain the rising popularity of court annexed mediation in Kenya.<sup>17</sup>

It has also been argued that mediation is not the ideal way to get the truth of a matter. In a courtroom setting, lawyers have many tools to produce evidence, which tools may not be available in mediation. Another challenge is that in mediation, it is not always guaranteed that there will be an agreement at the end, thus in such cases it will become expensive because parties will have to go back to court to resolve the conflict.<sup>18</sup>

### **5. The Scope of Mediation as a form of Conflict Management in Kenya**

Mediation has become very common in resolution of civil disputes such as domestic related disputes which include divorce, child custody and in some cases, it is usually ordered by courts as in the case of court annexed mediation in Kenya<sup>19</sup>. Mediation has also become the order of resolution of disputes in contracts and civil/criminal damage cases where restorative justice is the main aim of resolution of the dispute. An example is in the case of *Republic vs. Mohamed Abdow Mohamed*<sup>20</sup> in which two families resolved the murder dispute through mediation.<sup>21</sup> Even though the place of this case in the criminal law jurisprudence

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<sup>16</sup> Elisabeth Lindenmayer and Josie Lianna Kaye, "A Choice for Peace? The Story of Forty-One Days of Mediation in Kenya" August 2009, Available at file:///D:/KenyaMediation\_IPI2009.pdf (Accessed on 27/08/2018). AUGUST 200

<sup>17</sup> See generally, *Mediation (Pilot Project) Rules, 2015*, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9<sup>th</sup> October, 2015, (Government Printer, Nairobi, 2015).

<sup>18</sup> *Ibid.*

<sup>19</sup> Civil Procedure Act, Cap 21, sec. 59A & 59B; *Mediation (Pilot Project) Rules, 2015*, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9<sup>th</sup> October, 2015, (Government Printer, Nairobi, 2015).

<sup>20</sup> [2013] eKLR.

<sup>21</sup> K. Muigua, "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p. 21. Available at <http://www.chuitech.com/kmco/attachments/article/111/Paper%20on%20Article%20159%20Tradditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf> (Accessed on 27/08/2018).

in Kenya is still in contention, it demonstrates the possibility of use of ADR in criminal matters as captured in the Criminal Procedure (Plea Bargaining) Rules, 2018.

Formal mechanisms for conflict management such as litigation and arbitration are not always effective in managing conflicts as they have been inaccessible by the poor owing to technicalities, complex procedures, high costs and delays. This therefore calls for the need to refer these disputes to a mechanism that is effective regardless of the challenges. Mediation is the one of the best means by which these disputes should be resolved as it is the most authentic form of dispute resolution mechanisms for all kinds of disputes even before the formal laws were introduced.<sup>22</sup>

Conflict management in Kenya continues to face major challenges in the current national and regional environments. Instability in the neighbouring states has also resulted in increased cross-border conflicts, proliferation of arms, and even humanitarian crisis which has resulted in the loss of lives and property. The better strategy to resolve conflicts in a constructive way is the use of the process of mediation. It is imperative to appreciate that conflicts are not resolved by using common sense or mechanistic method of logic and reasoning out.<sup>23</sup>

The Constitution of Kenya 2010 has provided that alternative forms of dispute resolution including mediation, arbitration and traditional methods shall be promoted.<sup>24</sup> The Kenyan Judiciary has since provided for court annexed mediation as a process of accessing justice. Courts now refer cases to trained mediators to handle them. If the parties reach an agreement with the assistance of a mediator the same is adopted by the court as an order of the court and is implemented accordingly. In Kenya, mediation has helped to clear the heavy

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<sup>22</sup> Ibid.

<sup>23</sup> Anna Ngibuini Mwaure, "Mediation as a peace building tool" Available at <https://www.standardmedia.co.ke/article/2001288873/mediation-as-a-peace-building-tool> (Accessed on 27/08/2018)

<sup>24</sup> The Constitution of Kenya 2010, Article 159 (2) (c).

backlog of old unresolved cases in court and indeed Judiciary is promoting mediation as a preferred process of handling cases.<sup>25</sup>

**Some of the cases that mediation has resolved over the years include:**

The Njenga Karume family row over Kshs. 17 billion property which is a three-year court battle over who and how the estate should be managed. The family reached a common ground on the way forward through engaging in the process of mediation in a span of three months.<sup>26</sup>

There is also the forty-one-day peace process, culminating in the Agreement on the Principles of Partnership of the Coalition Government, which was signed by the former President Mwai Kibaki and the Honorable Raila Odinga on 28<sup>th</sup> February 2018, putting an end to the crisis of the 2007-8 Post Election Violence handled by the late and former head of African Union, Koffi Annan. These are some of the successful matters that have been finalized through mediation in Kenya.

**6. Conclusion**

From the above, we can therefore infer that mediation is one of the best and most suitable methods of resolving commercial disputes in Kenya. This paper has discussed and met objective which is to bring into awareness the fact that mediation is one of the most preferred and appropriate dispute resolution mechanisms in Kenya and that it ought to be used in the management of conflicts that are prevailing in our country for just and expeditious resolution of such disputes. However, there is need to establish a comprehensive legal framework for mediation so to provide a foundation to which the process of mediation lies.

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<sup>25</sup> Hon. Caroline Kendagor, *"The Judiciary: Court Annexed Mediation – A Solution by you for you"* A Paper presented to ICPAK Professional Forum at Mombasa on 1<sup>st</sup> March, 2017.

<sup>26</sup> Citizen Digital - Njenga Karume family settle bitter row on Ksh.17 billion property by Lawrence Baraza dated *August 27, 2018*

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## **Justice at Crossroads: Unlocking the Potential for Appropriate Dispute Resolution (ADR) Mechanisms in a Dynamic Legal Environment**

*By: Dr. K. I. Laibuta\**

### **1. Introduction**

ADR mechanisms in Africa trace back to the very origin of mankind. Indeed, Africa's unique dispute resolution strategies were suitably designed to manage and resolve conflicts without distinction as between civil wrongs and criminal offences, a classification whose innovation is attributed to the advent of the modern day conventional judicial system. Today, the spectrum of dispute resolution mechanisms in the continent is shaped by multiple legal orders, which include (a) informal community-based alternative justice systems; (b) traditional dispute resolution mechanisms; (c) commercial arbitration and ADR (either backed by statute or founded on contractual relations); and (d) the all-familiar conventional judicial system characterized by a range of adjudicative processes. Though rarely amplified as a fact, it is believed that only a small fraction of disputes escalate and find their way into the conventional judicial institutions while most are resolved through a diverse range of ADR mechanisms.

The fact that conflicts are an integral part of human relations, their effective management and the resolution of ensuing disputes become critical to the maintenance of social order and the very existence of communal life. It is no wonder that conflict management and dispute resolution strategies have evolved over the centuries in response to the diverse social needs, norms and standards of fairness in their endeavor to balance and resolve competing interests.

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The establishment of conventional judicial institutions in developing common law jurisdictions was closely linked to British colonial administrative strategies. They were founded on the English legal system with minor modifications to accommodate local circumstances.<sup>1</sup> Other modern day adjudicative institutions belong to the civil law system, the legal system predominant on the European continent historically influenced by that of ancient Rome, and common in Francophone Africa. The concept of legal justice as understood in the context of sociological jurisprudence of the day was locally adapted and applied to suit the colonial agenda and satisfy the demands of the emerging agrarian and industrial economies. The ensuing rapid growth in the private-sector-driven commerce and industry in the urban centres coupled with the complexity of the ever-changing social-economic environment began to make pressing demands for effective management and resolution of conflicts resulting from rising levels of competing needs and interests.

The ensuing complexity of social-economic relations was characterized by competition and friction generating new demands, claims and wants<sup>2</sup> overwhelming the conventional judicial systems which are largely viewed as outdated and incapable of expeditious and effective management and resolution of conflicts. This has resulted in crisis in litigation.<sup>3</sup> Hence, the urgent call for strategic review and reform to recreate “a competent, efficient and effective judiciary”<sup>4</sup> backed by ADR.

Developed common law and civil law jurisdictions shared similar history prompting far-reaching reforms and change in policy and practice culminating

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<sup>1</sup> Kwach, R. O. (Hon. Mr. Justice) (1998) “Report of the Committee on the Administration of Justice” p.6.

<sup>2</sup> Pound, R. (1921) “A Theory of Social Interests” 15 Proceedings American Sociological Society, p.1.

<sup>3</sup> Kwach, R. O. (1998) at p.47 observes that there is “an increased growth of the Kenyan population and its urbanisation” (among other factors) resulting in delay and backlog of cases that bedevil the administration of justice.

<sup>4</sup> Kwach, R. O. (1998), p.7.

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in international best practices. They adopted alternative strategies for conflict management and dispute resolution hitherto unknown to the conventional adversarial and inquisitorial civil justice systems, and set the pace for reform in other jurisdictions.”<sup>5</sup> As Slapper et al (1996) observe, these reforms have greatly improved the machinery of civil justice by eliminating impeding factors such as administrative irregularities and inadequacies, prohibitive costs of litigation, clogged systems due to endemic delay in conclusion of civil proceedings and the intimidating solemnity, not to mention the complexity of largely incomprehensible substantive law and rules of adversarial as well as inquisitorial procedures with which lay parties had to contend<sup>6</sup> and which are still common in developing jurisdictions. Kwach (1998) also highlights psychological, information, economic, physical, geographical and literacy barriers as additional obstacles that inhibit access to justice.<sup>7</sup>

Over the years, it was hoped that ADR would offer practical solutions to the impediments that characterize the administration of civil and criminal justice in commonwealth Africa. Indeed, ADR was often viewed as a universal remedy for the afflictions with which our modern-day justice systems are identified. However, this supposed panacea has itself fallen ill with multiple wounds inflicted by ill-fitting policy, legal and institutional frameworks, not to mention the slow pace at which the legal profession and court users move towards internalizing the value of alternatives to litigation. It is true to say that the journey has been long and the Promised Land far from view.

While modern-day ADR strategies reflect age-old practices common in local communities and African traditional societies, they are slowly losing their efficacy as they take on the burdens perpetually borne by the conventional judicial system. Lawyers who delight in litigation to demonstrate their dexterity

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<sup>5</sup> Slapper, G. & Kelly, D. (1996) “Source Book On English Legal System” Cavendish Publishing Ltd., p.195.

<sup>6</sup> Ibid.

<sup>7</sup> Kwach, R. O. (1998), p.54.



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often to the financial, emotional and relational detriment of their contending clients have lately shifted their battlefields to the arena of commercial arbitration. In the end, arbitral tribunals are transformed into private courts completely robed in dilatory conduct, complexity and disproportionate costs, which ADR seeks to purge. Likewise, other ADR mechanisms do not enjoy their fair share of popularity in the prevailing atmosphere of strife. These challenges are compounded by the apparent lack of enthusiasm to embrace and promote tested ADR strategies. The question remains as to what holistic approaches are at our disposal to address these issues and challenges so as to hasten the pace for uptake of ADR among the legal fraternity and its closely-guarded clientele.

In order to successfully steer our dynamic economy towards the rightful course as regards ADR strategies as the market mechanisms of choice in our attempt to manage conflicts and resolve disputes, we must be persuasive in our answers to the following questions:

- a) What is the nature of ADR, and how do ADR strategies spur our social, cultural and economic development?
- b) How do ADR strategies compare with litigation?
- c) What is the degree of awareness as respects the nature and form of ADR mechanisms among the legal fraternity and their ever-growing clientele?
- d) What challenges impede on ADR as the strategies of choice in the bid to manage conflicts and resolve our civil disputes?
- e) Is there room for ADR in the criminal justice system and, if so, to what end and degree?
- f) Finally, what are you and I doing about it?

This paper recognizes the existence of multiple legal orders for the administration of justice and the need to promote and support community justice systems and conventional market mechanisms that have recently emerged to address the need for expeditious dispute resolution and claim adjudication through quality procedures to the ends of quality outcomes at proportionate

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costs. This presentation covers only a few of what would be considered to be the conceptual imperatives for full and equal access to both civil and criminal justice, by means of which ADR and TDR are a significant part. Hence, the need to promote and support ADR and TDR for a holistic dispute resolution framework.

### **2. Seeking the Ideal**

The primary goal of an ideal civil and criminal justice system is the effective management of conflicts and just resolution of disputes through a fair but swift process at a reasonable expense in time and money. It recognizes the fact that delay and excessive expense invariably negates the value of an otherwise just resolution. Similarly, systemic delay and expense common in civil litigation and criminal proceedings render the system inaccessible. Even though there is no absolute measure of a reasonable expense, jurisdictions world over subscribe to the basic principle that the cost of resolving a dispute should be proportional to its magnitude, value, importance and complexity. These are the standards that market mechanisms seek to achieve in order to provide alternatives to civil litigation to the discontent of litigation lawyers.

ADR practitioners and proponents of appropriate market mechanisms find reason in the assertion that it is not enough that the resolution of a dispute is fair. In addition to expedition and cost-effectiveness, two other considerations are vital to quality outcomes. To achieve quality outcomes, a sound balance must be struck between (a) a rights-based approach common in litigation; and (b) an interest-based and need-driven approach common in ADR. While a rights-based approach (characteristic of adversarial judicial systems) strictly upholds the legal rights and obligations of the parties, as do arbitral proceedings, an interest-based and need-driven approach characteristic of negotiation and mediation aims at a just resolution of a dispute that meets the interests and needs of all parties.

In contrast, an adversarial system of dispute resolution is not designed with expedition and cost-effectiveness in mind. To the contrary, it is designed to resolve conflict by a competition of adversaries. It is no wonder that delay, case backlogs and disproportionate costs of litigation are frequently cited as some of

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the main factors that impede effective resolution of disputes. In addition, the complexity of rules and the intricate architecture of the legal framework limits party control and sets the stage for legal counsel, whose adversarial approach to zealously champion the legal rights and downplay the corresponding obligations of their clients erodes the possibility of promoting and protecting the parties' needs and interests. In the end, extensive advocacy is rewarded regardless of the outcome or value of the case. Accordingly, the judicial system fails on all counts to provide efficient and effective justice. If unchecked, arbitral proceedings are likely to go down the same bumpy lane.

To appreciate the value of ADR in our dynamic world, one must internalize and subscribe to the words of Chief Justice Warren E. Burger of the US Supreme Court, who, with regard to the primary duty of legal counsel, had this to say:

*"The obligation of the legal profession is...to serve as healers of human conflicts.... We should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, with the minimum stress on the participants. That is what justice is all about."*

Granted, not all cases are suitable for mediation or other ADR strategies which, in any event, are voluntary. However, you will all agree with me that court litigation does not heal, but instead exacerbates, conflicts. In effect, legal counsel fail in their ordained duty to heal human conflicts in cases where they needlessly recommend and facilitate litigation. While recognising the determinative authority of the Judiciary, ADR practitioners draw keen attention to market mechanisms best suited to facilitate the management of conflicts and resolution of civil and criminal disputes (a) expeditiously, i.e., in the shortest possible time; (b) with the least possible expense; and (c) with the minimum stress on the disputants. In the words of Chief Justice Warren E. Burger, "... that is what justice is all about". Yet, the tendency among our learned fraternity has been to put tradition and financial considerations ahead of quality procedures and quality outcomes that serve to equalise the opportunity to access justice. Neither does the Judiciary place the deserved value on the emerging market mechanisms by

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citing ADR strategies as useful only for the purpose of mitigating case backlogs. It is in the spirit of these cherished outcomes that this paper recommends a progressive shift towards an approach that balances legal rights and obligations on the one hand and needs and interests of the parties, and the community at large, on the other. Such reforms require review of sectoral policy and legislation to promote market mechanisms and community justice systems (including traditional dispute resolution mechanisms) to complement the conventional judicial system in the delivery of both civil and criminal justice.

If well thought through, this wholesome approach would equalize the opportunity to access justice and maximise inter alia (a) proportionality; (b) party control; (c) expedition; (d) quality procedures and outcomes; and (e) consumer satisfaction. Indeed, the need for the formulation and implementation of a judicial policy to guide pre-action and pre-trial protocols, and (ii) court-mandated ADR in the justice sector, cannot be overemphasized. The primary goal is to establish policy, legislative and institutional frameworks for the promotion of early dispute resolution, whether by adjudicatory, facilitative or evaluative means within the ADR spectrum.

The writer subscribes to the inspiring words of Sandra Day O’Conner (an American Judge), who had this to say respecting the critical role of ADR strategies in the justice system:

*“The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving’ disputes have been considered and tried.”*

### **3. Harnessing Multiple Strategies in the Modern Day Legal Framework**

Multiple legal orders are a common feature of most jurisdictions in Africa. The conventional judicial system operates alongside a diverse range of community justice systems and other alternative dispute resolution strategies that continue to complement and to offer practical alternatives to judicial services. While community justice systems were largely designed to restore and repair

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relationships in the context of restorative and distributive justice, the emergent market mechanisms that comprise what is commonly referred to as ADR are well suited to achieve comparable ends whether with or without judicial intervention. Hence, the pressing need to reconstruct our policy and legal frameworks to guarantee quality procedures and outcomes in conflict management and dispute resolution. The question is, how?

We must recognize at the outset that conflict management and dispute resolution takes place on a daily basis in and outside the conventional judicial system with which we appear to have been unduly preoccupied. Secondly, it must be borne in mind that most community justice systems are largely unregulated. Thirdly, the extant judicial policies and legal frameworks in accordance with which commercial arbitration and ADR practitioners operate regulate conflict management and dispute resolution in only a small fraction of business and social relations. Finally, the existence of multiple legal orders calls for a holistic approach to dispute resolution. To this end, the beneficial example of Kenya sets the pace for the desired policy and legislation for the promotion and regulation of ADR practice in Africa.

The formal and informal justice systems that operate in tandem are either voluntary or coercive in nature and effect. This paper focuses on the voluntary dispute resolution mechanisms comprising what is commonly known as ADR. The spectrum of ADR in the community justice systems and the modern day market mechanisms with which ADR practitioners are familiar may be viewed as a recipe for the realization of the constitutional right of access to justice at an affordable cost.<sup>8</sup> The market mechanisms (which range from negotiation, conciliation, mediation, early neutral evaluation, adjudication and commercial arbitration, only to mention a few) emerged to address the need for expeditious resolution of disputes at proportionate costs. Over the years, ADR practitioners and professional bodies have sought to institutionalize and promote the establishment of policy and legal frameworks for the regulation of ADR, and to

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<sup>8</sup> The Constitution of Kenya, 2010, art 48.

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insulate their professional practice from the age-old community justice systems that are largely self-regulating without the need for statutory control except, perhaps, for the purpose of recognition and legitimisation.

Kenya's case is worth noting. The Constitution of Kenya, 2010 recognises the value of the extant multiple legal orders and seeks to place limitations on their outcomes. It lays down the principles of judicial authority and provides the foundation for the promotion and support of informal ADR mechanisms. To this end, the Constitution provides that, in exercising judicial authority, the courts and tribunals shall be guided by the principles that (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); and (d) justice shall be administered without undue regard to procedural technicalities.<sup>9</sup>

Clause (3) of article 159 sets conditions on which traditional dispute resolution (TDR) mechanisms may be applied. It provides that TDR mechanisms shall not be used in a way that (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with the Constitution or any written law.<sup>10</sup>

Whether or not replicated in identical terms, these constitutional ideals are not alien to comparable jurisdictions in Africa. Indeed, most commonwealth jurisdictions in Africa share Kenya's experience with respect to the legislative and institutional frameworks under which ADR is practised side by side with community justice systems. While only a few of these jurisdictions have comprehensive statute law dedicated to ADR in its widest sense, they nevertheless recognise the value of market mechanisms in the management of conflicts and resolution of contractual disputes at proportionate costs. More and

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<sup>9</sup> Ibid art 159(2).

<sup>10</sup> Ibid cl (3).

more jurisdictions are recognising the pressing need to establish a holistic ADR framework that enjoys comprehensive statutory and other regulatory support mechanisms in recognition of the existence of multiple legal orders that characterise our dynamic multicultural society.

## **4. Unlocking the Potential of ADR in Africa's Dynamic Legal Environment**

### **4.1 Introduction**

Even though greater emphasis is often laid on market mechanisms in civil claims founded on contract and other private legal relationships, traditional societies in Africa make little or no distinction between civil and criminal liability except in their restorative and retributive approach to claim adjudication. More emphasis is laid on restoring the parties and their communities to the place they would have been but for the offending conduct complained of. These informal justice systems not only seek to heal but also impose punitive sanctions in appropriate cases. In effect, their restorative approach to redress claimants and victims of offences does not ignore the need for retribution or corrective sanctions imposed in certain cases. Their underpinning principles are anchored on the needs and interests of both the parties and of the community at large.

It should be borne in mind, though, that the use of ADR as a means of restorative justice is not unique to Africa. Australia, the United States of America and India, only to name a few, have been on the forefront of applying ADR strategies in both civil and criminal proceedings in a bid to enhance access to justice.

Suffice it for the moment to observe that the future of ADR and its efficacy in guaranteeing quality procedures and quality outcomes in conflict management and dispute resolution in both civil and criminal proceedings depends on the architecture of our policy, legal and institutional frameworks. Accordingly, these frameworks should be suitably designed to promote and support ADR mechanisms as practised not only in informal community justice systems, but also in support of the adjudicative functions of the Judiciary. In effect,

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recognition and support of the multiple legal orders by appropriate policy and legislation offers a firm foundation for effective resolution of disputes.

Despite the history of our judicial system, recent developments shed a ray of hope that soon, and very soon, ADR will be the process of choice in comparison to civil litigation. In his article on ADR, Adam Campbell correctly observes that “over the years, ADR has enjoyed varied degrees of popularity. Not too long ago, all civil disputes ended up in litigation, often with a great investment of time and expense.”<sup>11</sup>

#### **4.2 Contending with the Exponential Change towards ADR**

We all appreciate that by nature, change begets resistance. Happily, though, the desired change towards ADR as the strategy of choice in conflict management and dispute resolution is in view. In his article titled “The Mind of the Lawyer Leader,” Dr. Larry Richard observes that “Few...today would argue with a proposition that we are in the midst of continuous external, disruptive, accelerating and exponential change.”<sup>12</sup>

According to evolutionary psychologists, “... exponential change is a state of existence to which we have not yet adapted.” According to Dr. Richard, the exponential change overloads our coping systems and causes such reactions as passivity, increased irritability and other negative emotions, reduced cognitive capacity, to protect yourself and focus on your own needs and less inclination to collaborate, co-operate or team up with others.<sup>13</sup>

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<sup>11</sup> Adam Campbell “Alternative Dispute Resolution – A Faded Fad or Viable Alternative for Business Disputes?” available at <[raibarone.com/wp-content/upload/2013/08/alternative-dispute-resolution-a-faded-fad-or-viable-alternative-for-business-disputes-adam-campbel.pdf](http://raibarone.com/wp-content/upload/2013/08/alternative-dispute-resolution-a-faded-fad-or-viable-alternative-for-business-disputes-adam-campbel.pdf)> (last accessed on 17<sup>th</sup> July 2018).

<sup>12</sup> Richard L “The Mind of the Lawyer Leader” available at [www.lawpractice.org](http://www.lawpractice.org) (last accessed on 17<sup>th</sup> July 2018).

<sup>13</sup> Ibid.



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True, the legal fraternity is yet to adapt to the dynamic world of ADR. Legal practice characterized by tenacity for litigation still exists in the past. It is no wonder that the exponential change towards ADR appears to have overloaded the coping systems of most legal minds, which explains their: passive attitude towards ADR; increased irritability and other negative emotions; reduced cognitive capacity to recognise the invaluable benefits of ADR; the tendency to protect the age-old ways of claim adjudication through litigation; and focus on their need to sustain one-track professional practice with diminished inclination towards collaborative strategies characteristic of ADR that facilitate co-operation and team spirit in the management of conflicts and resolution of disputes.

Today's dynamic legal environment presents developing jurisdictions with a time of great change, and we cannot afford to do business as usual. Engagement in civil litigation and defence of criminal charges as though it were a sport from which we derive professional satisfaction without regard to the just outcomes and tangible benefits to our clients is tantamount to failure to deliver on our calling. "While a problem-focussed mind set is needed in our role as lawyers, it is devastating to us as human beings in a time of great change."<sup>14</sup> Accordingly, it is incumbent upon each one of us to embrace and promote ADR and alternative justice systems that serve to deliver quality outcomes.

#### **4.3 The Potential of Modern-day ADR Strategies**

Most common and civil law jurisdictions have a defined legal framework for the conduct of commercial arbitration. Accordingly, little remains to be said about this market mechanism, save that commercial arbitration needs to be salvaged from the apparent drift towards highly formal adversarial model comparable to judicial proceedings, which has the likelihood of making arbitration bereft of quality procedures and outcomes on account of undue technicalities in which litigation lawyers delight despite the disproportionate costs to their clients' detriment.

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<sup>14</sup> Ibid at p.4.

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While other ADR mechanisms are essentially voluntary and contractual by nature, a holistic conflict management and dispute resolution framework would be an invaluable complement to the conventional judicial system. To this end, court mandated/annexed ADR requires enabling policy and legislation to guide judicial officers and tribunals in the promotion of ADR pursuant to article 159(2)(c) of the Constitution.

Even though most jurisdictions have rules of civil procedure that regulate ADR as part of the judicial process, few have comprehensive legislative and administrative frameworks dedicated to ADR. Such rules of procedure do not go beyond declaratory statement of their overriding objectives of *inter alia* expeditious disposal of proceedings<sup>15</sup> and the expression of authority to refer disputes for resolution by a specified ADR mechanism under an order of the court.<sup>16</sup> In effect, court-annexed ADR plays a significant role in the resolution of disputes submitted for adjudication in judicial proceedings.

#### **4.4 Unlocking the Potential of Informal Community Justice Systems**

The fact that community justice systems are essentially self-regulating and self-enforcing dictates that policy and legislation be appropriately reformed to promote and support these mechanisms without the need to regulate them. The only regulatory content of such policies and legislation should be aimed at ensuring that –

- a) the process and outcomes of community justice systems and their ADR mechanisms do not violate the Bill of Rights;
- b) such processes are not repugnant to justice and morality, and that they do not offend the Constitution or any written law;
- c) ADR practitioners in the communities are sensitised on (i) the relevant constitutional standards (such as the effect of article 159(3) of the Constitution of Kenya); and (ii) the law;

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<sup>15</sup> Sections 1A and 1B of the Civil Procedure Act (Cap. 21 Laws of Kenya).

<sup>16</sup> Order 46 of the Civil Procedure Rules, 2010.

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- d) There are defined jurisdictional limits and powers of ADR tribunals in making awards or sanctioning the criminal conduct of those persons subject to the community justice system;
- e) there is in force a code of ethics and standards of conduct for ADR practitioners;
- f) all practitioners of community-based ADR mechanisms adhere to the prescribed standards of ethical conduct;
- g) unethical conduct by ADR practitioners is sanctioned by law;
- h) any person whose fundamental rights and freedoms are violated in any of the ADR processes has access to judicial intervention and redress;
- i) the ADR mechanisms are accessible by all on an equal basis, and for a minimal fee, if any;
- j) the outcomes of ADR provide effective remedies and party satisfaction; and
- k) that there are simplified procedures for judicial intervention to enforce mediated settlements or agreements voluntarily entered into in resolution of civil disputes.

#### **4.5 The Potential of ADR in Criminal Justice**

The ongoing debate on the extent to which ADR strategies should be applied to enhance criminal justice is of great interest to sociological jurists and criminal lawyers alike. While the Criminal Procedure Code permits reconciliation between a victim and the offender, and subsequent withdrawal of charges in what is generally referred to as offences against the person, there is no consensus on whether reconciliation should be extended to all types of offences, including public and statutory offences, regardless of their gravity. Moreover, plea bargaining is common across the spectrum of criminal offences. In this regard, there is an ongoing debate as to whether ADR strategies, particularly mediation, should be entrenched into the criminal justice system, laying emphasis on restorative rather than retributive justice.

The ubiquity of plea bargaining demonstrates the relevance of ADR in the criminal justice system. This involves the prosecutor trading a reduction in the

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seriousness of the charges or the length of the recommended sentence for a waiver of the right to trial and a plea of guilty to the reduced charges. In such cases, the accused and the prosecutor have valid reason for bargain and settlement. In a case in which the evidence of guilt is overwhelming, the prosecution can avoid the inordinate expense and delay of a trial by offering modest concessions to the accused. When the evidence is less clear-cut, the State can avoid the risk of an acquittal by agreeing to a plea to a reduced charge. In view of the fact that substantive criminal law sanctions a wide range of charges and sentences for various types of criminal conduct, and because the procedural law allows prosecutors wide discretion in selecting charges, the prosecution has the discretion to give the defense a substantial incentive to plead guilty to a lesser charge, or to the offence charged in return for a lighter sentence.

In principle, plea bargaining (i.e., charge bargaining, fact bargaining or sentence bargaining) serves to enhance criminal case management and promotes the right to an expeditious trial. Moreover, the conception of social justice calls for “legal justice,” which means that the system for the administration of criminal justice must provide a cheap, expeditious and effective instrument for the realisation of justice for all sections of the society irrespective of their social or economic status.

Institutionalised plea bargaining is prevalent in India, Nigeria and the United States of America, only to name a few, where it plays a significant role in the disposal of criminal cases. Yet, there are those who argue that since a crime is an offence against society at large and the State, its very nature puts ADR out of the reach of the victim and the offender. This paper takes a contrary view and posits that plea bargaining by means of mediation and reconciliation stand to serve the wider interest of society by taking on modern-day ADR strategies, In so doing, the court, the public prosecutor, the investigating officer, the offender and the victim of the offence charged collaborate in the alternative process towards a victim-centred restorative justice, an approach that meets the needs and interests of, and yields satisfaction for, both the victim and the offender despite the apparent leniency and general public disapproval.

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As a means of restorative justice, ADR is used to facilitate the convergence of the needs and interests of the victim, the offender and their immediate community. As explained by Vikrant Sopan Yadav, "... restorative justice focuses on resolving the disputes between the parties[restoring] and maintaining the harmonious relations between them. It creates opportunities for parties to crime to discuss the crime and its ramification, to repair the harm caused, and restore the amicable relations between [them]."<sup>17</sup>

Tony Marshall defines restorative justice as "...a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of that offence and its implications for the future."<sup>18</sup> In other words, it is a facilitative process for resolving crime by focusing on redressing the harm done to the victims, holding offenders accountable for their actions and, often also, engaging the community in the resolution of that conflict.<sup>19</sup> Simply put, the conception of restorative justice denotes ADR as "... a road the parties must travel to arrive at their goal of mutually satisfactory settlement"<sup>20</sup> in cases other than capital and sexual offences, which go against the grain of article 159(3) of the Constitution.

The need for restorative criminal justice cannot be overemphasized. Today's dynamic legal system demands a shift from the predominant retributive approach in which the offender is viewed as deserving punishment or rehabilitation in accord with the concept of distributive justice. The proponents of retributive and distributive justice view a crime as a violation of the State rather than the victim. This explains why the State takes charge of the proceedings in which the victim is denied active participation and relegated to

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<sup>17</sup> Prof. Vikrant Sopan Yadav "ADR as a means of restorative justice" in *International Journal of Law* Vo. 3(2) (March 2017) pp.59-61 available at [www.lawjournals.org](http://www.lawjournals.org) (last accessed on 6<sup>th</sup> August 2018).

<sup>18</sup> Theo Gavrielides *Restorative Justice Theory and Practice: Addressing the Discrepancy (Criminal Justice Press Helsinki 2007)* pp.2-3.

<sup>19</sup> United Nations Office on Drugs and Crime *Handbook on Restorative Justice Programmes (Criminal Justice Handbook Series New York 2006)* p.6.

<sup>20</sup> Lon Fuller "Mediation - Its Form and Its Functions" s. *California Law Review* (1971" Vo. 44 pp.305-27.

the insignificant role of a prosecution witness with the primary objective of punishing or rehabilitating the offender instead of viewing the crime as a matter to be dealt with between the victim and the offender. In contrast, restorative justice is inclusive and focuses on restoring the harmful effects of the act of crime, and actively involves all parties in the criminal process.<sup>21</sup>

Rather than punish or rehabilitate the offender in total disregard for the needs and interests of the victim, restorative justice enables the offender to (a) repent for their crime; (b) strive to mend the injury done; and (c) be reintegrated into the community.<sup>22</sup> Moreover, revenge in itself is counterproductive. As Ric Simmons rightly concludes, it does not redress the victim or relieve their fears. Neither does it heal or provide closure, or help the society to make sense of the resulting tragedy.<sup>23</sup> On the other hand, ADR provides an opportunity for the victim, the offender and their community to participate in the process with the shared goal of redressing the harm done, reintegrating the offender into the society, and bringing closure to the matter. There is little doubt that widespread adoption of ADR in criminal proceedings will go a long way in enhancing criminal justice in our dynamic legal system.

## **5. Conclusion**

Having recognised the need for policy, legislative and institutional reforms to support ADR, African states need to take decisive steps to regulate ADR practice and procedure in both civil and criminal cases. They need to harness and unlock the potential of the multiple legal orders in accordance with which individuals and local communities manage conflicts and resolve disputes in disregard of the popular distinction between civil wrongs and criminal offences.

To this end, there is need to reform policy and legislation to, among other things (a) promote, strengthen and support the application of ADR and TDR

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<sup>21</sup> Jim Dignan *Understanding Victims and restorative Justice* (Open University Press 2005) p.94.

<sup>22</sup> Ric Simmons "Private Criminal Justice" *Wake Forest Law Review* (2007) Vol. 42 p.945.

<sup>23</sup> *Ibid.*

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mechanisms in various communities so as to give effect to article 159(2)(c) and (3) of the Constitution; (b) set minimum standards of conduct and conditions for the application of ADR and TDR by local communities; (c) clearly define the jurisdictional limits and powers of community justice systems in civil and criminal disputes; and (d) regulate the application of market mechanisms in dispute resolution by ADR practitioners and professional organisations.

While it is desirable that ADR practitioners and professional organisations be self-regulated, the need for enabling policy and legislation cannot be overemphasised. A comprehensive ADR policy would be instrumental in, among other things, guiding (a) the development and implementation of programmes, plans and actions for the training of judicial officers in the application of court mandated/annexed ADR strategies; (b) the development of programmes for the sensitisation of ADR practitioners on the constitutional standards and conditions for the application of ADR mechanisms; (c) the formulation of a code of ethics for ADR practitioners and disciplinary procedures to be applied by professional organisations; and (d) the adoption or development, and enforcement of universally accepted standards of ADR practice.

The proposed policy and law reform measures would provide the much-needed regulatory framework to back judicial institutions as they begin to annex or mandate appropriate ADR strategies designed to guarantee full and equal access to civil and criminal justice. However, the recommendations made in this paper are by no means exhaustive. Neither is it suggested that they are applicable to each and every jurisdiction in Africa in identical terms. Rather, they are design to provoke thinking and exploration of possibilities for policy, law and institutional reforms to promote and strengthen ADR mechanisms alongside the conventional judicial system. The paper recognizes the need to set minimum standards for the regulation of ADR practitioners and the related professional organisations without undermining their paramount right to self-regulation, and without disturbing the fabric of self-enforcing community justice systems.

## **Arbitration Agreement as the Foundation of International Commercial Arbitration**

*By: Justice Muga Apondi\**

### **1. A General Overview of the Arbitration Agreement**

When parties agree to arbitrate their disputes, they give up the right to have those disputes decided by the national court. Instead, they agree that their disputes will be resolved privately, outside any court system. The arbitration agreement thus constitutes the relinquishment of an important right to have the dispute resolved judicially and creates other rights. The rights it creates are the rights to establish the process for resolving the dispute. In their arbitration agreement, the parties can select the rules that will govern the procedure, the location of the arbitration, the language of the arbitration, the law governing the arbitration, and frequently, the decision makers, whom the parties may choose because of their particular expertise in the subject matter of the parties' dispute. The parties' arbitration agreement gives the arbitrators the power to decide the dispute, and defines the scope of that power. In essence, the parties create their own private system justice<sup>1</sup>.

An arbitration agreement is the basis of all arbitrations. It is basically an agreement where the parties undertake that specified matters arising between them shall be resolved by a third party acting as an arbitrator and that they will honour the decision (award) made by that person<sup>2</sup>.

Sec 4 of the Arbitration Act, No. 4 of 1995 states as follows;

#### *Forms of arbitration agreement*

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<sup>1</sup> Margaret L. Moses= "*The Principles and Practice of International Commercial Arbitration.*"

<sup>2</sup> W. Tuner, "Arbitration Agreements" (3) *Arbitration* 230(2000).



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*An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*

*An arbitration agreement shall be in writing.*

*An arbitration agreement is in writing if it is contained in-*

*A document signed by the parties:*

*An exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or*

*An exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.*

*The reference in a contract document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract*

On the other hand, Article II of the United Nations Conference New York, states as follows:

*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*

*The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.*

*The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.*

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*Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.*

An analysis of the above succinctly shows that Section 4 of the Arbitration Act deals with the form that arbitration agreement should take. Briefly, it dwells on the content. On the other hand, The New York Convention under Article II emphasizes on two issues. The first issue is that, each contracting State should recognise an agreement in writing. Secondly, it emphasises the issue of enforcement of the agreement in accordance with the rules of procedure of the territory where the award is relied upon. It also blocks the imposition of any unnecessary fees in the course of the above two processes. Basically, it puts a foreign award at par with a domestic one, both in terms of recognition and enforcement.

In addition to the above, an arbitration agreement has also been defined as an agreement to submit present and future disputes to arbitration.<sup>3</sup> On the other hand, the 1985 UNCITRAL – Model Law on International Commercial Arbitration has given the following definition: Art. 7

“arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

The arbitration agreement shall be in writing.

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<sup>3</sup> Kariuki Muigua, *Settling Disputes through Arbitration in Kenya*, (3<sup>rd</sup> edn, Glenwood Publishers Ltd, Nairobi, 2017).

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An arbitration agreement in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference, “electronic communication” means any communication that the parties make by means of data messages; “data message” means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

## **2. Option II**

### *“Arbitration agreement”*

This is an agreement by the parties to submit to arbitration all or certain disputes which may arise between them in respect of a defined legal relationship, whether contractual or not.

Dr. Kariuki Muigua<sup>4</sup> has cogently submitted that arbitration agreements are contracts just like any other and hence must contain the following requirements;

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<sup>4</sup> Ibid, p. 25

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An agreement which usually consists of an offer and acceptance of that offer. A contract arises when an offer to make a contract is accepted. The agreement must have consideration which is something bargained for and given in exchange for a promise. A contract must contain a bargain. The parties must have the capacity or legal ability to contract which means that the letter must be between competent parties. The subject matter of the contract must be legal.

Generally, issues such as criminal matter, child custody, family matters and bankruptcy are not arbitrable.

Some contracts must be in proper form.

From the above, it is apparent that the 1985 UNCITRAL Model Law requires that the agreement must be in writing and secondly, there must be mutual consent of the parties.

One of the model law clauses also requires that the disputes between the parties must have arisen in respect of a defined legal relationship. Most drafters of arbitration clauses will not only provide that the parties agree to resolve “all disputes arising out of or related to the contract usually, a party’s tortuous claims or claims of unfair business practices will be related to the contract, even though not necessarily arising out of it.

It is a general principle that the arbitration clause does not depend on the validity of the remaining parts of the contract in which it is contained as long as the arbitration clause itself is validly entered into by the parties and worded sufficiently, broadly to cover non-contractual disputes, an arbitrator may declare a contract invalid but still retain jurisdiction to decide a dispute as to the consequences of the invalidity.<sup>5</sup>

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<sup>5</sup> Ibid.

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The above concept is vividly captured in the Model Law (Art. 16 (1) as follows:

*“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.”*

Schwebel justifies the separability doctrine on four grounds as outlined below.<sup>6</sup>

When parties enter into an arbitration agreement which is widely phrased, they usually intend to require that all disputes, including disputes over the validity of the contract, are to be settled by arbitration.

This may be an implied term of the contract. Applying the separability doctrine thus gives effect to the will of the parties

If simply by denying that the main contract is valid one part can deprive the arbitrator of competence to rule upon that allegation, this provides a loophole for parties to repudiate their obligation to arbitrate. This defeats one of the main advantages of choosing arbitration over litigation as a means of dispute settlement: speed and simplicity without the time and expense of the courts.

There is a well-established legal fiction that when parties enter into a contract containing an arbitration clause, they are really entering into two separate agreements: the *principal agreement containing their substantive obligations*, and the *arbitration agreement which provides for the settlement of disputes arising out of the principal agreement*. In this situation, if the principal

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<sup>6</sup> Stephen M. Schwebel, *International Arbitration: The Salient Problems* (1987) ch 1, 1-13.

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agreement is alleged to be void, there is no question about the validity of the arbitration agreement since it is an independent contract.

It is a widespread practice that courts usually review only arbitral awards and not the merits of disputes which are meant to be arbitrated. However, if we do not accept the separability doctrine, courts would be forced to do this very thing.

In the case of *Heyman v Darwins*<sup>7</sup>, the separability doctrine was clearly enunciated by the House of Lords. In that regard, Lord Macmillan, with whom Lord Russell of Killoren agreed, approved the separability doctrine in the following terms;

*“I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other hinc inde, but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such disputes shall be settled by a tribunal of their own constitution.*

In addition to the above, a standard arbitration agreement should at least provide for the following;

***Dispute to be resolved by arbitration.***

The wording of the agreement should be explicit on the disputes that can be resolved during the arbitration.

***The disputants must be clearly identified.*** It should be absolutely clear who the parties are so that there may be no need for substitution.

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<sup>7</sup> (1942) 72 L1 L Rep 65 (HL).

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### ***Venue of the Arbitration.***

In the context of international arbitration, an agreement on the venue is essential since it may be a determinant of the applicable law. Where the parties do not indicate the venue in the arbitration agreement the tribunal is mandated to determine the venue. The choice of the venue could have important consequences for the procedure applicable which ultimately, will affect the conduct of the proceedings.

### ***Applicable Law:***

This must also be indicated in the agreement where parties intend to rely on specific statutes. The parties should definitely specify the substantive law that they have agreed upon, in order to avoid unnecessary disputes at the time of arbitration.

### ***Procedure during arbitration:***

Whereas the parties should agree on the procedure to be adopted by the tribunal, where there is a disagreement, then the rule is, *that the arbitrator is the master of procedure.*

### ***Number of Arbitrators:***

Generally, parties are free to agree on the number of arbitrators, failing which there will be one arbitrator. It is common knowledge that where the arbitration agreement is clear on the mode of appointment of the arbitrator, courts are unlikely to interfere.

### ***Parties should state the language of the arbitration in the arbitration clause. Limitation Period for Dispute***

#### ***Resolution:***

It is always prudent and advisable for the arbitration agreement to indicate the limitation period for instituting arbitral proceedings. That will prevent a situation where an arbitral award is set aside for being time - barred.

***Costs:*** In arbitration, the parties are at liberty to agree on the costs.

**Appeals:** In situations where the parties wish to reserve a right of appeal, then this must expressly be stated in the agreement.

### **3. Common Mistakes in Drafting Arbitration Agreements**

Given the above analysis, it would be useful to point out the common mistakes that drafters make when drawing up arbitration agreements. According to John M. Townsend<sup>8</sup>, he identifies seven of the most damning “sins” that plague arbitration clauses and offers possible solutions to the same.

#### **Equivocation**

He candidly quotes Lawrence Craig, Rusty Park and Jan Paulson who have aptly described equivocation in their book *International Chamber of Commerce*:

Arbitration<sup>9</sup>. They state that the essence of this sin is the failure to state clearly that the parties have agreed to binding arbitration. Because arbitration is a creature of contract, if there is no contract, there is no agreement to arbitrate.

*“Craig, Park and Paulsson’s example of an equivocating clause has certain gallic simplicity: in case of dispute, the parties undertake to submit to arbitration, but in case of litigation the Tribunal de la Seine shall have exclusive jurisdiction”*

In essence, the authors are urging drafters strongly to insert a provision that, if a dispute arises, it will help the parties obtain an arbitration award without a detour through the court system. Basically, the drafter must produce an enforceable agreement to arbitrate.

At an international level, lawyers consider the touchstone of arbitration drafting as Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York

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<sup>8</sup> Townsend, John M, "Drafting arbitration clauses: Avoiding the 7 deadly sins." *Dispute Resolution Journal* 58, no. 1 (2003): 28.

<sup>9</sup> *International chamber of Commerce Arbitration* 9.02 (1990 2d ed. Oceana Publications) *Seine shall have exclusive jurisdiction.*



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Convention. The same provides; Each Contracting State should recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which

### **Inattention**

The sin of inattention occurs where the drafting has been done with insufficient attention to the transaction to which it relates. It is crucial that when a lawyer drafts an arbitration agreement he should consider the total circumstances of the case and also the hopes and aspirations of his client. Needless to state, arbitration has some basic advantages like privacy, speed and cost effectiveness. However, there is also need for the client to be informed of the disadvantages like loss of right to appeal and restrictions of the law to arbitration of certain matters like serious criminal offences. Clients who engage in international trade should be informed that the New York Convention and the Panama Convention make arbitration awards enforceable in most countries so long as the country where the award is to be enforced are parties to the same convention. In addition to the above, it is also significant to take note of the location of the assets of the adversary to ease the burden of enforcement.

### **Omission**

It is crucial that a drafter avoids the sin of omission by overlooking key and critical elements in an arbitration agreement. In that regard, the drafter should clearly state when, where and how to conduct the arbitration.

### **Over-Specificity**

No doubt, this is the opposite to the sin of omission. Rather than providing insufficient detail, the drafter provides too much. This can happen when a drafter wants to impress his clients that he is highly learned and can be verbose. The sin of over-specificity can greatly contribute to difficulties in interpretation

### **Unrealistic Expectations**

This can be described as a companion to the sin of over-specificity. No doubt, the majority of clients, especially the ones lodging a claim for money or vacant

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possession of premises consider time to be of essence. That is a legitimate and reasonable expectation. However, in the process of pursuing that goal there is need for them to be realistic and not impose unrealistic time lines. Where deadlines are not met, then that can result in fresh litigation in courts. In many European countries, failure to meet a deadline deprives an arbitrator of jurisdiction to proceed with the arbitration.<sup>10</sup>

### **Litigation Envy**

There are situations where the drafter of an arbitration clause cannot be reconciled to the thought of letting go of the familiar security blanket of litigation. Consequently, the same results in a clause for the arbitration to follow court rules. That has been described as the sin of litigation envy. In other situations, drafters can also manifest litigation envy when they are reluctant to trust the result and provide for expanded review of the arbitration award.

### **Overreaching**

There can be situations where the drafter of an arbitration clause cannot resist the temptation to tilt the arbitration process in favour of his or her client. This is what can be described as the sin of overreaching. Whereas the drafter can be tempted to favour his client the same should be avoided by all means since it will make the playing field tilted and also counterproductive.

### **Case Law:**

Due to problems arising from the drafting of arbitral agreements there has been growing jurisprudence related to this area of the law. At this stage, a few examples from different jurisdictions will illustrate the said jurisprudence.

In the case of

**Fiona Trust & Holding Corporation and Others v Privalov & Others<sup>10</sup>**

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<sup>10</sup> [2007] UKHL 40 Pg 1053.

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*The owners of eight vessels which formed part of a Russian state owned group of companies entered into charters on the Shelltime 4 form with eight charters. Clause 41(b) of the form provided that “Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties hereby agree” Clause 41(c) then allowed for “any such dispute” to be referred to arbitration. The owners alleged that the Charters were procured by the bribery of the senior officers of the Russian state owned group by the third defendant who controlled or was associated with the charter companies. They purported to rescind the charters and commenced Court proceedings for a declaration that the Charters had been validly rescinded, submitting that they were entitled to rescind the Charter parties, including the arbitration agreements, because the Charter parties had been induced by bribery.*

*HELD: The time had come for a fresh start to be made to the construction of arbitration clauses. Such construction should start from the assumption that the parties as rational businessmen were likely to have intended any dispute arising out of the relationship into which they had entered or purported to enter to be decided by the tribunal.*

*Sec 7 of the 1996 Act was to be interpreted so that the main agreement and the arbitration agreement had to be treated as having been separately concluded and the arbitration agreement could be invalidated only on a ground which related to the arbitration agreement and was not merely a consequence of the invalidity of the main agreement.*

*On the other hand, in the case of AT & Technologies Inc V/s Communications Workers of America<sup>11</sup>, The United States Supreme Court said that, in the absence of any express provision excluding a particular grievance from arbitration, only the most forcefully evidence of a purpose to exclude the claim from arbitration could prevail”.*

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<sup>11</sup> (1986) 475 US 643 Pg 650.

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*In Germany: see Schlosser “The Decision of 27<sup>th</sup> February 1970 of the Federal Supreme Court of the Federal Republic of Germany (Bundesgerichtshof)<sup>12</sup> stated as follows:*

*“there is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising there from, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals.*

In Kenya, in the case of:

***Family Bank Limited v Kobil Petroleum Limited<sup>13</sup>***

The Court stated that the contract between the Plaintiff and the defendant provided that “*Any dispute with regard to any matter in connection with this contract be referred to arbitration. The Court, noting that the arbitration clause thereof was valid, stated that where parties have agreed to oust the jurisdiction of the court and rather go to arbitration that has to be respected by both of them and the Court since it is they (the parties) who knew better how to resolve their dispute in question is within the arbitration clause.*

In another case,

*Mohammed Gulam Hussein Fazal Karmali & another v The Chief Magistrate’s Court Nairobi and another<sup>14</sup>*

The Court stated that where the parties, in unequivocal terms, have provided for the means to resolve disputes between them, that is, by arbitration in London under the Rules of the London Court of International Arbitration (LCIA), the effect is that the parties had by a consensual process agreed to resolve any

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<sup>12</sup> *Arbitration Int* 1990, 6 (1) P. 79.

<sup>13</sup> ELC NO. 651 of 2010, at the High Court of Kenya

<sup>14</sup> [2006] eKLR.

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dispute or differences arising from the agreements by arbitration and that the Court had a responsibility to uphold party autonomy.

The Court noted that the responsibility to uphold party autonomy arises from the fact that Kenya has ratified the UNICITRAL Model Law which requires the state and the Courts to uphold the principle of party autonomy in resolving commercial disputes and where there is an arbitration agreement.

In my considered view, the general Jurisprudence emerging from different Jurisdictions is that where the parties have demonstrated clear intentions of settling their cases through arbitration, the Courts have facilitated their autonomy.

#### **4. Conclusion**

This paper has not only dealt with the general overview of the arbitration but has also defined what a standard arbitration agreement should look like.

In addition to the above, the paper has also dealt at length with the separability doctrine by giving four grounds. Apart from the above, the paper has also dealt at length with the essential elements of an arbitral agreement.

It is contended that the arbitration agreement is the foundation of international commercial arbitration and needs to be carefully drafted. At the outset, it must be pointed out that the majority of international commercial transactions are concluded successfully to the satisfaction of the parties. That explains why international business has been expanding rapidly. In situations where there have been disagreements then the parties opt to turn to arbitration.

Inherent in that choice, the parties not only wanted to resolve their disputes expeditiously and cheaply, but may prefer to maintain a long-term relationship that will be beneficial to all the parties.

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Under those circumstances, it will not be prudent to have a complicated, complex and vague agreement. A clear, simple and elaborate arbitration agreement will not only be easier to interpret, but will also be cost effective. Needless to state, quick resolution of commercial disputes will assist the parties to carry out more transactions which invariably will enhance more profits and economic growth. Besides the above, there will arise many circumstances where a carefully drafted international commercial arbitration agreement may pre-empt any disputes going through the whole process of arbitration.

That can arise where the parties are represented by diligent, open-minded and upright lawyers who have the interests of their clients at heart. These lawyers can quickly interpret the international commercial arbitration agreement and advise their clients accordingly.

An efficacious and clear agreement needs not to be drafted in legalese or complex language. This assertion is well supported by the position taken by Margaret L.<sup>15</sup> Moses who stated as follows;

“The parties to an arbitration agreement enjoy substantial autonomy to determine the parameters of the legal regime in which their disputes will be resolved. In international agreements, counsel who draft arbitration clauses need to be well informed and educated about creating a legal framework that works well-that permits the procedures they desire, that minimizes the need for disputes about the framework itself, that does not risk violating institutional or legal mandatory rules, and that does not create the kind of ambiguities and uncertainties that can invalidate the agreement to arbitrate.

Clear and knowledgeable drafting of an arbitration agreement can significantly impact an international transaction by providing for efficient resolution of disputes. Moreover, a well-drafted clause may even contribute to the ongoing

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<sup>15</sup> Ibid.

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business relationship by deterring parties from actually bringing a claim. When the arbitration clause is clearly valid, and sets forth a process that will work smoothly and efficiently, parties should have less incentive to avoid both litigation and arbitration by simply settling their dispute informally<sup>16</sup>.

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<sup>16</sup> Ibid, pg 54.

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## **Independence and Impartiality in Arbitration Practice in Kenya: Demystifying “The Reasonable Third Person Test”**

By: **Jeffah Ombati\***

### **Abstract**

*Independence and impartiality of arbitrators are fundamental pillars in arbitration practice in Kenya. However, there is a clear overlap between arbitral independence and impartiality. For instance, a party appointed arbitrator may lack independence on account of a relationship between the arbitrator and the party making the appointment, and may be partial on account of that relationship. This demonstrates instances of bias in arbitration. “The reasonable third person test” against bias of arbitrators has been established to ensure that arbitrators conduct themselves independently throughout the arbitration proceedings. This opens another intervention by courts in arbitration which is essentially limited. Similarly, the challenge and removal of an arbitrator by the court should be properly contained as it may be abused by those intent on disrupting the arbitral process. Thus, this paper seeks to demystify “The Reasonable Third Person Test” in determination of circumstances giving rise to justifiable doubts as to the impartiality and independence of the arbitrator.*

### **1. Introduction**

The independence and impartiality of arbitrators are basic tenets of arbitration practice in Kenya. The arbitrator must be independent and impartial both towards the parties involved and the authorities concerned. The arbitrator should also be perceived as independent by the third reasonable person.<sup>1</sup> However, there is a clear overlap between arbitral independence and impartiality. For instance, a party appointed arbitrator may lack independence on account of a

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<sup>1</sup> Jung, Helena, *The Standard of Independence and Impartiality for Arbitrators in International Arbitration: A Comparative Study Between the Standards of the SCC, the ICC, the LCIA and the AAA*. Uppsala University Faculty of Law, 2008, p. 7.

relationship between the arbitrator and the party making the appointment, and may be partial on account of that relationship. This demonstrates instances of bias in arbitration.<sup>2</sup>

“The reasonable third person test” against bias of arbitrators has been established to ensure that arbitrators conduct themselves independently throughout the arbitration proceedings. This opens another intervention by courts in arbitration which is essentially limited pursuant to section 10 of the Arbitration Act.<sup>3</sup> Similarly, the challenge and removal of an arbitrator by the court should be properly established in a bid to shield any loopholes that may be exploited by those intent on disrupting the arbitral process. Thus, this paper seeks to demystify “The Reasonable Third Person Test” in determination of circumstances giving rise to justifiable doubts as to the impartiality and independence of the arbitrator.

## **2. Independence and Impartiality in Arbitration Practice**

Arbitration is a dispute settlement mechanism that is entrenched in the Constitution of Kenya 2010.<sup>4</sup> It is subject to statutory control whereby formal disputes are determined by a third-party neutral appointed by the parties or appointing authority to determine the dispute and give a final and binding award.<sup>5</sup>

Disputants usually opt for arbitration because of its attributes which include voluntariness of parties to appoint the arbitrators, and the power of parties to determine the rules for the conduct of arbitration proceedings. The arbitration law and rules are tailored to offer speedier, less expensive and proportionate resolution of disputes and delay of any sort must be avoided at all costs. This

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<sup>2</sup> Trackman, Leon, *The Impartiality and Independence of Arbitrator Reconsidered*, University of New South Wales Faculty of Law Research Series (2007), pp. 1-22, p. 6-8.

<sup>3</sup> No. 4 of 1995, Laws of Kenya.

<sup>4</sup> Art 159, Constitution of Kenya 2010, laws of Kenya.

<sup>5</sup> Muigua K., *Settling Disputes Through Arbitration in Kenya*, 3<sup>rd</sup> Edition, Glenwood Publishing Nairobi, February 2017, p 1.

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underpins the rationale of stalwart safe designs in the arbitration laws that are mainly entrenched to prevent parties from holding the process ad infinitum.<sup>6</sup>

The independence and impartiality of arbitrators are fundamental pillars in arbitration practice in Kenya. In arbitration, the concepts of impartiality and independence are not synonymous. Independence ordinarily relates to relationships, for example, whether an arbitrator is professionally or personally related to one of the parties, or has a familial or business connection to or with that party. This professional relationship could also include a relationship in which the arbitrator, or partner, has acted or is acting as counsel, an employee, an advisor or as a consultant on behalf of one party.<sup>7</sup>

The independence of the arbitrator is dependent on the degree of such relationships. The measure of an arbitrator’s independence is sometimes conceived objectively: would a reasonable person conclude, in light of the relationship in issue, that the arbitrator is independent or whether someone called upon to reach such a determination might superimpose his or her sense of reasonableness for that of the reasonable person.<sup>8</sup> Thus, lack of independence of arbitrators is heavily influenced by their relationships with individuals with interests on the case that is before the arbitration for determination.

Impartiality of arbitrators on the other hand, relates to a state of mind that is sometimes evidenced through conduct demonstrating that state of mind. An arbitrator may be perceived as partial towards one party if he displays preference for, or partiality towards one party or against another, or whether a third person reasonably apprehends such partiality. The test applicable to impartiality is

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<sup>6</sup> Kenya Pipeline Company Limited v Kenya Oil Company Limited & another [2015] eKLR, Miscellaneous Civil Case 357 of 2014, para. 22.

<sup>7</sup> Trackman, Leon, *The Impartiality and Independence of Arbitrator Reconsidered*, University of New South Wales Faculty of Law Research Series (2007), pp. 1-22, p. 6-7.

<sup>8</sup> *Ibid.*

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subjective in the sense that it goes to the actual state of mind and where applicable, ensuing conduct of the arbitrator.<sup>9</sup>

The above conceptualisation indicates a clear overlap between arbitral independence and impartiality. For instance, whether a party appointed arbitrator lacks independence on account of a relationship between the arbitrator and the party making the appointment, and being partial on account of that relationship. However, the relationship associated with arbitral independence may be immaterial, while a lack of partiality may be material. For instance, a party appointed arbitrator may be unrelated to the appointee, such as when the appointee chooses him because he works in the same industry but for a different company to the appointee; but the arbitrator may still display conduct that demonstrates bias or reasonable apprehension of bias in favour of the appointing party.<sup>10</sup>

In preventing bias, the arbitrator is obligated to ensure impartiality and independence from the time he accepts an appointment and must maintain the same throughout the entire course of the arbitration proceedings. Even though the arbitrator’s obligation ends when he renders the final award, arbitrators are obligated to extend their impartiality and independence into the correction or interpretation of the final award. The independence and impartiality of an arbitrator should be evident in his words and conduct and the way he treats both parties and their counsel and the way he conducts the whole proceedings.

Further, impartiality and independence are basic elements of rule against bias. Under the Constitution of Kenya 2010, the rule against bias is a limb of natural justice that should be applied in all means of dispute settlement<sup>11</sup> and the procedure of arriving at administrative actions.<sup>12</sup> Arbitration is consensual to the parties and arbitral forums are always conducted in private. Intrinsically, all

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<sup>9</sup> Ibid, pp. 6-8.

<sup>10</sup> Ibid.

<sup>11</sup> Art 50 (1), Constitution of Kenya 2010, laws of Kenya.

<sup>12</sup> Art 47, Constitution of Kenya 2010, laws of Kenya.

rules of natural justice including necessity of impartiality and hearing must be heeded even in the private process thus justifying their applicability in arbitration.

### **3. Demystifying “The Reasonable Third Person Test” in Determination of Bias of Arbitrators**

#### **3.1 “The Reasonable Third Person Test”**

The court jurisprudence establishes that perception, appearance or suspicion of bias in the eyes of a reasonable man is the test applicable in determining allegations of bias of officer presiding over judicial or quasi-judicial proceedings which include arbitrators. The grounds for the alleged bias should not be based on the merely speculative depositions that do not meet the standard of proof on the alleged bias. The nature of these grounds should be that which a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias as provided in the IBA Guidelines on Conflicts of Interest in International Arbitration.<sup>13</sup>

#### **3.2 Establishment of “The Reasonable Third Person Test”**

“The Reasonable Third Person Test” is the test used by the High Court in determining the allegations of bias of arbitrators. This test is established in article 12 (2) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. These provisions enable a party to arbitration to challenge an arbitrator “only if” circumstances exist that give rise to “justifiable doubts” as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties.<sup>14</sup> “The Reasonable Third Person Test” has been adopted in Section 13 of the

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<sup>13</sup> IBA Guidelines on Conflicts of Interest in International Arbitration Adopted by resolution of the IBA Council on Thursday 23 October 2014, p.14.

<sup>14</sup> Art 12, UNCITRAL Model Law on International Commercial Arbitration UN Doc A/RES/40/17 annex1 (As adopted by the United Nations Commission on International Trade Law on 21<sup>st</sup> June 1985 and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

Arbitration Act which are the fundamental provisions that lay down their applicability in the Kenyan courts.

### **3.3 Demystifying “The Reasonable Third Person Test”**

The courts’ jurisprudence conceptualises “The Reasonable Third Person Test” as a two-prong test that is stringent and objective. This test provides that circumstances raising the justifiable doubt as to the impartiality and independence of the arbitrator must exist and substantively justified with concrete evidence. The two elements of “The Reasonable Third Person Test” are discussed herein below:

#### ***3.3.1 Circumstances Premising the Alleged Bias Must Exist***

The phrase “only if” in article 12 (2) of the UNCITRAL Model Law on International Commercial Arbitration connotes that the High Court must find that the circumstances underpinning the alleged bias of the arbitrator actually exist and are not merely believed to exist. The allegations levelled against the arbitrator should not be merely premised on suspicion and feeling of the counsels that the arbitrator cannot be impartial and independent. The law has purposefully set this standard so high to curb instances where inflated trivial issues may easily pass for real and substantial grounds of removal of an arbitrator thus contravening the constitutional principle of justice that courts should promote arbitration as one of the efficacious alternative dispute resolution mechanism.<sup>15</sup>

#### ***3.3.2 Circumstances Premising the Alleged Bias Must be Justifiable***

The circumstances premising the alleged bias should be justifiable. They should go beyond saying that the arbitrator is unable to be impartial and independent in determining the dispute into more concrete matter. In *Kenya Pipeline Company Limited v Kenya Oil Company Limited & Another*,<sup>16</sup> the court held that the circumstances which constitute “justifiable doubt” as to impartiality of the

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<sup>15</sup> Art 159 (2) (c), Constitution of Kenya 2010, Laws of Kenya.

<sup>16</sup> *Kenya Pipeline Company Limited v Kenya Oil Company Limited & another*, Miscellaneous Civil Case 357 of 2014.

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arbitrator need not necessarily relate to the substantive dispute at hand but they should be of such nature which impeach the integrity of the arbitrator or would create real apprehension in the eyes of a reasonable person that justice will not be done by the arbitrator in the dispute at hand.

The element of “justifiable doubt” is entrenched in the IBA Guidelines on Conflicts of Interest in International Arbitration which provide that doubts are justifiable if a reasonable third person, having knowledge of the relevant facts and circumstances, would reach the conclusion that there is a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.<sup>17</sup>

Further, IBA Guidelines provide that justifiable doubts necessarily exist as to the arbitrator’s impartiality or independence in any of the situations: there is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration; the arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration; the arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case; and the arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.<sup>18</sup>

The determination of what amounts to circumstances giving rise to justifiable doubts as to the impartiality and independence of the arbitrator is not an easy exercise. It is marred with numerous controversies. For instance, it is difficult to determine when the personal opinion of the arbitrator; departing of the arbitrator from the procedure agreed by the parties; use of “unsavoury” language and

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<sup>17</sup> IBA Guidelines on Conflicts of Interest in International Arbitration Adopted by resolution of the IBA Council on Thursday 23 October 2014, p.14.

<sup>18</sup> Ibid, p. 29.

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misconduct of the arbitrator, amount into justifiable doubts as to the impartiality and independence of the arbitrator. These instances are discussed herein below:

#### *3.3.2.1 Personal Opinion of the Arbitrator*

The personal opinion of the arbitrator can amount into justifiable doubt as to impartiality of the arbitrator if the matters discussed by the arbitrator relate or are linked to the case before him. These opinions must be supported by the concrete evidence for them to amount into a substantive ground of the removal of the arbitrator. However, personal opinions or orientations of the arbitrator on matters of a general nature such as corruption do not fall within this province. Also, matters which are really peripheral, imagined or fanciful or mere belief or opinion of a person that the arbitrator will not be impartial do not pass the test of qualification into the bracket of circumstances which raises justifiable doubt on the impartiality of the arbitrator.

In deliberating on the allegation of bias, the High Court should examine the remarks made and the decisions arrived by the arbitrator when deliberating on allegations on whether the personal opinion of the arbitrator impeach his impartiality and independence. The alleged bias should be clearly established by direct evidence or clearly inferred from a set of relevant facts and the conclusions and inferences made from the remarks should match or be supported by the stated facts. To validate the allegation of bias, the deliberation of the court should establish the link between the remarks by the arbitrator and their consequences on the impartiality and conduct of the arbitrator.

In *Kenya Pipeline Company Limited v Kenya Oil Company Limited & Another*<sup>19</sup>, Sole Arbitrator in the Matter of an Arbitration between Kenya Oil Company Limited & Kobil Petroleum Limited v Kenya Pipeline Company Limited, Mr Ahmednasir Abdullahi SC, in an interview stated that “*Kenya Pipeline Company is a corporation run by corrupt persons who are incapable of making proper decisions with respect to the*

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<sup>19</sup> Kenya Pipeline Company Limited v Kenya Oil Company Limited & another, Miscellaneous Civil Case 357 of 2014.



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*award of tenders, are motivated by improper considerations including requiring inducement in the performance of their duties, are susceptible to manipulation in awarding of contracts and cannot be trusted to conduct the affairs of a public corporation with integrity and accountability.”* Kenya Pipeline Company interpreted the arbitrator’s views as amounting to bias. On 11<sup>th</sup> July 2014, it challenged the arbitrator to withdraw under Section 14 (2) of the Act. However, the arbitrator ensued to make his decision on the matter dated 15<sup>th</sup> July 2014. Kenya Pipeline Company, aggrieved by the arbitrator’s decision, instituted court proceedings pursuant to Section 14 (3) of the Arbitration Act against the alleged bias.

Kenya Pipeline Company argued that the words and conduct of the arbitrator raised apprehension of bias, and that the final award would not be made fairly thus breaching the basic tenets of justice. However, the court determined that the alleged bias was not substantiated as the personal opinions of the arbitrator were on matters of a general nature, that is, corruption, which do not amount to circumstances giving rise to justifiable doubts as to the impartiality and independence of the arbitrator.

#### *3.3.2.2 Departing the Procedure Agreed by the Parties*

The departure of the arbitrator from the procedure agreed by the parties can amount into circumstances giving rise to justifiable doubts as to the impartiality and independence of the arbitrator if it is done at the detriment of the other party. This departure is as a result of the discretion enjoyed by the arbitrator for him to effectively determine the matter before the arbitral tribunal.

Matters such as postponement of the existing deadlines unilaterally requested by one party; admission of evidence requested by one party as opposed by the other; and reduction of the number of witnesses and hearings requested by one party as opposed to the other parties fall within the province of the arbitrators’ discretion province. The exercise of the arbitrator’s discretion impacts the demeanour of the arbitrator thus justice must be seen to be done especially due

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to the tendency of the losing party to attack the neutrality of the arbitrator.<sup>20</sup> Thus, mere departure of the arbitrator from the procedure agreed by the parties do not amount to justifiable ground for the bias unless it is proved that the departure advantaged one party at the detriment of the other party.

#### 3.3.2.3 *Use of “Unsavoury” Language*

The words of the arbitrator impact his integrity and the confidence of his office and the arbitral award. Thus, he is under obligation to carefully weigh his words and restrict them within the professional code of conduct. Words are important and they carry a lot of weight thus should be used carefully. Use of unsavoury language may be a ground for removal of an arbitrator. The language of the arbitrator is unsavoury if it bears an element of arrogance as determined in *Zadock Furnitures Systems Limited & Another v Central Bank of Kenya*.<sup>21</sup> In this case, the arbitrator had referred the counsels as “stepping into their client’s shoes” an allegation that the court determined as not amounting into unmeasured language hence did not amount to circumstances giving rise to justifiable doubts as to the impartiality and independence of the arbitrator.

#### 3.3.2.4 *Misconduct of the Arbitrator*

To establish that the arbitrator is incapable of acting impartially in the arbitration due to misconduct, the alleged misconduct should be proved by adducing cogent evidence. Further, specific instances constituting the alleged misconduct should be established. This will show the distinction between misconduct and mere perception.

Perception is different from imputed bias which involves ascribing to the arbitrator of conduct or something which is undesirable of law, but based on a set of cogent facts if it is to amount to “misconduct” in law, as opposed to mere perception or supposed bias or fanciful wishes or apprehensions of a party. The

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<sup>20</sup> Varady, T., Barcelo, J., & von Mehren, A. *International Commercial Arbitration*, A Trans National Perspective, American Casebook Series, fifth edition (1999), pp. 309-313.

<sup>21</sup> *Zadock Furnitures Systems Limited & Another v Central Bank of Kenya* [2014] eKLR, Misc Civil Application 193 of 2014.

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rule is aimed at preventing removal of an arbitrator at the whims of a dissatisfied party or what is commonly known as “forum shopping” by parties.<sup>22</sup>

The allegations for misconduct of arbitrator must satisfy the threshold of law. This is because of very high possibility that removal of an arbitrator by the court may be abused by parties whose intent is on disrupting the arbitral process. Thus, the law has set out a stringent test for removal of an arbitrator which is the same as that which applies in disqualification of a judicial officer from presiding over a case as expounded in *Chania Gardens Limited v Gilbi Construction Company Limited & Another*.<sup>23</sup>

Bias or impartiality or lack of independence of an arbitrator are all within the realm of misconduct of the arbitrators, thus qualifies as a ground for the setting aside of an arbitral award as per section 37 of the Arbitration Act.

#### **3.4 Rationales of “The Reasonable Third Person Test”**

Parties choose arbitration because they seek an expeditious justice. This underpins the rationale of “the reasonable third person test” which is established to ensure that an arbitrator conducts himself independently throughout the arbitration proceedings. Bias is contrary to the constitutional principle of impartiality and independence of the arbiters in dispute resolutions. Thus, there is need to seal all possible avenues of bias from the arbitrators.

Elimination of bias of arbitrators aims at maintaining confidence in the arbitration process. Thus, there is a need to curb a reasonable ground for assuming that there is a possibility for bias, and whether it is likely to produce in the minds of the parties a reasonable doubt as to the fairness of the administration of justice.

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<sup>22</sup> *Chania Gardens Limited v Gilbi Construction Company Limited & Another*, Miscellaneous Cause 482 of 2014, [2015] eKLR.

<sup>23</sup> *Ibid.*

### **3.4 “The Reasonable Third Person Test” and Intervention of Court in Arbitration.**

The challenge of the bias of the arbitrator amounts to court intervention in arbitration process which is highly limited as per section 10 of the Arbitration Act. This has been deliberated by the court in *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited*.<sup>24</sup> The court, while deliberating on the allegations of the bias of the arbitrator, should be cognisant of its fundamental duty to encourage and support arbitration generally. The court should also take notice and into consideration that the arbitration process connotes the avoidance of the court process hence the court ought to intervene in exceptional circumstances that are duly proven to fall within the limited prescription of the Arbitration Act. These instances that open ways for court intervention in arbitration must be so cautiously invoked and approved by court and the evidence leading to the intervention must be convincing enough. The court should favour progress of the arbitral process in instances there is doubts on grounds of court intervention is to be favoured.

The words “only if” and “justifiable doubts” in Article 12 (2) of UNCITRAL) Model Law on International Commercial Arbitration and section 13 (3) of Arbitration Act shows that the law accords limited situations where an arbitrator can be removed by the court. This is because the challenge and removal of an arbitrator by the court may be abused by those intent on disrupting the arbitral process. Parties opt for arbitration because of its expediency and this element should be upheld by courts at all times.

### **4.0 Conclusion**

In conclusion, “The reasonable third person test” against bias of arbitrators ensures that arbitrators conduct themselves independently and impartially throughout the arbitration proceedings. The grounds for the alleged bias of the arbitrator should not be based on the merely speculative depositions but on

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<sup>24</sup> *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited*, Miscellaneous Application 158 of 2016, [2017] eKLR.

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concrete set of facts that a reasonable person, fully apprised of the circumstances of the case would hold that there has been an appearance of bias. The circumstances raising the justifiable doubt as to the impartiality and independence of the arbitrator must exist and substantively justified with concrete evidence. This test is stringent and objective purposefully to seal possible avenues that may be exploited by unscrupulous parties whose intent is on disrupting the arbitral process.

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## **Adversarial Nature of Arbitral Proceedings: Enhancing Arbitration as a Dispute Resolution Mechanism in Kenya**

By: *David Topua Lesinko\**

### **Abstract**

*The Arbitration Act No. 4 of 1995 heralded a new regime in ensuring that there is a speedy and expeditious resolution of disputes. The Kenyan Act is modeled on the UNCITRAL Model Law on Arbitration which limits court intervention in the arbitral process. This extends to issues of appeal under the Act.*

*Jurisprudence in the Kenyan High Court as well as the Court of Appeal has been inconsistent on the right to appeal under section 35 of the Act of the Arbitration Act, No. 4 of 1995. Parties to arbitration agreements continue to invoke the court process especially on appeal of awards under section 35 frustrating and delaying access to justice. The concept of finality of awards as espoused under Article 5 of the UN Model Law is key to arbitration. Further it makes arbitration especially on international commercial disputes more attractive as compared to litigation.*

*The central argument advanced in this paper is that there is a need to streamline appeals under section 35 of the Kenya's Arbitration Act to ensure that arbitral disputes are not subjected to long delays that are experienced when parties resort to the court process. In advancing this argument, the paper will first, provide an introduction to the study; secondly, it will analyze the legal framework governing arbitration in Kenya; third, it will examine the appellate jurisdiction of the court and lastly the conclusion.*

### **1. Introduction**

*"First, there is the central importance of a harmonious relation between the courts and the arbitral process. This has always involved a delicate balance, since the urge of any*

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\* David Topua Lesinko is a post-graduate student at the University of Nairobi, School of Law. This paper is extracted from my dissertation submitted to the University of Nairobi Law School in partial fulfilment of the Degree of Bachelor of Laws (LLB) in April 2017. The dissertation was supervised by Dr. Kariuki Muigua.



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*judge is to see justice done, and to put right injustice wherever he or she finds it; and if it is found in an arbitration, why then the judge feels the need to intervene. On the other side, those active in the world of arbitration stress its voluntary nature, and urge that it is wrong in principle for the courts to concern themselves with disputes which the parties have formally chosen to withdraw from them, quite apart from the waste of time and expense caused by gratuitous judicial interference....”<sup>1</sup>*

The enactment of the Arbitration Act, 1995 coupled with the promulgation of the Constitution of Kenya 2010 heralds a regime where the realization of justice in Kenya is more evident than before especially for those in the commercial sector.

Several scholars have attempted to define the concept of arbitration. For example;

Ronald Bernstein argues that the concept of arbitration is basically a mechanism for the resolution of disputes which takes place in private pursuant to an agreement between two or more parties which agree to be bound by the decision to be given by the arbitrator according to law.<sup>2</sup>

Jacob Gakeri defines arbitration as an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards.<sup>3</sup> Arbitration has comparatively been one of the most preferred means of resolving disputes especially international commercial disputes. The paper seeks to examine how arbitration can be used to resolve such disputes in an efficient and expeditious manner. This is with respect to court intervention

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<sup>1</sup> Lord Mustill foreword to the treatise on Indian arbitration law by OP Malhotra SC.

<sup>2</sup> Ronald Bernstein, *Handbook of Arbitration Practice: General Principles* (Sweet & Maxwell, London, 1998) p. 313.

<sup>3</sup> Jacob Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1(6) *International Journal of Humanities and Social Science*

< [http://www.ijhssnet.com/journals/Vol.1\\_No.6;\\_June\\_2011/25.pdf](http://www.ijhssnet.com/journals/Vol.1_No.6;_June_2011/25.pdf)> accessed 14 November 2015.

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mechanisms allowed under the Constitution of Kenya (Article 164 and 165), Arbitration Act and other relevant laws. The most relevant court intervention mechanism that this study will focus on is the right to appeal. This is provided under section 35 as well as 39 of the Arbitration Act, No. 4 of 1995. Section 10 provides for the caveat in courts intervening in arbitral matters. It provides that “except as provided in this Act, no court shall intervene in matters governed by this Act.”<sup>4</sup> This study argues that this right has been misused and has subsequently cases dealt under arbitration being delayed for as long as 10 years.

This paper is inspired by arguments raised in the cases of; *Anne Mumbi Hinga v Victoria Njoki Gathara*,<sup>5</sup> as well as in *Nyutu Agroviet Limited v Airtel Networks Limited*.<sup>6</sup> The court, in these cases, emphasized the importance of arbitration as a means of resolving disputes in Kenya. Most importantly, according to the learned judges, parties opt for arbitration or out of court settlement because they do not wish to be subjected to the expensive, litigious, long journey associated with the adjudicative process in Kenya.

The most critical question that would overarch this paper is whether arbitration as a means of resolving disputes has fulfilled the expectation of parties in terms of expeditious and prompt resolution of disputes. This concern comes at a timely moment when we are witnessing delay in enforcement of awards for a long period of time.<sup>7</sup> This paper is also alive to the fact that arbitration has been embraced by lawyers to a large extent making it more adversarial such that its ability to deliver expeditious and cost-effective justice almost becomes a pipe dream.<sup>8</sup> This has made parties invoke the court process in the course of arbitral

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<sup>4</sup> Section 10 of the Arbitration Act, No. 4 of 1995.

<sup>5</sup> [2009] eKLR

<sup>6</sup> [2015] eKLR

<sup>7</sup> *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR.

<sup>8</sup> Kariuki Muigua, “The Lawyer as a Negotiator, Mediator and a Peacemaker’ in Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* (Glenwood Publishers Limited, Nairobi, 2015) pg. 163-186; Murray J, *et al*, ‘*Process of Dispute Resolution: The Role of Lawyers* (Foundation Press New York, 1988); Weda, A.O., *The Ideal Lawyer*, (Law Africa Publishing, Kenya, 2014);

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proceedings due to the disputants' dissatisfaction.<sup>9</sup> Against this background, this leads one to question whether arbitration still remains the golden child of commercial justice and the role it will play going forward in helping reduce the case back log in an overburdened judiciary.

Dr. Kariuki Muigua in his works "Nurturing Commercial International Arbitration in Kenya" posits that Kenya is a key player in international trade and a preferred destination for international investment.<sup>10</sup> However, the author decries national court interference in arbitral proceedings. He argues that sometime matters are appealed to the highest court in the land in the hope of trying to set aside awards. He advances a very important argument which is central to this study. He argues that parties to arbitral proceedings have used court intervention to delay and sometime frustrate the process. This often delays matters as well as making arbitration a less favourable form of dispute resolution.<sup>11</sup>

## **2.0 The Legal Framework of Arbitration in Kenya**

Kenya has had laws on Arbitration from as early as 1914. The legislative framework for arbitration in Kenya is found in the Constitution of Kenya 2010, the Arbitration Act, 1995, 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, among others. The paper will give a brief overview of each of these relevant legislations.

## **2.1 Constitutional Foundation for Arbitration**

The Constitution of Kenya vests judicial authority in courts and tribunals. In exercising this authority, courts and tribunals are guided by a set of fundamental

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<sup>9</sup> Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Ltd, Nairobi, 2012) pg 10.

<sup>10</sup> Kariuki Muigua, 'Nurturing International Commercial Arbitration in Kenya' (2014) <<https://international-arbitration-attorney.com/wp-content/uploads/Nurturing-International-Commercial-Arbitration-in-Kenya.pdf>> accessed 31 July 2016.

<sup>11</sup> *Ibid.*

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principles. One of these principles is that courts promote alternative forms of dispute resolution including arbitration.<sup>12</sup>

Article 189 of the Kenyan Constitution also provides that national legislation shall provide for procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

It is important to note that the 1963 Kenyan Constitution did not have any provisions on alternative dispute resolution as a means of resolving disputes. The 2010 Constitution has since granted arbitration and other mechanisms of resolving disputes constitutional recognition.

#### **2.2 The Civil Procedure Act and the Civil Procedure Rules 2010**

The Oxygen principle obligates the courts to ensure that the parties pursue alternative means of resolving their disputes.<sup>13</sup> Nyamu JA in *Kenya Commercial Bank v Kenya Planters Cooperative Union*,<sup>14</sup> posits that “the principal aims 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 ensuring that the parties are on an equal footing and finally, allotting to each case an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.<sup>15</sup>

Courts of law are therefore encouraged to explore other forms of ADR to resolve disputes between parties. For instance, Order 11 of the Civil Procedure Rules 2010 provides for pre-trial rules which court need to consider such as ADR before setting the matter for hearing.<sup>16</sup> Under Order 46 of the Civil Procedure Rules 2010

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<sup>12</sup> Constitution of Kenya 2010, Article 159 (2) (c).

<sup>13</sup> Civil Procedure Act, section 1A & 1B.

<sup>14</sup> [2010] eKLR.

<sup>15</sup> *Ibid.*

<sup>16</sup> See *the Mechanisms of Case Management under the new Civil Procedure Rules, 2010* by The Hon. Lady Justice Jeanne W. Gacheche of the High Court of Kenya 2011.

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and Sections 59 and 59(C) of the Civil Procedure Act, a court can make orders referring a suit to arbitration.<sup>17</sup>

### **2.3 The Arbitration Act, 1968**

The Arbitration Act (Cap. 49) enacted in 1968 was repealed by the Arbitration Act, 1995. The Act was closely modeled on the English Arbitration Act of 1950.<sup>18</sup> Just like the English Arbitration Act of 1950, the 1968 Act laid the framework for intervention by the court in arbitrations.<sup>19</sup>

The 1968 Act as was adopted disregarded the provisions of the New York Convention.<sup>20</sup> The Arbitration Act instead adopted the General Protocol on Arbitration Clauses 1923 and the Convention on the Execution of Foreign Awards 1927 as its First and Second Schedules respectively.<sup>21</sup>

Both the General Protocol on Arbitration Clauses 1923 and the Convention on the Execution of Foreign Awards 1927 have been repealed by the New York Convention.<sup>22</sup> The General Protocol on Arbitration Clauses required contracting parties to recognize agreements to refer existing or future disputes in commercial matters to arbitration. The implication of this is that disputes not contemplated

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<sup>17</sup> Civil Procedure Act, Chapter 21 of the Laws of Kenya.

<sup>18</sup> See English Arbitration Act of 1950.

<sup>19</sup> Kariuki Muigua's lecture on Arbitration Act, 1995 and Arbitration Act 1996 of UK delivered at the Chartered Institute of Arbitrators Kenya Branch Entry Course held at College of Insurance on 25-26th August 2008.

<sup>20</sup> Kenya ratified the New York Convention on 10 February 1989 and it became operational on 11 May 1989.

<sup>21</sup> These documents were concluded under the auspices of the League of Nations cited in Jacob Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1(6) International Journal of Humanities and Social Science

<[http://www.ijhssnet.com/journals/Vol.\\_1\\_No.\\_6;\\_June\\_2011/25.pdf](http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf)> accessed 14 November 2015.

<sup>22</sup> New York Convention, article VII (2).

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by the phrase “commercial matters” were not arbitrable. The Protocol also did not specify the character of the arbitration agreement.<sup>23</sup>

Jacob Gakeri argues that although the Convention on the Execution and Enforcement of Foreign Awards required contracting parties to recognize and enforce foreign arbitral awards, it had the following salient features that are worth noting;<sup>24</sup>

- a) First, the relevant article on recognition and enforcement of arbitral awards was not couched in mandatory language.
- b) Second, it gave courts plenary power to refuse enforcement.

The 1968 Act was thus repealed for allowing courts with a leeway to interfere in arbitration.<sup>25</sup> Farooq Khan on this note argues that arbitration based on the 1968 Act did not enjoy the advantages of arbitration of speed and cost effectiveness. This together with the emergence of UNICITRAL Model Arbitration Law provided the Kenyan Parliament with an easy option of enacting the Arbitration Act, 1995 which repealed the 1968 Act.<sup>26</sup>

#### **2.4 The Arbitration Act 1995**

The Arbitration Act, 1995 was amended by the Arbitration (Amendment) Act 2009. The 1995 Act came into force on 2nd July, 1996 after the repeal and replacement of the Arbitration Act of 1968.

As opposed to the Arbitration Act of 1968 which allowed interference by courts of the arbitral process, the Arbitration Act, 1995 cushions arbitral proceedings

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<sup>23</sup> Jacob Gakeri, ‘Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR’ (2011) 1(6) International Journal of Humanities and Social Science, 225.

<sup>24</sup> *Ibid.*

<sup>25</sup> Farooq Khan, ‘Introduction to Arbitration’ A paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 11th and 12th of February 2002.

<sup>26</sup> *Ibid.*

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from court interference. Section 10 of the 1995 Act provides that “except as provided in this Act, no court shall intervene in matters governed by this Act.”

The 1995 Act as amended by the Arbitration (Amendment) Act 2009 is modeled on the UNCITRAL Model Law on International Commercial Arbitration of 1985.

UNCITRAL Model Law on International Commercial Arbitration of 1985 was adopted by the United Nations Commission on June 21, 1985. Its main objective was to help states to harmonize their arbitration laws to meet the unique needs of international commercial arbitration practice.

#### **2.5 The Arbitration Rules 1997<sup>27</sup>**

The Arbitration rules provides for the procedure to be followed in arbitration proceedings. The rules also provide for the application of the Civil Procedure Act in matters involving the Arbitration Act.<sup>28</sup>

#### **2.6 The Nairobi Centre for International Arbitration Act, 2013**

This legislation provides for the establishment of an International Arbitration Centre in Kenya. The regional centre is to provide an avenue for settling international commercial disputes. The centre gives investors the necessary confidence in the country’s legal system. The centre is also to provide advice and assistance for the enforcement and translation of arbitral awards.<sup>29</sup>

The Chartered Institute of Arbitrators, Kenya Branch, established in 1984, also promotes and facilitates determination of disputes by arbitration. The institute has affiliations with arbitration bodies and institutions in other countries across

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<sup>27</sup> The rules were formulated by the Honorable Chief Justice on 6th May, 1997 pursuant to Section 40 of the Arbitration Act, 1995.

<sup>28</sup> Musili Wambua, ‘Broadening Access to Justice in Kenya through ADR; 30 Years On’ (2015) 3(1) Alternative Dispute Resolution  
<file:///C:/Users/User/Downloads/Journal%202015CiaArb.pdf>  
accessed 14 November 2015.

<sup>29</sup> Nairobi Centre for International Arbitration Act, section 5(k).

the world and with the London Court of International Arbitration and the International Chamber of Commerce in Paris.<sup>30</sup>

## 2.7 International Aspect of Arbitral Laws

Paolo Contini writing in the American Journal of Comparative Law in 1959 on the recognition and enforcement of arbitral awards writes that with the expansion of international trade, the business world became reluctant to litigate in courts of law due to differences arising from international commercial transactions.<sup>31</sup>

Contini argues that due to these differences, states developed bilateral treaties including provisions for the enforcement of arbitral awards. The most notable developments in the field of arbitration include the Geneva Protocol on Arbitration Clauses of 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.<sup>32</sup>

Kenya is a Contracting Party to the New York and Washington Conventions. These international conventions help in ensuring predictability by establishing common approaches to the enforcement of arbitral agreements and awards.<sup>33</sup> The Washington Convention unlike the New York Convention and the UNCITRAL Model Law, are designed to facilitate foreign investment and its contribution in popularizing and furtherance of international commercial arbitration has been phenomenal. On the other hand, the New York Convention

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<sup>30</sup> See The Chartered Institute of Arbitrators Kenya Branch website <<http://www.ciarbkenya.org/>> accessed 14 November 2015.

<sup>31</sup> Paolo Contini, 'International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 8(3) *The American Journal of Comparative Law* <<http://www.jstor.org/stable/837713>> accessed 26 November 2015.

<sup>32</sup> *Ibid.*

<sup>33</sup> Jack Coe, *International Commercial Arbitration: American Principles and Practice in a Global Context* (Transnational Pub 1997)



and the UNCITRAL Model Law are regarded as the mainstays of international commercial arbitration.

The New York Convention was adopted by a diplomatic Conference on June 10th 1958, prior to the establishment of the United Nations Commission on International Trade Law (UNCITRAL). It came into force on June 7, 1959. This convention obligates courts of contracting parties to give effect to arbitral jurisdiction whenever proceedings are instituted pursuant to a contract containing an arbitration clause.<sup>34</sup>

### **2.8 The UNCITRAL Model Arbitration Law, 1985**

The UNCITRAL Model law adopted in 1985 provides for a law acceptable to states with different legal, social and economic systems. It also helps the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.<sup>35</sup>

The Model law provides a framework to guide countries in adopting domestic arbitral laws. The law is emphatic that an arbitration agreement must be written.<sup>36</sup> The Model Law covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal, the extent of court intervention to recognition and enforcement of arbitral awards. The Model Law was amended in 2006.

Many countries have remodeled their national laws on the basis of the Model law. It was also intended to promote the use of arbitration domestically and on the international plane. Scholars argue that the Model Law is an improvement of the New York Convention. Kenya is a member of the United Nations Commission on International Trade Law.

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<sup>34</sup> Ronald Bernstein, *Handbook of Arbitration Practice* (Thomson Professional Pub Cn 1987).

<sup>35</sup> UN General Assembly General Resolution 40/72, 11 December, 1985.

<sup>36</sup> The UNCITRAL Model law, Chapter II.

Arbitration is also set out in Article 33 of the United Nations Charter. Article 33 of the Charter provides for the various conflict management/resolution mechanisms that parties to a dispute may resort to. These mechanisms include; mediation, conciliation, arbitration, judicial settlement among others.<sup>37</sup>

### **3.0 Appellate Jurisdiction of Courts in the Arbitral Process**

Dr. Jacob Gakeri argues that one of the salient features of the Arbitration Act was enormous power it gave to courts of law in the arbitral process. He contends that the powers were too intrusive and has affected the growth of arbitration as a tool for dispute resolution.<sup>38</sup> One of the ways through which the court can influence arbitral process is on the area of appeals.

Dr. Muigua making reference to the Court of Appeal decision in *Anne Mumbi Hinga v Victoria Njoki Gathara*, addresses the formal and substantive requirements that an arbitral award should meet. The substantive requirements are that the award should be cogent, complete, certain, final, enforceable and consistent.<sup>39</sup>

According to a study conducted in 2006 by the Queen Mary School of International Arbitration, University of London, a majority of the people interviewed, view the availability of an appeal mechanism in arbitration to be a disadvantage, since it makes the whole process more 'cumbersome and litigation-like and essentially negate a key attribute of the arbitral process' i.e. the finality of arbitral awards.

The principle of finality tends to discourage parties from appealing an award made on merits. In the case of international arbitrations, awards are final and

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<sup>37</sup> Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Limited 2012), 1.

<sup>38</sup> Jacob Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (2011) 1 *International Journal of Humanities and Social Science*, page 227

<[http://www.ijhssnet.com/journals/Vol.\\_1\\_No.\\_6;\\_June\\_2011/25.pdf](http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf)> accessed 26 August 2018.

<sup>39</sup> *Ibid.*

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binding, except where a party makes a request before the domestic courts to have an award set aside on limited grounds on limited grounds relating to jurisdiction, procedural irregularities or on a ground of public policy.<sup>40</sup>

The Arbitration Act under section 32A emphasizes on the principle of finality of arbitral awards. It stipulates that “Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by the Act.”<sup>41</sup> Finality according to Dr. Muigua is that the award must deal finally with all the issues referred to it as well as it implies that courts cannot interfere with an arbitral award through judicial review.

#### **3.1 Appeal of Arbitral Awards: Kenyan Case Study**

Appeal of an award arises once an arbitral proceeding has been concluded. This is normally done by parties under section 35, 37 as well as section 39 of the Arbitration Act to the High Court. Appeals under the Kenyan Arbitration Act can be viewed in two main broad ways. First, is that parties may agree that the right of appeal be available to an aggrieved party on questions of law arising out of the award. Such appeal shall be to the High Court. The court may either determine the question of law arising or confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.<sup>42</sup> The decision of the High Court is subject to appeal before the

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<sup>40</sup> See Article 34 of the Model Law on International Commercial Arbitration; sections 9-11 of the (United States) Federal Arbitration Act, 9 US Code; Article 24 of the Singapore International Arbitration Act; (Australia) International Arbitration Act 1974 (Cth); s. 8; Arbitration Law of People’s Republic of China, Art. 70; See also New York Convention; See also discussion on Public Policy in Harriet Mboce, ‘Enforcement of International Arbitral Awards: Public Policy Limitation in Kenya’ (LLM, University of Nairobi).

<sup>41</sup> Section 32A of the Arbitration Act, 1995.

<sup>42</sup> Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (2nd edn, Glenwood Publishers Limited 2012) 183-184; Section 39 (2) (b) of the Arbitration Act.

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Court of Appeal if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award.<sup>43</sup>

Additionally, the Court of Appeal can grant a party leave to appeal where it is of the opinion that a point of law of general importance is involved, the determination of which will substantially affect the rights of one or more of the parties. The Court of Appeal in this situation may then exercise any of the powers which the High Court could have exercised under section 39(2) of the Arbitration Act.<sup>44</sup>

In the UK as seen under the English Arbitration Act, an appeal to the High Court is available to the parties as a right.

Section 39 of the Kenyan Arbitration Act addresses appeals arising on questions of law. It states that:<sup>45</sup>

*“Where in the case of a domestic arbitration, the parties have agreed that-*

- a) an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or*
- b) an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court.”*

An appeal to the court on a point of law is not a review of the entire award as contemplated by section 35. The jurisdiction of the court is therefore limited to issue of law raised and the court must accept the facts as found by the arbitrator. This position was well articulated in *Geogas S.A v Trammo Gas Ltd* (The

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<sup>43</sup> Githu Muigai, *Arbitration Law & Practice in Kenya* (Githu Muigai ed, 1st edn, lawAfrica 2011) 83–84 ch 5; Section 39 (3) (a) of the Arbitration Act.

<sup>44</sup> Section 39 (3) of the Arbitration Act.

<sup>45</sup> Section 39 of the Arbitration Act; Githu Muigai, 'The Role of the Court in Arbitration Proceedings' in Githu Muigai (ed), *Arbitration Law & Practice* (1st edn, lawAfrica 2011) 82–84.

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“Balears”) where the court interpreted an appeal brought under section 1 of the English Arbitration Act, 1979.<sup>46</sup> Lord Justice Steyn in addressing the limits of the jurisdiction of the court hearing an appeal under the English Act said the following:

*“The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators’ award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators’ findings of fact.”<sup>47</sup>*

The Court of Appeal in *Kenya Oil Company Limited & another v Kenya Pipeline Company*, drew a similarity between section 1 of the English Arbitration Act and section 39 of the Kenyan Arbitration Act and therefore argued that they advocate for the same principle when it comes to appeals on questions of law. Lord Justice Steyn has called upon courts of law to be careful and vigilant to ensure that parties to arbitration agreements do not attempt to question or qualify the arbitrator’s findings of fact or dress up questions of fact as question of law. In his opinion, courts should firmly discourage this behaviour.<sup>48</sup>

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<sup>46</sup> [1991] 2 Lloyds Rep 318; See also the principle laid out with regard to appeals under section 39 in *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] KLR 898; See also the interpretation of section 20(3) of the Arbitration Act in paragraph 31 in the Court of Appeal decision in *Civil Appeal No. 102 of 2012 (Kenya Oil Company Limited & another v Kenya Pipeline Company* [2014] eKLR).

<sup>47</sup> [1991] 2 Lloyds Rep 318.

<sup>48</sup> *Ibid.* See paragraph 41 & 42 of the Court of Appeal judgement.

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Second, appeals in arbitration can also be initiated by an aggrieved party making an application to the High Court to set aside an award based on a ground provided under section 35(2) of the Arbitration Act. However, the most critical concern that can be raised under this section is how far a party can appeal an award under section 35 of the Act? High Court/Court of Appeal/Supreme Court.

### **3.2 Objective of the Arbitration Act, 1995 and the UNCITRAL Model Law on Appeals**

The UNCITRAL Model law represents a comprehensive study by the United Nations Commission on International Trade Law on how best to harmonize laws on international commercial arbitration. It was adopted by the Commission on 21 June 1985.

The Court of Appeal in *Kenya Oil Company Limited & another v Kenya Pipeline Company* [2014] noted that the Arbitration Act, 1995 adopted the 1985 UNCITRAL Model Law on International Commercial Arbitration.<sup>49</sup> Dr. Jacob Gakeri argues that the Arbitration Act, 1995 “is an unimaginative replication of UNCITRAL Model Law.”

The Model Law restricts the involvement of courts of law in the arbitral process except in the circumstances provided by the law.<sup>50</sup> The Model Law envisages a situation in which courts of law play a supportive role in the arbitral process.<sup>51</sup>

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<sup>49</sup> Paragraph 35 of the Court’s judgement.

<sup>50</sup> Section 10 of the Arbitration Act embodies this principle. Article 5 of the UNCITRAL Model Law on International Commercial Arbitration provides that; “In matters governed by this Law, no court shall intervene except where so provided in this Law.”

<sup>51</sup> Jacob Gakeri, ‘Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR’ (2011) 1 International Journal of Humanities and Social Science

<[http://www.ijhssnet.com/journals/Vol.\\_1\\_No.\\_6;\\_June\\_2011/25.pdf](http://www.ijhssnet.com/journals/Vol._1_No._6;_June_2011/25.pdf)> accessed 8 March 2017.

### 3.3 Jurisprudence from Kenyan Courts

In the case of *Nyutu Agrovet Limited v Airtel Networks Limited*,<sup>52</sup> the applicant had filed a notice of motion in the High Court under section 35 of the Arbitration Act to set aside an award. Kimondo J, delivered a ruling in December 1, 2011 in which he had set aside the award in its entirety. The main ground was that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties.

Nyutu challenged the decision of Kimondo, J of setting aside the award under section 35 of the Arbitration Act and Airtel on the other hand presented a notice of motion with the main prayer being the record of appeal be struck out as the appeal of the award should not lie before the Court of Appeal.

Mr. Fred Ngatia appearing on behalf of the Applicant argued that when parties went for arbitration and thereafter to the High Court under section 35 of the Act, the decision that followed was not subject to appeal before the Court of Appeal by virtue of section 10 of the Act. It was also his submission that the Act did not at all confer the right of appeal on either of the parties and neither of them could seek refuge under Article 164(3) of the Constitution. And that where a party was not invoking the powers donated by section 39 of the Act, no court can intervene because such a matter is solely governed by the Act. Section 35 fall outside the purview of section 39. Omolo, J.A and Onyango Otieno, J.A, also adopted this position in *Kenya Shell Ltd v Kobil Petroleum Ltd*,<sup>53</sup> where the Court noted that section 10 aimed to discourage intervention of the courts even at the appellate level. In the *Kenya Shell Case*, the court noted that where parties choose to resolve their disputes under the Arbitration Act, by way of arbitral proceedings, the courts take a back seat. Arbitration in principle advocates for the finality on disputes, and as such a severe limitation is imposed on access to the courts, thereby as a matter of public policy, it brings litigation to an end.<sup>54</sup>

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<sup>52</sup> [2015] eKLR.

<sup>53</sup> Civil Application No. Nai. 57/2006.

<sup>54</sup> Cf. arbitration proceedings under Order XLV of the Civil Procedure Rules and one which parties envisions in their contractual obligations where the Arbitration Act No. 4 of 1995. The latter discourages court intervention.

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In *Anne Mumbi Hinga v Victoria Njoki Gathara*, the court emphasized the autonomy of the Arbitration Act and arbitration proceedings conducted under the Act. The court noted that the provisions of the Civil Procedure Act and the Rules thereunder, did not apply to arbitral proceedings under the Act, despite the provision of Rule 11 of the Arbitration Rules which under the hierarchy of laws in section 3 of the Judicature Act cannot override section 10 of the Act. Rule 11 however applies when it comes to the enforcement of the awards. Section 10 of the Arbitration Act, if strictly interpreted excludes application for leave to appeal to the Court of Appeal, or even seeking a stay of awards of arbitration. Is it therefore correct for one to conclude that the Arbitration Act is a self-contained code that does not require aid from other legal provisions to give it effect?

Prior agreements and by the parties in terms of section 39 (2) of the Act that a decision under section 35 shall go to appeal, such consent shall be within the parameters of section 39. Widespread jurisprudence from the Kenyan courts also emphasize on the point that no appeal lies from the High Court decision under section 35, and that the High Court decision is final.<sup>55</sup>

But a critical question that arises is where one draws the line between the right of the appellant to appeal a decision of the High Court and the jurisdiction of the Court of the Appeal to entertain such a matter. It is my argument that both issues are mutually reinforcing, and that one cannot exist in the absence of the other. There is therefore need to ensure that if in principle and even under the law appeals under section 35 do not lie from the High Court to the Court of Appeal how do we ensure that one party is not prejudiced. Courts should therefore be conscious to make this distinction when the situation arises.

Section 35 of the Act does not take away the jurisdiction conferred to the Court of Appeal under Article 164 (3) of the Constitution nor one conferred by section 3(1) of the Appellate Jurisdiction Act especially where a party do not have the

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<sup>55</sup> *Njoka Tanners Ltd & Others vs Industrial & Commercial Development Corporation NRI HC. Misc. Appl. No.8/2001, Tony Mark Tanui vs Andrew Stuart & Another H.C. Misc. App.No.69/2012.* The decisions in these cases supports the argument on finality.



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right to appeal which would by law allow the jurisdiction of the court to crystallize to hear an appeal. In a nutshell, the court could have jurisdiction to determine a particular issue but in arbitration parties may not have the right to come before the court on appeal. As was observed by the Court of Appeal in *Kaikuta M. Hamisi v Peris Pesi Tobiko*, that the right to appeal must expressly be granted by law and not by implication and that whenever a party comes before the court of law, they must show the right of appeal intended be exercised.<sup>56</sup>

Other scholars argue that perhaps, section 35 does not limit the right to appeal decision rendered under that section. If this is the case could this translate to the fact that section 10 of the Arbitration Act is unconstitutional.<sup>57</sup> It is important to note that Rule 11 of the Arbitration Rules allows for the application of the Civil Procedure Rules in arbitration matters where it is appropriate to do so.

#### **4.0 Conclusion**

The Constitution of Kenya recognizes arbitration as a form of alternative dispute resolution mechanism. The court plays a key role in the arbitral process especially with regard to various intervention mechanisms. Based on jurisprudence from the Kenyan High Court, there is need to ensure that the court plays a more facilitative role. This will ensure parties to the arbitral process are able to realize gains that accrue from arbitration as a means of dispute resolution.

Karanja JA, in his ruling in *Nyutu Agrovet Limited v Airtel Networks Limited* noted that Section 10 and 35 of the Arbitration Act must be interpreted within the context of the concept of finality as internationally recognized in arbitral proceedings conducted under the UNICITRAL model. They are not unconstitutional at all. Arbitration as a dispute resolution mechanism is not imposed on parties. They choose it freely when they incorporate the arbitration

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<sup>56</sup> *Kakuta M. Hamisi vs Peris Pesi Tobiko* (C.A. No.154/13).

<sup>57</sup> Njoroge Regeru Submissions in *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] eKLR at page 4.

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agreement into their contract, and at times even include the finality clause as was the case here.<sup>58</sup>

The learned judge noted that when parties choose arbitration, they are sending a clear message to the court that they do not wish to be subjected to long, tedious, expensive and sometimes inconvenient journey that is commercial litigation. This paper argues that this right has been misused and has subsequently seen cases dealt under arbitration being delayed for as long as 10 years. Nonetheless, Arbitration law & practice in Kenya must ensure that the expectations and the confidence of those who opt for it is met. Consequently, this would ensure that Kenya remains the most preferred seat/venue of international arbitrations in the African region and the world at large.

Arbitration practice has a bright future in Kenya.

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<sup>58</sup> Nyutu Agrovat Limited v Airtel Networks Limited [2015] eKLR

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## **Embracing Alternative Dispute Resolution in Kenya: Challenges, Prospects and Opportunities**

By: *Abdirazak Mohamed\**

### **Abstract**

*Alternative Dispute Resolution (ADR) mechanisms are generally associated with flexibility, efficiency, expediency and cost effectiveness. They have long been viewed as an answer to the problems associated with litigation such as delays and costs. The Constitution of Kenya 2010 formally recognises ADR mechanisms and requires courts and tribunals to promote their use. Constitutional recognition of ADR can be argued to be as a result of the recognition of the unique attributes of these mechanisms and was meant to shift the tides from the use of litigation to the use of ADR in dispute resolution. However, despite the constitutional recognition of ADR, it can be said that the same is yet to be fully embraced in the country with many Kenyans still resorting to litigation whenever a dispute arises. This paper seeks to interrogate the practice of Alternative Dispute Resolution in the country, identify challenges associated with ADR and explore the way forward and opportunities for the effective utilisation of ADR in Kenya.*

### **1. Introduction**

The Constitution of Kenya, 2010 recognises and advocates for the promotion of Alternative Dispute Resolution. Article 159 (2) (c) thereof requires courts and tribunals, in exercising judicial authority, to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>1</sup> This represents a paradigm shift from the previous constitutional dispensation in the country that did not specifically recognise Alternative Dispute Resolution. Unlike Article 159 (2) (c) of the Constitution of Kenya 2010, Chapter four of the Repealed Constitution which established the judiciary did not provide for or stipulate the use of ADR in

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<sup>1</sup> Constitution of Kenya, 2010, Article 159 2 (c)

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dispute resolution.<sup>2</sup> Despite the lack of constitutional recognition under the old regime, the practice of ADR still existed in Kenya. Arbitration had its legal foundation under the Arbitration Act, No. 4 of 1995 and traditional dispute resolution existed among the various communities in Kenya.

However, the promulgation of the Constitution of Kenya 2010 and the subsequent recognition of ADR were meant to cement its place in the justice system in the country. The consequence has been that courts have heeded this call and where applicable, they have referred matters before them to Alternative Dispute Resolution. In *Re Estate of Stone Kathuli Muinde (Deceased)*, the court had the following observation to make;

*'Is there room for reference of succession disputes to arbitration or mediation? The answer to this is in the affirmative. Article 159(2) identifies alternative dispute resolution as one of the principles that ought to guide the courts in the exercise of judicial authority. Opportunities for dispute resolution outside of the court process are therefore envisaged under the supreme law of Kenya. The court can refer the whole dispute or portions of it to resolution vide mechanisms that are alternative to the court process.'*<sup>3</sup>

Further, in *Nanchang Foreign Engineering Company (K) Limited v Easy Properties Kenya Limited*, it was observed that;

*'It is evident that the court is mandated by the supreme law to promote the use of alternative dispute resolution mechanisms and that it is also vested with power in civil cases to refer any matters it deems suitable for resolution by such appropriate methods for the attainment of the overriding objective contemplated under Sections 1A and 1B of the Civil Procedure Rules, 2010.'*<sup>4</sup>

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<sup>2</sup> The Constitution of Kenya, Revised Edition 2009 (2008) (Repealed)

<sup>3</sup> (2016) eKLR

<sup>4</sup> Civil Case No. 487 of 2013, (2014) eKLR

## 2. Why Alternative Dispute Resolution?

The essence of any dispute resolution mechanism is to guarantee access to justice. Access to justice is a fundamental constitutional right that a core tenet of democracy. To this effect, the Constitution requires the state to ensure access to justice for all persons and if any fee is required, it should be reasonable and should not impede access to justice.<sup>5</sup>

Section 1A of the Civil Procedure Act states its overriding objective as the facilitation of the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act and calls upon the courts to give effect to this provision.<sup>6</sup> However, a critical look at the judicial system in Kenya may lead to a conclusion that the overriding objective of the justice system is not being effectively achieved. In its '*State of the Judiciary and the Administration of Justice Annual Report, 2016-2017*', the Judiciary observed that at the end of the Financial Year 2016/2017, there were 533,350 pending cases in the judiciary which represented an increase of 7 percent from the 499,341 at the close of the Financial Year 2015/2016.<sup>7</sup> The report also observed that a total of 344,180 cases were filed in the judiciary during the same period.<sup>8</sup>

These statistics point to a key problem associated with the judicial process in Kenya, which is backlog of cases. The high number of cases being filed in court also shows that the country is yet to fully embrace Alternative Dispute Resolution as some of the cases could effectively be handled by ADR mechanism such as arbitration, mediation and traditional dispute resolution. With increasing number of cases being filed each day in the courts, it is very likely that the problem will keep on persisting.

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<sup>5</sup> Constitution of Kenya 2010, Article 48

<sup>6</sup> Civil Procedure Act, Cap 21, S 1 A

<sup>7</sup> Available at, <https://www.judiciary.go.ke/download/state-of-the-judiciary-and-the-administration-of-justice-report-2016-2017/>  
Accessed on 21/08/2018

<sup>8</sup> Ibid



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In some instances, courts have had to step in and refer disputes to ADR pursuant to Article 159 (2) (c) of the Constitution. This raises the question why the parties cannot opt to use Alternative Dispute Resolution in the first instance and have to go to court before such a dispute is referred to ADR. The period between filing a court case and referring the same to Alternative Dispute Resolution is thus wasted time that could have been utilized in seeking a solution to the dispute through ADR.

Alternative Dispute Resolution mechanisms offer some advantages not otherwise available through litigation. ADR mechanism such as mediation and negotiation give parties to disputes substantial control in the resolution process.<sup>9</sup> Further, ADR can help in the reduction of time it takes to resolve disputes and diminish the backlog of cases experienced by the courts.<sup>10</sup> Further, ADR mechanisms can help in the preservation of long term relationships of the parties where the solution is based on the mutual consensus of the parties.

### **3. Challenges/Shortcomings of ADR Mechanisms in Kenya Uncertainty over the Outcome of the Process**

One advantage that litigation boasts over Alternative Dispute Resolution is the certainty guaranteed in the final outcome of a case. The doctrine of *stare decisis* mandates courts of law to follow past precedents when cases with similar facts or legal issues are brought before them. Such past decisions may be binding or persuasive depending on the hierarchy of the courts with the decisions of higher courts being binding in nature on courts below them. This creates an element of certainty over the outcome of a dispute when such is compared to prior disputes of the same nature.

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<sup>9</sup> Kariuki Muigua, 'ADR: The Road to Justice in Kenya' page 25, Available at [www.kmco.co.ke](http://www.kmco.co.ke) accessed on 22/08/2018

<sup>10</sup> International Development Law Organisation (IDLO), 'Enhancing Access to Justice through Alternative Dispute Resolution.' Available at <https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya> accessed on 22/08/2018

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On the other hand, there are no precedents when it comes to Alternative Dispute Resolution and each dispute is determined on its merits without reference to prior disputes. With regards to arbitration, it has been observed that arbitrators may ignore relevant precedent and their awards have no value as precedent in future disputes.<sup>11</sup> It has also been argued that arbitrator's decisions are fundamentally ad hoc, untethered from the rules and standards applied to resolve past disputes.<sup>12</sup> This is also true for the other ADR mechanisms such as mediation and Traditional Dispute Resolution where the doctrine of precedent does not apply.

Lack of precedent or standards against which disputes are determined could result in conflicting decisions over the same issues and facts. This problem is posed by ADR mechanisms where precedents are not followed in determining disputes.

#### **3.1 Fragmented Nature of the ADR Legal Framework in Kenya**

The legal framework on Alternative Dispute Resolution in Kenya cannot be deduced from any one single source but is governed by a myriad of legislations and institutions. Arbitration in Kenya is generally governed by the Arbitration Act, no. 4 of 1995. There is no statute on mediation, but its legal basis can be found in the Civil Procedure Act, Cap 21 Laws of Kenya.<sup>13</sup> Institutions such as the Chartered Institute of Arbitrators (Kenya Branch) and the Nairobi Centre for International Commercial Arbitration are also involved in the regulation of arbitration and mediation in Kenya. Each of these institutions has its own rules and procedures, the rules and procedures are not uniform among such

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<sup>11</sup> David Horton, 'Arbitration as Delegation' 86, N.Y.U.L. REV, 437-490 (2011)

<sup>12</sup> W.C Mark Weidenmaier, 'Judging Lite- How Arbitrators Use and Create Precedent', North Carolina Law Review, Vol 90. No. 4 (2012).

<sup>13</sup> Section 59B of the Act provides that the court may direct any dispute presented before it be referred to mediation on the request of the parties concerned, where it deems it appropriate to do so or where the law so requires. Section 59A thereof establishes the Mediation Accreditation Committee whose functions inter alia include; determining the criteria for certification of mediators and maintaining a register of qualified mediators.

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institutions. Other ADR mechanisms such as negotiation, conciliation and fact finding have no governing legislation but reference can be made to section 59C of the Civil Procedure Act which allows their application. The section provides that;

*'A suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral and such dispute shall be governed by such procedure that the parties agree or the court orders.'*<sup>14</sup>

Lack of uniformity and the fragmented nature of the ADR legal framework in Kenya pose the danger of such mechanisms being less desirous due to lack of a strong legal foundation. Further, it creates the risk of lack of uniformity in the procedure governing these mechanisms due to the various institutions involved in the same.

The Traditional Dispute Resolution framework is further complicated by the fact that the country has over 42 tribes each with its own unique culture. Such mechanisms can only be efficient where both parties to a dispute belong to the same community; it would not be suitable for TDR to be used where parties to the disputes are from different communities as it would require one of the parties to willingly submit themselves to the customs and culture of another community.

These are some of the challenges associated with the fragmented nature of the ADR legal framework in Kenya.

### **3.2 Perceived Inferiority of ADR Mechanism**

The Constitution of Kenya, 2010 uses the word '*Alternative*' when making reference to the various methods of dispute resolution other than litigation.<sup>15</sup> The word '*Alternative*' is defined to mean 'not usual or traditional' or 'existing or functioning outside of the established society.'<sup>16</sup> This definition can as well

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<sup>14</sup> Ibid, section 59C

<sup>15</sup> Supra note 1

<sup>16</sup> Webster, Merriam. "Merriam-Webster online dictionary." (2006).

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connote that the mechanisms stipulated under Article 159 (2) (c) of the Constitution of Kenya, 2010 are subsidiary to litigation hence being referred to as 'alternative'.

Traditional Dispute Resolution mechanisms which rely on African Customary law were considered retrogressive by the colonial masters and this view found its way in the laws of the land. This can be found in the Judicature Act which allows for the application of African Customary Law only to the extent that, '*it is not repugnant to justice and morality or inconsistent with any written law.*'<sup>17</sup> This position has been further reinforced by the Constitution which places a caveat on the use of TDR mechanism by stipulating that;

*'TDR shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is inconsistent with the Constitution or any written law.'*<sup>18</sup>

Such notions, especially when considered that the standards of justice and morality in reference is the 'western concept' hinder the effective utilisation of TDR mechanisms which could well be suited to the local circumstances of the country and the local communities. Other ADR mechanism such as arbitration and mediation heavily rely on courts on issues such as grant of injunctions and enforcement of awards. This raises the issue whether ADR can survive on its own without interference by the courts.

## 4. Way Forward

### 4.1 Towards a Policy Framework on ADR

The importance of a legal and policy framework in any society cannot be overemphasized. Laws serve the purpose of maintaining order and creating certainty within a legal system. One of the challenges highlighted with the current ADR mechanism in Kenya is the lack of a uniform legal and policy

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<sup>17</sup> Judicature Act, Cap 8 Laws of Kenya, s 3 (2).

<sup>18</sup> Constitution of Kenya, 2010, Article 159 (3),

framework on the same. Further, Traditional Dispute Resolution mechanisms are yet to be institutionalized by way of putting in place supporting adequate legal and policy measures that would ensure effective utilisation of the same in access to justice.<sup>19</sup> There is need for a harmonized legal and policy framework to deepen the use of ADR in Kenya. Such would ensure clarity on the policy roadmap for ADR in Kenya and enhance establishment of an ADR coordination mechanism among the various ADR processes.<sup>20</sup>

A comprehensive ADR policy framework would also serve the purpose of:

1. Guiding the development and implementation programmes and actions on the application of ADR in Kenya;
2. Set minimum standards of conduct and conditions for the application of ADR; and
3. Define the jurisdictional limits and applicability of the various ADR mechanisms.<sup>21</sup>

#### **4.2 Broadening the Scope of Application of ADR Mechanisms in Kenya**

The application of ADR in Kenya has mostly been in civil, commercial and personal disputes. The application of ADR In criminal matters has however been subject to different interpretations by the courts.<sup>22</sup> ADR should however be more

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<sup>19</sup> Kariuki Muigua, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' <http://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf>  
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<sup>20</sup> 'Judiciary Supporting Alternative Dispute Resolution Mechanisms' Available at <https://www.judiciary.go.ke/judiciary-supporting-alternative-dispute-resolution-mechanism/>  
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<sup>21</sup> K I Laibuta, 'ADR in Africa: Contending with multiple legal orders for wholesome dispute resolution' (2015) (3) (2) *Alternative Dispute Resolution*, available at [https://www.ciarbkenya.org/wp-content/themes/mxp\\_base\\_theme/mxp\\_theme/assets/final-volume-3-issue-1----april-16.pdf](https://www.ciarbkenya.org/wp-content/themes/mxp_base_theme/mxp_theme/assets/final-volume-3-issue-1----april-16.pdf) Accessed on 30/08/2018

<sup>22</sup> In R v Mohamed Abdow Mohamed (2013) eKLR, the accused was facing murder charges, however the families of the accused and the deceased had settled the matter under Somal Customary Law after compensation had been made and rituals conducted,

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utilised in family disputes where there is need to preserve relationships. ADR mechanisms such as mediation have been heralded being able to settle the root causes of conflicts and assist parties to explore mutually satisfying and durable solutions,<sup>23</sup> and are therefore more effective in resolving such disputes unlike litigation. Further, pursuant to article 60 (1) (g) of the Constitution,<sup>24</sup> disputes involving community land should be resolved through local community initiatives and TDR. Such has the advantage of being able to discern the root cause and history of the conflict and the dispute resolution process will centre on facilitating peace and harmony among the parties unlike litigation which is adversarial in nature.

#### **4.3 Limited Court Intervention in Alternative Dispute Resolution**

Court's intervention in ADR has elicited much debate with arguments being put forward that courts should not play a lead or management role in respect of the ADR processes.<sup>25</sup> In Kenya, the Arbitration Act, No. 4 of 1995 allows a party before or during arbitral proceedings to request from the High Court interim measures of protection.<sup>26</sup> Further, the Act provides for a mechanism of appeal to the High Court for setting aside an award and application for enforcement of awards.<sup>27</sup> Further, court annexed mediation in Kenya is conducted under the

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the court allowed an application by the prosecution to have the matter marked as settled under Article 159 of the Constitution. However, in *R v Mohamed Noor Mohamed* (2016) Eklr where the accused had also been charged with under contrary to section 203 as read with section 204 of the Penal Code, the court disallowed an application by the accused to have him and the deceased family time to reconcile and settle the matter out of court stating that the charge against the accused is a felony and as such reconciliation as a form of settling the proceedings is prohibited.

<sup>23</sup> Kariuki Muigua, *'Alternative Dispute Resolution and Access to Justice in Kenya'* Glenwood Publishers Limited (2015), p 21.

<sup>24</sup> The article identifies one of the principles of land policy to be the encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.

<sup>25</sup> Tania Sourdin, *'The Role of the Court in Alternative Dispute Resolution.'* Asian Journal of Mediation, 2013

<sup>26</sup> Arbitration Act, No. 4 of 1995, S 7

<sup>27</sup> Ibid, sections 36 and 37.

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supervision of the court which is in charge of the screening process, referral of matters to mediation, grant of interim measures and enforcement of mediation agreements.

However, the paper argues that there should be minimal to no interference by the courts in ADR. This may not be possible at the moment due to the fact that some of the ADR mechanisms are yet to be institutionalized and lack of an efficient legal framework that defines the nature and scope of the ADR processes and which grants powers to the various ADR practitioners. The very essence of ADR is to avoid the court process and the continued intervention by the courts goes against this idea. It is therefore important that ADR be dissociated from the court process in order to enhance its growth and success.

#### **5. Conclusion**

The paper argues that Constitutional recognition of ADR pursuant to Article 159 (2) (c) was meant to enhance the place of ADR mechanism in the justice system in Kenya. However, the same is yet to be effectively achieved due to various reasons. Some of the reasons identified include the perceived inferiority of ADR mechanisms when compared to the formal/judicial system and the fragmented nature of the ADR legal framework in the Kenya. The right of access to justice is an important Constitutional right which can be achieved through ADR. The paper advocates for the adoption of a comprehensive legal framework on ADR, broadening the scope of application of ADR mechanisms in Kenya and limited court intervention in ADR in order to enhance its success.

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Abdirazak Mohamed*

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## **The Role of the National Courts in Arbitration in Kenya**

By: **Michael I. W. Muyala** \*

### **Abstract**

*Arbitration is a legal consensual process of settling a dispute in a judicial manner by a person other than a court of law.<sup>1</sup> It is one of the alternative dispute resolution mechanism provided by the Constitution of Kenya 2010.<sup>2</sup> In addition, the Charter of the United Nations<sup>3</sup> provides that arbitration is a means of resolving disputes in the first instance.<sup>4</sup> Courts and arbitration are connected in one way or another. Arbitration makes justice more accessible than courts by being faster, flexible and potentially less expensive if the parties adopt appropriate procedures.<sup>5</sup> It should be noted that the national courts have a role to play in arbitration proceedings. The role of courts in arbitration proceedings is well documented in the Constitution of Kenya 2010, Arbitration Act of Kenya and Nairobi Centre for International Commercial Arbitration Act 2013. This paper seeks to critically analyze the role of the national courts in arbitration in Kenya.*

### **1. Introduction**

The main legal framework that supports arbitration in Kenya is the arbitration Act 1995 backed by the national courts. According to Michael Kerr, international arbitration cannot function without the assistance of national courts. Only they possess the coercive powers to enforce agreements to arbitrate, as well as the

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<sup>1</sup> E A Marshall Gill: *The Law of Arbitration* (4th edn Sweet & Maxwell 2001), 1; K Muigua 'Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya' (2013) 1 (1) *Alternative Disputes Resolution CIArb-Kenya Journal*, 43-78, 58.

<sup>2</sup> Constitution of Kenya 2010, article 159.

<sup>3</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October, 1945

<sup>4</sup> Kariuki Muigua *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Limited 2012), 2.

<sup>5</sup> Paul Ngotho, *The Bastard Provision in Kenya's Arbitration Act*, A paper presented to CIArb (Kenya Branch) & CADR Regional Arbitration Conference, 2013 Southern Sun Hotel, Nairobi, Kenya.

resulting awards.<sup>6</sup> The role of the national courts in arbitration comes in three phases. The first phase is before arbitration proceedings, the second phase is during arbitration proceeding and the third phase is after arbitration proceedings.

It should also be noted that National courts make sure that some fundamental and internationally- recognized standards, principles and policies are observed and complied with: Independence and impartiality of arbitrators, Equal treatment of parties and setting aside arbitral awards.

## **2. The role of the courts before arbitration proceedings**

This is the first instance before any party makes application for arbitration proceedings starts. At this stage, the courts can intervene in two ways: Firstly, through staying courts proceedings; and secondly, through issuance of interim measures of protection.

### **2.1 Staying Court proceedings**

In international trade, disputes may arise and when they do, parties may look for a way to solve them. In both domestic and international contracts, parties may agree to put in an arbitration clause that will help them solve any disputes should they arise. As it is known, when parties have not been able to resolve a dispute, and one party decides to begin an arbitration, the first step for counsel is to read the arbitration agreement, then read and follow the rules chosen by the parties in that agreement. However, there are ways in which the court can intervene in arbitration proceedings. The first instance in which a court can intervene in arbitration proceedings is before reference is made to the arbitral tribunal. An order of stay of proceedings by the court is one of the most important pronouncements that the court makes to preserve the integrity of the arbitral process.

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<sup>6</sup> Michael Kerr, "Concord and Conflict in International Arbitration" (1997) 13 Arb Int 121 at 127.

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It is worthy to note that the court has no power to compel arbitration.<sup>7</sup> Where an arbitration agreement exists, the court is not under any duty to oust its jurisdiction where a party to the arbitration agreement approaches it. From the above discussion, it can also be stated that by the principle of party autonomy that is fundamental in arbitration proceedings, parties can agree to disregard the arbitration clause and by consent, take the matter for adjudication by the court.

Before a court grants stay of proceedings there are factors to be considered. These factors include the following:

- a) Existence of a valid arbitration agreement which is valid and enforceable

This is provided under section 6 of Arbitration Act which stipulates as follows:

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’;

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

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

- b) Existence of a dispute between the parties with regard to matters agreed to be referred to Arbitration.

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<sup>7</sup> Kariuki Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya.' A paper presented at the Chartered Institute of Arbitrators course on "Advocacy in Mediation and Arbitral Proceedings", on 5th February, 2009 (Revised on 1st March 2010) p.7.

<[http://www.kmco.co.ke/attachments/article/80/080\\_role\\_of\\_court\\_in\\_arbitration\\_2010.pdf](http://www.kmco.co.ke/attachments/article/80/080_role_of_court_in_arbitration_2010.pdf)>accessed 27th March, 2015.

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In *Abdul Aziz Suleiman v. South British Insurance Co. Ltd*<sup>8</sup>, the court held that where the parties have reached a settlement, there is nothing to be referred to arbitration.

- c) The applicant for stay must be a party to the arbitration agreement or at least a person claiming through a party e.g. a personal representative or trustee in bankruptcy.

In *Chevron Kenya Limited v Tamoil Kenya Limited*<sup>9</sup>, the High Court held that the Defendant was not a party to the arbitration agreement and therefore not entitled to lodge the application for stay of proceedings.

- d) The party making the application for stay must not have taken steps in the proceedings to answer the substantive claim. This is important in solving the problem of delaying tactics.

In *Pamela Akora Imenje vs. Akora ITC International Ltd & Another*<sup>10</sup>, subsequent to the filing of suit, the Plaintiff made an application for stay of the proceedings and reference of the matter to arbitration. Mr. Justice Waweru held that;

*The Plaintiff's application is wholly misconceived. Having chosen to file suit instead of invoking the arbitration clause in the Articles of Association of the 1st Defendant, she cannot now purport to have recourse to section 6 (1) of the Arbitration Act, 1995. That provision is available only to the Defendants. The very wording of the sub-section makes this plain and obvious....In the result, the Plaintiff's application by chamber summons dated 12th October, 2005 is refused. It is hereby dismissed with costs to the Defendants. Orders accordingly.*

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<sup>8</sup> Civil Appeal No. 779 of 1964 [1965] E.A. 66, at p. 70

<sup>9</sup> [2007] eKLR.

<sup>10</sup> [2007] eKLR.

## 2.2 Issuance of Interim Measures of Protection

Provisional measures are grants of temporary relief issued to protect the rights of parties pending the final determination of the case.<sup>11</sup> According to section 7 of Arbitration Act, “It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.” In granting interim measures of protection, the court does not thereby assume jurisdiction over the matters to be resolved by the arbitral tribunal.<sup>12</sup> It is also important to know the power of the court to grant interim measures before arbitration proceedings is different from the power of the arbitral tribunal to grant interim measures as per section 18 of Arbitration Act.

A party to arbitration proceedings can seek from the national courts interim measures like orders for preservation like attachment before judgment; interim custody or sale of goods (e.g. perishables) the subject matter of the reference or for detention or preserving of any property or thing concerned in the reference, appointing a receiver and interim injunctions. However, when granting interim measures of protection before arbitration proceedings, the court has to consider certain factors. In the Court of Appeal case of *Safari Limited –v–Ocean View Beach Hotel Limited & 2 Others*<sup>13</sup>, Justice Nyamu stated that; ‘under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.
2. Whether the subject matter of arbitration is under threat.
3. In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application?
4. For what period must the measure be given, especially if requested for before the commencement of the arbitration, so as to avoid

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<sup>11</sup> Shadat Mohameded, A Critical Analysis of Arbitral Provisional Measures in England and Wales, PHD Thesis 17<sup>th</sup> January 2014, p.2.

<sup>12</sup> Githu Muigai, ‘The Role of Court in Arbitration Proceedings’ in Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (lawAfrica) 78.

<sup>13</sup> (2010) eKLR.

encroaching on the tribunal's decision making power as intended by the parties?'

Justice Nyamu then rendered an interim measure of protection for 28 days only, to enable the parties to institute the necessary arbitral proceedings failing which the order would automatically cease to operate.

### **3. The Role of the Court during Arbitration Proceedings**

After arbitration proceedings have started, there are ways in which court can intervene in arbitration proceedings. According to Arbitration Act, the national courts can intervene in the following ways: appointment of arbitrators,<sup>14</sup> challenging arbitrators,<sup>15</sup> termination of arbitrators mandate,<sup>16</sup> determining arbitrator's tribunal,<sup>17</sup> interim measures of arbitrators during arbitration,<sup>18</sup> courts assistance in taking evidence for use in arbitration,<sup>19</sup> Determination of a question of law.<sup>20</sup>

The intervention of the court is only allowed in the Act only in the wordings of section 10 of the Arbitration Act of Kenya. However, this position can be challenged as being unconstitutional because the Constitution gives the High Court unlimited jurisdiction.<sup>21</sup> It can also be argued that the High Court has supervisory jurisdiction over any tribunal<sup>22</sup>, hence section 10 of Arbitration Act 1995 is unconstitutional. In the intervention as to the arbitral awards, it has been argued that there is only one way to intervene in the enforcement of arbitral awards. In the case of *Nyutu Agrovet Limited v Airtel Networks Limited*,<sup>23</sup> the court

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<sup>14</sup> Arbitration Act, section 12.

<sup>15</sup> Arbitration Act, section 14.

<sup>16</sup> Arbitration Act, section 15.

<sup>17</sup> Arbitration Act, Section 17(5).

<sup>18</sup> Arbitration Act, Section 18(2).

<sup>19</sup> Arbitration Act, section 28.

<sup>20</sup> Arbitration Act, section 39.

<sup>21</sup> Constitution of Kenya 2010, article 165.

<sup>22</sup> Ibid, article 165(3).

<sup>23</sup> (2015) eKLR

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stated that parties have no right to appeal against the setting aside ruling of the High Court. Mweru J as he then was stated:

*“My view is that the principle on which the arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from courts, for determination by a body put forth by themselves, and adding to all that as in this case, the arbitrators award shall be final, it can be taken as long as the given award subsist it is theirs. But in the event it is set aside as it was the case here, that decision of the High court remains final and their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless of course they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily choose it to be so”.*

The role of the court will be important where there is breach of rule of natural justice. In the case of *Sadrin Kurji and another v Shalimar Limited and 2 others*<sup>24</sup>, the court held:

*“Arbitration process as provided for by the Arbitration Act is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This however, does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are being breached by the process of arbitration. Hence in exceptional cases, in which the rules are not adhered to, the courts will be perfectly entitled to set in and correct obvious errors.”*

### **3.1 Appointment of arbitrators**

According to Margaret L Moses,<sup>25</sup> in arbitration proceedings parties have the power to appoint arbitrators. The arbitrators chosen should have the skill, knowledge and experience to effectively conduct arbitration proceedings.<sup>26</sup>

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<sup>24</sup> (2006) eKLR

<sup>25</sup> Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge press 2008

<sup>26</sup> Margaret L Moses, *The Principles and Practice of International Commercial*



By its nature it is always the parties' agreement that give the parties power to appoint an arbitrator to solve the commercial dispute. It is also manifested by the principle of party autonomy which states that it is the parties who have powers to appoint arbitrator in arbitration dispute.<sup>27</sup> However, at some point the courts are allowed to appoint arbitrators to solve commercial disputes. When the courts are told to appoint an arbitrator, they should apply putting in mind caution that arbitration is a consensual process and that the decision of the court is final and binding and not subject to appeal.<sup>28</sup>

There are also instances where a party can move to court to challenge the appointment of an arbitrator. In this scenario, the court can grant an application to set aside an appointment of an arbitrator and this can only happen when the court believes that there is a good reason, failure or refusal of the party in default to appoint his arbitrator in due time.<sup>29</sup>

### **3.2 Determining Arbitrator's Tribunal**

It is worthy to note that jurisdiction is everything in arbitration. There are instances where a party may challenge the jurisdiction of the arbitral tribunal. This issue may be raised in the High court. When faced with the question of jurisdiction, the arbitral tribunal decides the matter in two ways. Firstly, the tribunal may decide on the issue as a preliminary question.<sup>30</sup> Secondly, the tribunal may decide the issue at the stage of arbitral award.<sup>31</sup> However, before raising the issue of arbitration to high court, the arbitral tribunal has the power to determine its jurisdiction. This is through the doctrine of *kompetenz kompetenz*. Mohammed Nyaoga<sup>32</sup> opines that when the arbitrators are conducting their

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Arbitration, Cambridge press 2008

<sup>27</sup> Arbitration Act, section 12.

<sup>28</sup> Arbitration Act, Section 12(8).

<sup>29</sup> Arbitration Act, section 12(4).

<sup>30</sup> Kariuki Muigua, The Arbitration Act: A Review of Arbitration Act,1995 of Kenya Vis-à-vis Arbitration Act 1996 of United Kingdom available at <http://www.kmco.co.ke/attachments/article/75/075-ARBITRATION-ACT-REVIEW.pdf> accessed on 21/1/2016.

<sup>31</sup> Ibid.

<sup>32</sup> Mohammed Nyaoga, The Jurisdiction and Power of the Arbitrator, in Githu Muigai,

duties, they should always consider not acting beyond their scope. In the case of *Nyangau v Nyakwara*<sup>33</sup> the court held:

*“In arbitration proceedings under an order of the court, the arbitrator must act within either the stipulated time or that extended by agreement.”*

### 3.3 Challenging arbitrators

A party can challenge the appointment of an arbitrator and seek his removal at the time the tribunal is constituted. Challenge for removal of an arbitrator can be done if there is reason to believe that there is a conflict of interest, impartiality and improper conduct.

This is done by making an application to the High Court as an appeal from the tribunals’ decision, but before a party makes first make an application before the tribunal for its determination. It is upon the decision of the tribunal rejecting the challenge that a party approaches the High Court for its determination on the same.<sup>34</sup> The decision of the High Court is final and binding, and not subject to any appeal.<sup>35</sup>

### 3.4 Termination of Arbitrators mandate

It is the arbitrator’s duty to maintain independence or to be impartial when conducting arbitration.<sup>36</sup> However, there are sometimes that the arbitrator can perform duties ineffectively that will warrant his or her removal. A court of law can terminate the conduct of an arbitrator if he fails to conduct arbitration proceedings properly. In addition, when the arbitrator dies or become ill, the court can also terminate arbitration proceedings.<sup>37</sup>

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Arbitration Law and Practice in Kenya (2013) Law Africa.

<sup>33</sup> (1986) KLR.

<sup>34</sup> Arbitration Act, Section 14(3)

<sup>35</sup> Arbitration, Section 14(6)

<sup>36</sup> Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge press 2008 P.130

<sup>37</sup> Githu Muigai, ‘The Role of Court in Arbitration Proceedings’ in Githu Muigai (ed), *Arbitration Law and Practice in Kenya* (law Africa) 81.

There are also other instances where the arbitrator may decide to withdraw himself from the arbitration proceedings. When this happens, the arbitrator should give a notice to the parties and also apply to the high court for relief from any liability from the parties. When the High Court is satisfied with the arbitrator's plea to resign, it will grant the relief and the decision is final and not subject to appeal.<sup>38</sup> An arbitrator may also be removed from attending to the arbitration proceedings when there is evidence to show that he or she or co-arbitrator is or are uncooperative in the mandate given to them by the parties.

### **3.5 Interim Measures of Arbitrators during Arbitration**

Interim relief means an order given by the relevant authority before the final determination of a dispute. In arbitration proceedings, interim award means relief granted before the final award.<sup>39</sup> UNICTRAL Model law defines interim measures as any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- a. Maintain or restore the status quo pending determination of the dispute;
- b. Take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
- c. Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- d. Preserve evidence that may be relevant and material to the resolution of the dispute.<sup>40</sup>

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<sup>38</sup> The Arbitration Act section 16 A.

<sup>39</sup> Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge press 2008 P.100

<sup>40</sup> Margaret L Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge press 2008 p.101.

Interim measures are grants of temporary relief issued to protect the rights of parties pending the final determination of the case.<sup>41</sup> In the case of *Don Wood Co. Ltd v Kenya Pipeline Ltd*, Ojwang J as he then was stated:

*“The courts jurisdiction to grant injunctive relief under section 7 of the Act was meant to preserve the subject matter of the suit pending the determination of the issues between the parties.”*

Interim measures are important in minimizing any loss during arbitral proceedings.<sup>42</sup> Secondly, they also facilitate enforcement of awards.<sup>43</sup> A party to the arbitration proceedings is the one under duty to request provision of interim measures.<sup>44</sup> According to Oscar Reyden,<sup>45</sup> in arbitration process one of the parties may decide to go to court to seek interim measures against a decision of the arbitrators.

### **3.6 Courts assistance in taking evidence for use in arbitration**

The court has a major role in collecting evidence for use in arbitration.<sup>46</sup> The role of the court in assistance in collecting evidence include issuing summons to witnesses to secure their attendance and examination of a witness on oath before an officer of the court or any other officer.<sup>47</sup>

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<sup>41</sup> Shadat Mohmeded, *A Critical Analysis of Arbitral Provisional Measures in England and Wales*, PHD Thesis 17<sup>th</sup> January 2014, p.2.

<sup>42</sup> Dana Renee, *How to best protect party rights: The Future of Interim Relief in International Commercial Arbitration under the Amended UNCITRAL Model Law*, 25(3) *American International Law Review*, 2010, 586.

<sup>43</sup> *Ibid*

<sup>44</sup> Ali Yesilirmark, *Provisional Measures in international Commercial Arbitration* (Kluwer Law international 2005), p.167.

<sup>45</sup> Oscar Reyden, *On the Legal Frameworks and Substantive Standards Governing the Granting of Interim Measures in International Commercial Arbitration* (LLM Thesis 2011) available at <http://lup.lub.lu.se/student-papers/record/2296168/file/2343343.pdf> accessed on 28/08/2015.

<sup>46</sup> *Arbitration Act*, section 28.

<sup>47</sup> Kariuki Muigua, *FIClarb, Settling disputes through Arbitration in Kenya* (Lodana publishers) 184.

### **3.7 Determination of a question of law**

During arbitration proceedings, some issues of conflict may arise. Some of these issues include question of the law. When a question of the law arises, it is always the work of the arbitral tribunal to determine the matter. However, the national courts also have a role to play in determination of such questions. A party to arbitration proceedings may file an application to the High Court to appeal the decision of the arbitral tribunal.<sup>48</sup>

### **4. The Role of the Court after Arbitration Proceedings**

The role of the court generally, after arbitration proceedings, always involves arbitral awards. The issue of arbitral awards after arbitration proceedings includes:

1. Setting aside of arbitral award<sup>49</sup>
2. Recognition and enforcement of arbitral award<sup>50</sup>

#### **4.1 Setting aside arbitral award**

After conducting arbitration proceedings, the arbitral tribunal is expected to issue an award. An award is expected to be final and binding.<sup>51</sup> It is therefore the duty of arbitrators to render an enforceable award.<sup>52</sup> An award is supposed to be valid. An award is said to be valid if it is consistent with the parties' agreement, chosen rules and the applicable law.<sup>53</sup>

There are formalities of an award. By formalities, the award should be in writing, supported by reasons, dated and place of arbitration named, signed by the arbitrators, final and binding and filed and registered by the arbitral tribunal.<sup>54</sup>

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<sup>48</sup> Arbitration Act section 39.

<sup>49</sup> Arbitration Act, Section 35.

<sup>50</sup> Arbitration Act, section 36

<sup>51</sup> Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008, pp.179.

<sup>52</sup> *Ibid.* pp.139.

<sup>53</sup> Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008, pp.184.

<sup>54</sup> Michael Muyala, *Strengthening the Legal and Institutional Framework of*

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According to Kariuki Muigua, award should be cogent, complete, certain, consistent, final and enforceable.<sup>55</sup> If the award is not enforceable, a party may challenge the same in the national courts. However, courts rarely overturn arbitral awards.<sup>56</sup>

It is also worthy to note that there are grounds for challenging arbitral awards. The challenge for arbitral awards includes jurisdictional and procedural challenge. That the tribunal exceeded its powers. A tribunal may have had jurisdiction under the arbitration agreement, but nonetheless rendered an award that it was not entitled to make.<sup>57</sup> The most challenge to arbitration award is through procedural challenges.<sup>58</sup> A good example is the UNICITRAL Model that provides four procedural ways of challenging an award.<sup>59</sup> These four grounds include the following:

- a) a party must not be under any incapacity, and the agreement must be valid
- b) a party must have been given proper notice of both the appointment of the arbitrator and the scheduling of the proceedings, and must have been able to present its case
- c) the subject matter has to be within the scope of the arbitration agreement; and
- d) the arbitral tribunal must be constituted in accordance with the agreement of the parties.

Two other grounds may be raised and determined by the national courts: firstly, whether the subject matter is arbitrable, and secondly, whether the award

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International Commercial Arbitration: The Case of Nairobi Centre for International Arbitration, LLM Thesis UON2017, p 66

<sup>55</sup> Kariuki Muigua, *Settling Disputes through Arbitration in Kenya*, p.151.

<sup>56</sup> *Ibid*, p.193

<sup>57</sup> *Ibid*, p.195

<sup>58</sup> *Ibid*, p.195

<sup>59</sup> *Ibid*

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conflicts with the public policy of the state.<sup>60</sup> However, the arbitrability ground will not cause many awards to be vacated, because there are very few matters today that are not considered arbitrable.<sup>61</sup> The second ground that a court could raise is a violation of public policy. Public policy is defined differently in different jurisdictions, but in most, an award could be vacated if it was not consistent with fundamental notions of justice, honesty, and fairness.<sup>62</sup> Thus, corruption, fraud, or lack of integrity in the process could be considered a violation of public policy, requiring the award to be annulled.<sup>63</sup>

There are methods that a party may employ to challenge an award. A party can challenge an award action to annul, set aside, or vacate the award (the terms differ in different jurisdictions) in the court at the situs of the arbitration.<sup>64</sup> However, in this paper, the court is given supervisory role when a party decides to make application to it to set aside the arbitral award.

The courts are given power to interfere with the arbitral awards.<sup>65</sup> However, there are very few instances that the courts interfere with the arbitral awards. Section 37 provides as follows: *Grounds for refusal of recognition or enforcement*

(2) *if the High Court finds that –*

- (i) *the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or*
- (ii) *the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.*

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<sup>60</sup> Ibid, p.196

<sup>61</sup> Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008, p.196

<sup>62</sup> Ibid, p.196

<sup>63</sup> Ibid, p.196

<sup>64</sup> Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008, p.193.

<sup>65</sup> Arbitration Act, section 39.

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The above mentioned section requires that the party whom the award does not favour to make an application to the High Court seeking to set aside the award on the grounds of public policy of Kenya. The Kenyan courts have not helped much in this area but have acted to limit the extent of application of the Act in defining public policy. In the case of *Christ for All Nations v Apollo Insurance Co. Ltd*, it was held, *inter alia*: —

*Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.*

In addition, in the case of *Christ for All Nations v Apollo Insurance Co. Ltd*, the Court of Appeal found that an award may conflict public policy 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.

A party wishing to make an application to set aside an award must do so before lapse of three months from the date the party making the application received the arbitral award.<sup>66</sup> The Court of Appeal in the case of *Anne Mumbi Hinga vs Victoria Njoki Gathara* stated that; ‘section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award.... All the applications filed in the superior court were incompetently brought before the superior court and the court lacked jurisdiction.

### **4.1 Recognition and Enforcement of Arbitral Award**

After issuance of an award by the arbitral tribunal, the parties to arbitration proceedings are expected to comply with the award. The losing party should comply with the award so that enforcement proceedings will not be necessary.<sup>67</sup>

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<sup>66</sup> Arbitration Act, Section 35(3).

<sup>67</sup> Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008, p.201.



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In addition, the winning party is supposed to initiate the judicial process of enforcement of the award if the losing party is reluctant to adhere to the award.<sup>68</sup> It is also important to note that enforcement of award is permitted because the international contract in its arbitration clause always provide for enforcement of arbitral award.

Article III of the New York Convention requires signatory countries to recognize arbitral awards as binding, and to enforce them in accordance with national law, consistent with the provisions of the Convention.<sup>69</sup> When a court “recognizes” an award, it acknowledges that the award is valid and binding, and thereby gives it an effect similar to that of a court judgment.<sup>70</sup> On the hand, enforcement means using whatever official means are available in the enforcing jurisdiction to collect the amount owed or to otherwise carry out any mandate provided in the award.<sup>71</sup>

The possibility of enforcement of arbitral award by the courts its high because you will find out that most countries have ratified international conventions that provide for enforcement of arbitral awards.<sup>72</sup> The conventions are important in international contracts and when arbitral awards are announced by the arbitration tribunal. One of the International Conventions that provide for enforcement of arbitral award is New York Convention for Enforcement for Arbitral Awards. The New York Convention for Enforcement for Arbitral Awards requires courts of Contracting States to enforce both arbitration agreements and arbitration awards.<sup>73</sup> Currently, more than 140 countries are

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<sup>68</sup> Ibid, p.202.

<sup>69</sup> Ibid, p.203

<sup>70</sup> Margaret L Moses, *The Principles and Practice of International Arbitration*, Cambridge University Press, 2008, p.203.

<sup>71</sup> Ibid, p.203.

<sup>72</sup> Ibid, p.202.

<sup>73</sup> Ibid, p.202.

parties to the New York Convention.<sup>74</sup> A good example is Kenya which ratified the New York Convention for Enforcement for Arbitral awards.<sup>75</sup>

A state party to the New York Convention for the Recognition and Enforcement of Arbitral Award (New York Convention) enforces awards according to its procedural laws. The New York Convention <sup>76</sup> provides that a party seeking such recognition and enforcement should produce to the relevant court<sup>77</sup>:

- a) The duly authenticated original award or a duly certified copy thereof;
- b) The Original agreement referred to in Article II or a duly certified copy thereof.

There is a process that the court needs to follow when enforcing arbitral award. Firstly, the award needs to be recognized, which entails the court accepting that the decision of the tribunal is valid and that it is binding on the parties. Thereafter, the court then enforces the award, which is the process of compelling the reluctant party to comply with the terms of the award.

## **5. Conclusion**

From the foregoing discussion, it is worthy to note that arbitration in Kenya is on the right path as far as practice of arbitration is concerned. The Constitution of Kenya 2010, being the supreme law of the land<sup>78</sup>, provides for arbitration as alternative dispute resolution mechanism.<sup>79</sup> The Arbitration Act of Kenya is consistent with the Constitution of Kenya. Again, Kenya as a country has ratified International Conventions, like the New York Convention, which is important in

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<sup>74</sup> Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>75</sup> Michael Muyala, Strengthening the Legal and Institutional Framework for International Commercial in Kenya: The Case of Nairobi Centre for International Arbitration.

<sup>76</sup> Article iv.

<sup>77</sup> Arbitration Act, Section 36(3).

<sup>78</sup> Constitution of Kenya 2010, article 2(1) The Constitution is also said to be supreme by virtue that it is the highest authority in the legal system.

<sup>79</sup> Constitution of Kenya 2010, article 159.

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the enforcement and recognition of arbitral awards. The Kenyan national courts have played a good role in arbitration practice. Whenever they are faced with applications in arbitration matters, their interpretation of the arbitration clauses has been commendable, giving the principle of party autonomy the eminence that it deserves and that is intended of arbitration.

The role of the court is very important in arbitration proceedings. In arbitration, as discussed earlier, the court plays an important role before a reference for arbitration is made, during arbitration proceedings and after an award is pronounced. However, sometimes the national courts can be abused by a party who intends to delay arbitration proceedings. There are only few recommendations that need to be made and Kenya will be a favourable hub for both domestic and international arbitration.

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## **Use of Alternative Dispute Resolution as a Tool for Fighting Corruption in Kenya: Case Study**

*By: Paul Mwaniki Gachoka\**

### *Abstract*

*In this Article, the author looks at the systemic and endemic crisis that is corruption in Kenya and whether ADR can be used effectively to fight corruption in the country. The Constitution of Kenya has made large strides in providing for the use of Alternative Dispute Resolution mechanisms to ease the burden that our courts are facing with the increased use of litigation to resolve disputes. The Article begins by highlighting how deeply entrenched corruption has become in the country. The legislative framework for fighting corruption is then analyzed and the enabling legislation for using ADR as a means of fighting corruption. Thereafter, a case study of particular cases where ADR has been used to recover assets that have been illegally acquired is examined to establish whether there were any advantages and/or challenges faced in the use of the ADR. The author ultimately makes a strong case for the use of ADR as an expedient tool towards restorative justice, and therefore strongly recommends its use in the fight against corruption.*

### **1. Introduction**

The origin of the term ‘corruption’ comes from the Latin words “*corruptus*” or “*corrumpere*” which broadly translate to mean spoiled or break into pieces.<sup>1</sup> Corruption occurs at all levels of society and at all forms – public, private, locally, nationally and internationally.<sup>2</sup> In the current era of globalization, transactions often transcend national boundaries, which increase the opportunities for corruption. Nonetheless, there is no universally accepted definition of the term. In some jurisdictions, for instance, an oral offer of a bribe is not considered as bribery or attempted bribery, unless the person offering the bribe takes further

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<sup>1</sup> Online Etymology Dictionary <https://www.etymonline.com/word/corrupt>

<sup>2</sup> <http://www.track.unodc.org/Academia/Documents/IBA%20Defining%20corruption.pdf>

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steps.<sup>3</sup> Consequently, different interpretations of ‘corruption’ are given by multiple jurisdictions according to their own cultural conceptions. However, one central theme that runs in most of the definitions given is the recognition that corruption involves the abuse or misuse of an official power to confer private or personal gain. The following few examples demonstrate this.

The Organization for Economic Cooperation and Development (OECD) explains corruption as “the abuse of a public or private office for personal gain. The active or passive misuse of the powers of Public officials (appointed or elected) for private financial or other benefits”.<sup>4</sup> The World Bank defines corruption as “the abuse of public or corporate office for private gain”<sup>5</sup>. Transparency International (TI) defines it as the “misuse of entrusted power for private gain”.<sup>6</sup> Interestingly, the United Nations Convention against Corruption (UNCAC) which is the only legally binding universal anti-corruption instrument has not attempted to define the concept of corruption. It rather adopts the approach of defining specific acts or instances that would amount to corruption, constituting the various offences provided for in Chapter III of the Convention. This gives each Member State the leeway and freedom to define the concept in accordance with their unique municipal or domestic legal systems.

Corruption can be classified as grand, petty and political, depending on the vastness of resources involved, the cadre and influence of the players involved, or the sector where it occurs, among other factors<sup>7</sup>. Its effects and consequences are the same irrespective of where it occurs or what form it takes. However, it is now generally accepted that corruption mostly hurts the poor and vulnerable in

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<sup>3</sup> OECD Observer N°260, March 2007

[http://oecdobserver.org/news/archivestory.php/aid/2163/Defining\\_corruption.html](http://oecdobserver.org/news/archivestory.php/aid/2163/Defining_corruption.html)

<sup>4</sup> OECD Glossaries, [2008], “Corruption”, A Glossary of International Standards in Criminal Law, OECD Publishing.

<sup>5</sup> V. Bhargava, [2006], “Curing the Cancer of Corruption”, p.1, Available online at: <http://siteresources.worldbank.org/EXTABOUTUS/Resources/Ch18.pdf>

<sup>6</sup> <http://www.transparency.org/whatwedo?gclid=CI34t8yS4LICFaTJtAodRS0A2g>

<sup>7</sup> <https://www.transparency.org/glossary/term/corruption>

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society. This was aptly stated by the Kenyan court in the case of *Christopher Ndarathi Murungaru Vs Kenya Anti-Corruption Commission and Another (NO. 2) [2006] e-klr*,<sup>8</sup> that:

*“corruption is equally a cancer which robs the society in general but more particularly the poor when resources of a country whether public or privately controlled are siphoned into local or foreign accounts for the benefit of a few individuals or groups thereof...it is a form of terrorism and tyranny to the poor, the majority of our populations...”*

The generally accepted forms of corruption include bribery, which is the payment (in money or kind) that is taken or given in a corrupt relationship.<sup>9</sup> These include kickbacks, gratuities, pay-off, sweeteners, greasing palms, etc.; Fraud, which involves some kind of trickery, swindle and deceit, counterfeiting, racketing, smuggling and forgery; Embezzlement, which is theft of public resources by public officials. It is when a state official steals from the public institution in which he/she is employed; Extortion, the extraction of money and other resources by the use of coercion, violence or threats to use force; Favoritism, a mechanism of power abuse implying a highly biased distribution of state resources.<sup>10</sup> However, this is seen as a natural human proclivity to favor friends, family and anybody close and trusted; lastly, nepotism, which is a special form of favoritism in which an office holder prefers his/her family members.

## **2. Corruption in Kenya – A Synopsis**

The history of corruption and anti-corruption in Kenya shows a generally increasing trend, where levels of corruption, magnitude of resources and anti-

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<sup>8</sup> H.C. Misc. Civil Appl. No. 54 of 2006 (O.S)  
<http://kenyalaw.org/caselaw/cases/view/15531>

<sup>9</sup> El Hadji I. SALL, *Universite du Sahel, Dakar-Senegal – Reduction of Corruption in Africa: A Tremendous Challenge* Retrieved from

<http://iespolicy.org/wp-content/uploads/2018/01/Sall-La-corruption-en-Afrique.pdf>

<sup>10</sup> <http://www.eajournals.org/wp-content/uploads/Governance-Corruption-and-the-Democratic-Order-in-Africa-The-Case-of-Nigeria.pdf>



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corruption efforts goes up incrementally over time.<sup>11</sup> Prior to independence, corruption was narrowly viewed from the perspective of bribery. The Prevention of Corruption Ordinance, 1956 only provided rudimentary offences of bribery of public officials. This law continued to operate post-independence. It was not until the late 1990s that Kenya started demonstrating a willingness to firmly deal with other more prevalent forms of corruption involving misuse of official power to embezzle state resources. The country has also tended to establish a more robust anti-corruption legislation over time, including the establishment of diverse institutional framework where different agencies play specialized roles. To appreciate the evolutionary trend, and the current status of the vice in the country, this paper will provide a synopsis through two avenues. These are, records and reports of the Ethics and Anti-Corruption Commission which provides a governmental perspective; and the annual surveys of the Transparency International, a non-governmental perspective.

#### **2.1 Reports by the Ethics and Anti-Corruption Commission**

Established by the Ethics and Anti-Corruption Commission Act of 2011, the mandate of the EACC is to combat and prevent corruption and economic crime in Kenya. The Commission undertakes its mandate through the multi-pronged strategies of law enforcement, prevention, public education and awareness, and promotion of ethics and integrity. Its predecessor institutions are Kenya Anti-Corruption Commission (2003-2011), Anti-Corruption Police Unit (2000-2003), Kenya Anti-Corruption Authority (1997-2000) and the Kenya Police Anti-Corruption Squad (1997 to pre-independence).<sup>12</sup>

The following is a comparative statistic on the number of complaints received and processed, the number of investigations arising from the complaints, and the

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<sup>11</sup> <http://www.eacc.go.ke/default.asp?pageid=2>

<sup>12</sup> Ethics and Anti-Corruption Commission (2017). *Report of activities and financial statements for the financial year 2016/2017*. Retrieved from <http://www.eacc.go.ke/Docs/AnnualReports/EACC-Annual-Report2016-2017.pdf>

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completed investigations. These statistics cover the period from 2004 (when KACC commenced operations) to 2018.<sup>13</sup>

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<sup>13</sup> *Ibid*

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*Table 1: Comparative statistics for reports, investigations initiated and completed*

<b>Year</b>	<b>Complaints Processed</b>	<b>Investigations Initiated</b>	<b>Investigations files forwarded to AG/DPP</b>
2004	3552	242	0
2005	3234	384	35
2006	7888	1150	84
2007	8188	1611	111
2008	4485	1232	86
2009	4335	1270	122
2010	4372	1281	104
2011	7106	2445	134
2012	5320	2183	89
2013	3355	1688	32
2014	4006	1950	68
2015	5660	2747	117
2016	7929	3856	167
2017	8044	3735	143
2018	6235	2898	n/a

*Source: KACC and EACC Annual Reports*

An analysis of the above statistics will demonstrate that the cumulative backlog of investigations and matters pending in court is particularly huge. The table below shows the outcome of the cases investigated, from 2013 to 2017.

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Year	Recommended for prosecution	Recommended for Administrative action	Recommended for closure	Cases finalized in court	
				Convicted	Acquitted/ Discharged
2013/14	44	9	17	1	1
2014/15	75	8	22	1	-
2015/16	136	4	27	11	3
2016/17	97	7	26	18	7
2017/18	143	10	27	35	9
<b>Total</b>	<b>495</b>	<b>38</b>	<b>119</b>	<b>66</b>	<b>20</b>

*Source: Report by EACC to the Justice and Legal Affairs Committee of the National Assembly (July 2018)*

From the above data, it will be deduced that out of 495 cases recommended for prosecution, the courts were able to conclude only 86, which represents a disposal rate of 17%. As the years go by, the backlog gap widens, and disposal rate becomes lower. The data has not captured those cases which end up in higher courts in form of appeals, leading to a second tier backlog. In addition, many of these cases will be affected by other cases of a different nature such as constitutional petitions and judicial review applications.

## **2.2 Annual Surveys by Transparency International (Corruption Perception Index)**

In spite of the many anti-corruption initiatives Kenya has put in place, corruption has remained rampant and Kenya's ranking in international corruption perception surveys has remained poor. Transparency International is an international movement whose vision is to eliminate corruption worldwide in partnership with governments, private sectors, and civil societies. It undertakes and ranks countries on a perceived anti-corruption score index. The index, which ranks approximately 180 countries and territories by their perceived levels of public sector corruption according to experts and businesspeople, uses a scale of 0 to 100, where 0 is highly corrupt and 100 is very clean. Kenya has continuously

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performed poorly based on the TI score index, which shows that corruption is on the increase every year. The performance index for Kenya from 2012 to 2017 is shown in the following table.<sup>14</sup>

<b>Year</b>	2017	2016	2015	2014	2013	2012
<b>Score</b>	28	26	25	25	27	27

*Source: Corruption Perception Index, Transparency International*

There have been other surveys apart from the ones by TI. On the economic front, the Global Ease of Doing Business report, 2014 ranked Kenya at 136/189; the Global Competitiveness Report, 2014 placed Kenya at position 115/144 while the Global Human Development Index ranked Kenya at position 147/195. This is a clear demonstration of the need to enhance anti-corruption measures and strategies in the country.

### **3. Legal and Institutional Framework for Fighting Corruption in Kenya**

Kenya has a somewhat very elaborate legal and institutional framework for fighting corruption, when compared to other countries. In terms of institutional arrangements, Kenya has dedicated anti-corruption bodies, as well as a plethora of other institutions which play a complementary role in the fight against corruption. Bodies that have a direct mandate include Ethics and Anti-Corruption Commission, Directorate of Criminal Investigations, Asset Recovery Agency, Financial Reporting Centre, National Anti-Corruption Campaign Steering Committee, Director of Public Prosecutions, among others. Agencies that play a complementary role include Office of the Attorney General and Department of Justice, Witness Protection Agency, Office of the Auditor General, National Intelligence Service, the National Treasury, Public Service Commission, Office of the Controller of Budget, Commission on Administrative Justice,

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<sup>14</sup> Transparency International. (2018). *Corruption Perceptions Index, 2017* (pp.10). Nairobi.

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Efficiency Monitoring Unit, and the Public Procurement Regulatory Authority, to name a few.<sup>15</sup>

In terms of the legal instruments for fighting corruption, it will be noted that Kenya has most of laws required for effective onslaught on corruption. Kenya's anti-corruption regime compares favourably with the best anti-corruption models in the world. Besides the elaborate anti-corruption provisions in the Constitution of Kenya, there are a number of legal instruments which directly or indirectly facilitate the fight corruption, such as: the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)(ACECA); the Ethics and Anti-Corruption Commission Act, 2011; the Public Officer Ethics Act, 2003 (No. 4 of 2003)(POEA); the Public Procurement and Asset Disposal Act, 2015(PPDA); the Proceeds of Crime and Anti-Money Laundering Act, 2009 (No. 9 of 2009)(POCAMLA); the Leadership and Integrity Act, 2012(LIA); the Elections Act, 2011 (No. 24 of 2011); the Mutual Legal Assistance Act, 2011 (No. 36 of 2011); the Commission on Administration of Justice Act, 2001 (No. 23 of 2011), and the Fair Administrative Action Act, 2015 (No. 4 of 2015), and the more recent Bribery Act, 2016; among others. Those that deserve a special mention are-

- i. Ethics and Anti-Corruption Commission Act, 2011 (No. 22 of 2011)**  
This Act principally provides for the establishment of EACC, its functions and powers, and procedures for nomination and appointment of Commissioners (Members), Secretary and staff.
- ii. Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003)**  
This Act provides for the investigation, prosecution, adjudication and punishment for corruption and economic crime offences.

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<sup>15</sup> Report of The Task Force On the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, October, 2015.

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- iii. **Leadership and Integrity Act, 2012 (No. 19 of 2012) (LIA)**  
LIA was enacted pursuant to the requirements of Article 80 of the Constitution, to provide for procedures and mechanisms for effective implementation of Chapter Six of the Constitution (on Leadership and Integrity). There is a general consensus that the current statute, as it is, falls short of the threshold expected in terms of providing an effective legal framework for realization of the leadership and integrity requirements.
- iv. **Public Officer Ethics Act, 2003 (No. 4 of 2003) (POEA)**  
POEA was enacted in 2003 to provide for ethics of public officers, including making provision for financial declarations.
- v. **Proceeds of Crime and Anti-Money Laundering Act, 2009 (POCAMLA)**  
POCAMLA establishes a strong legal framework for dealing with proceeds derived from all crimes including corruption, as well as combating the laundering of such proceeds.
- vi. **Mutual Legal Assistance Act, 2011 (No. 36 of 2011) (MLA Act)**  
The MLA Act was enacted to regulate and facilitate the processing of incoming or outgoing requests for assistance. It establishes the Office of the Attorney-General as the Central Authority, through which requests by or to competent authorities are channeled.
- vii. **Commission on Administrative Justice Act, 2011(No. 23 of 2011) (CAJ Act)**  
This Act establishes the Commission on Administrative Justice (CAJ) (commonly referred to as “the Office of the Ombudsman”). It is established as a successor to the Public Complaints Standing Committee (PCSC), and its principal function is to conduct investigations into complaints of abuse of powers by public officers or bodies, and make appropriate recommendations thereon. Article

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47 of the Constitution guarantees the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The enforcement of this right complements and boosts the fight against corruption.

#### **viii. Bribery Act 2016**

The principal objective of the Bribery Act 2016 is to criminalize the act of giving or receiving a bribe in all sectors. The Act commenced on 13 January 2016 and provides elaborate anti-bribery and anti-corruption obligations, with far reaching implications on all sectors, including public, private and non-governmental organizations in Kenyan; as well as foreign organizations doing business in Kenya.<sup>16</sup>

#### **4. Use of Alternative Dispute Resolution (ADR) as a Tool for Fighting Corruption in Kenya**

During his keynote speech at the commencement of ‘The Judicial Marches Week’ countrywide on August 21, 2012, the former Chief Justice, Hon. Dr. Willy Mutunga encouraged the public to use alternative dispute resolution mechanisms, including traditional ones, as long as they do not offend the Constitution to resolve disputes.<sup>17</sup> The common types of ADR practiced in Kenya are negotiation, mediation and arbitration. Negotiation has been defined as “the process we use to satisfy our needs when someone else controls what we want.”<sup>18</sup> Negotiation can be done through representative or by the parties personally. In both cases, parties have control over the outcome although there is little control over the process when negotiation is done by representatives.<sup>19</sup> Mediation is a bit different from negotiation in that the parties in dispute invite

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<sup>16</sup> <https://www.business-anti-corruption.com/country-profiles/kenya/>

<sup>17</sup> <http://kenyalaw.org/kenyalawblog/commencement-of-the-judicial-marches-week-countrywide/>

<sup>18</sup> Successful Negotiation by Robert Maddaux (2<sup>nd</sup> ed., 1999) at p. 5. According to Maddaux, negotiation normally occurs “because one has something the other wants and is willing to bargain to get it”.

<sup>19</sup> ADR Principles and Practice by Henry Brown and Arthur Marriott (2002) London, Sweet and Maxwell.



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or jointly select a neutral third party called a Mediator to assist and facilitate their communication towards the amicable resolution of their case. The Mediator has no authority to make any decisions that are binding on the parties, but uses certain procedures, techniques and skills to help them to negotiate an agreed solution of their dispute without adjudication. Arbitration has been defined as “the institution by which the parties entrust to arbitrators, freely chosen by them, the task of resolving their disputes.”<sup>20</sup> In arbitration, the third party neutral is privately chosen and paid by the disputants and the neutral third party makes a binding determination. The procedural rules may be statutory or imposed by an arbitral institution.

ADR has been gaining prominence in the country especially in the resolution of commercial disputes and to some extent mediation in resolving family disputes. However, use of ADR in fighting corruption is not only a novelty but it is mired with some controversy especially as economic crime and corruption offences are criminal matters and not civil or family matters. There are a myriad of questions revolving around this, some of which include: at what stage of the criminal case does one use ADR? Is it at the investigative stage or the prosecution stage? Also what forms of ADR are suitable for the ethical and anti-corruption cases?

#### **4.1 Enabling Legislation for use of ADR in the Fight against Corruption the Constitution**

Article 159 of the Constitution provides that in exercising judicial authority, the courts and tribunals should be guided by certain principles. One of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms should be promoted provided that they do not contravene the Bill of Rights, they are not repugnant to justice and morality or results to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.

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<sup>20</sup> De Boisseson, *Le droit francais de l'arbitrage*) 2nd ed., 1990) p.5.

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Article 159(2)(c) which provides that (2) in exercising judicial authority, the courts and tribunals should be guided by the following principles (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms should be promoted, subject to clause (3). The said Clause (3) provides that traditional dispute resolution mechanisms should not be used in a way that; (a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.

Article 252(1) (b) of the Constitution provides that each commission, and each holder of an independent office, has the powers necessary for conciliation, mediation and negotiation. This is replicated in Section 13(2) (d) of the Ethics and Anti-Corruption Commission Act which provides that the Commission shall have the power to conduct mediation, conciliation and negotiation.

#### **4.2 Anti-Corruption and Economic Crimes Act, Cap 65**

Section 25A (1) and (3) provide an avenue for settlement of criminal matters through ADR. It stipulates that the Commission may, in consultation with the Minister and the Attorney General, tender an undertaking in a form prescribed by the Minister, not to institute or continue with investigations against any person suspected of an offence under this Act. A number of conditions that must be satisfied are provided for. It states that an undertaking under this section should only be made in cases where the suspected person makes a full and true disclosure of all material facts relating to past corruption or economic crime, and; through the Commission, pays or refunds to, or deposit with, the Commission for, all persons affected, any property or money irregularly obtained, with interest thereon at a rate prescribed by the Minister; makes reparation to any person affected by his corrupt conduct; and pays for all loss of public property occasioned by his corrupt conduct. On the other hand, section 56B (2) of the ACECA provides a procedure for settlement out of court for civil matters, such as cases for recovery of illegally or irregularly acquired assets. The section empowers the Commission to negotiate and enter a settlement with any person against whom the Commission intends to bring, or has actually brought, a civil claim or application in court.

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### **4.3 Civil Procedure Act and Rules**

Order 46 of the Civil Procedure Rules make provisions for use of arbitration as a form of dispute settlement mechanism. Rule 20 of the Order states as follows-

*“Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.”*

Order 46 Rule 20, read together with Sections 1A and 1B of the Civil Procedure Act, therefore obligates the court to employ ADR mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. Court-annexed ADR will thus go a long way in tackling the problem relating to backlog of cases, enhance access to justice, and result in the expeditious resolution of disputes and lower costs. Pursuant to Order 46 rule 20 (3) it is only after a court-mandated mediation fails that the court shall set the matter down for hearing and determination.

### **5. Case Study on Use of ADR in Settlement of Corruption Cases**

In this part, the paper illustrates particular cases where ADR mechanisms have been utilized in expedient settlement of cases. The main challenges of using ADR are analyzed, and ultimately the advantages and lessons learnt in the use of the process.

#### **5.1 Recovery of Parcels of Land Belonging to Mombasa County Government**

In the late 1990s, prime parcels of land belonging to the then Mombasa Municipal Council were transferred to private companies. This was ostensibly done in order to raise funds for the then cash strapped council. Process of alienation was not entirely above board, but the companies paid money to the Council. Procedural aspects mandatory before the transfers were not adhered to. Properties alienated were prime public utility parcels consisting of a recreation park, clinic, school, prisons, a bus park, council houses, etc. Between 2006 and 2008, KACC filed numerous suits to recover the properties. Apart from their defences on right to property, the companies involved counter-claimed for the purchase price, inclusive of accruing interest for the entire duration, running to billions of

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shillings. Interim orders and applications were made by each party, giving rise to appeals and counter appeals. At some point, the Minister attempted to revoke the documents of title, but the High Court and Court of Appeal ruled such procedure to be unconstitutional. This created a stalemate without a clear way forward.

### **5.1.1 Negotiation and Settlement**

EACC took the opportunity to try and resolve the complicated asset recovery cases pending in the courts. Negotiations were commenced with the companies in respect of the Mombasa county properties. In March/April 2014, a comprehensive agreement on settlement was arrived at. The salient terms of the settlement were as follows- The companies agreed to surrender to the government about two thirds of all the parcels of land transferred to them. The surrendered parcels included the recreation park, the bus park, clinic and other critical service parcels. Retained parcels comprised mostly the formerly council staff houses. The assessed value of the surrendered parcels was approximately Kshs. 2 billion (US\$ 24 million). Those retained by the companies were worth about Kshs. 600 million (US\$ 7 million). The companies waived their claim of costs and interest. All suits subsisting were marked as settled. The consent would not waive any prosecution of a public officer, or recovery of additional properties not covered in the consent settlement.

### **5.2 Grand Regency Hotel (now Laico Regency Hotel)**

In the year 2007, the then KACC, in conjunction with the Central Bank of Kenya, negotiated with the prime suspect in the Goldenberg scandal, and this led to the recovery, on behalf of the Central Bank, the property L. R. No. 209/9514 on which is constructed the then Grand Regency Hotel. The consent settlement was recorded in High Court Miscellaneous Application No. 1111 of 2003, Kenya Anti-Corruption Commission versus Kamlesh M. D. Pattni & 16 Others, in terms of section 56A (2) of the Anti-Corruption and Economic Crimes Act, 2003. The hotel has one hundred and ninety-six (196) rooms which include one (1) presidential suite, one (1) royal suite, two (2) deluxe suites and thirty-two (32) executive suites, among other facilities. The consent paved way for settlement of numerous

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suits and counter-suits arising from the same subject matter, which had led to a stalemate among the parties.

### **5.3 Houses in Woodley Estate, Nairobi**

This involved a negotiation with allottees of various properties belonging to the then Nairobi City Council, located in Woodley Estate that had been irregularly alienated to private individuals, who were willing to surrender the same. It also included a prime property reserved for use as the mayor's house.

### **5.4 Railways Corporation Land in Kisumu**

Negotiation and consent led to surrender of two prime properties belonging to the Railways Corporation in Kisumu. The value of both properties amounted to Kshs. 60 million.

### **5.5 Land belonging to Gusii Training Institute**

Six prime properties belonging to the Gusii Training Institute, with a combined total value of approximately Kshs. 30 million were recently surrendered back to the institution, through negotiation with the grabbers after EACC filed recovery suits against them.

### **5.6 Karatina Police Station Land**

The plot illegally hived off from Karatina police station was returned following the institution of a recovery suit, and subsequent negotiation with the grabber.

It is not just land and immovable property that has been expediently recovered through ADR processes. Numerous cases for recovery of cash have also been settled in this manner a highlight of the major ones include the following-

- i. Kshs. 2,905,000 recovered for the Kenya Pipeline Company, Anti-Corruption Case No. 2 of 2017 (EACC vs Josphat Kipkoech Sirma).
- ii. Kshs. 60,000,000 recovered for Kenya Revenue Authority in Anti-Corruption Misc. Case No. 67 of 2017 (EACC vs Evanson Thuo Waweru & 2 Others).

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- iii. Kshs. 5,500,000 recovered for the Ministry of Tourism, in Anti-Corruption Misc. Case No. 7 of 2017 (EACC vs Charles Kiai Gacheru & Another).
- iv. Kshs. 6,567,393 recovered for the County Government of Muranga, constituting irregular expenditure by County officers during a foreign trip.

### **Main Challenges Encountered in ADR**

- i. *Complexity of Negotiations:* ADR processes become complex, especially where many parties are involved. For instance, in negotiation over the land properties, agencies such as the office of the Attorney General, the National Land Commission, the victim(s) and beneficiaries of the alienation participate. The more the parties involved, the more the complexity.
- ii. *Balancing competing interests:* Negotiations in essence are delicate. The parties involved have diverse and sometimes conflicting interests, yet each of them have to be taken into account.
- iii. *Politicization:* Politics tend to creep into any such process, clouding the potential benefits and gains.
- iv. *Negative Public Perception:* The public is yet to accept and fully comprehend the potential benefits that ADR offers, especially in relation to corruption matters. There is general ignorance and mistrust by the general public on the process.

### **Advantages of ADR - Lessons Learnt**

- i. Alternative dispute resolution mechanisms take shorter time compared to court litigation or prosecution.
- ii. ADR is less expensive.
- iii. ADR is less acrimonious.
- iv. ADR takes into account all the important factors, such as how the assets were acquired, roles played by different parties, expenses incurred, third party rights, etc

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- v. All stakeholders should be involved, informed and/or routinely updated
- vi. The parties should ensure that each action or step that is taken is legal and can be supported by the law.
- vii. Any agreement or settlement reached should be registered in the court, as a fall back mechanism in the event of default by either party.

Asset recovery through ADR should not be a waiver of prosecution of any public officer found to be culpable in the processes that led to alienation.

#### **5. Conclusion**

One of the challenges encountered in the fight against corruption by the main anti-corruption agency in Kenya, that is the EACC, include inadequate financial capacity and budget constraints.<sup>21</sup> ADR and especially negotiation requires less financial capacity as compared to litigation. In negotiation, there are no costs for a neutral third party. Traditional litigation on the other hand, is very costly due to high advocate fees and court fees. Another challenge in the fight against corruption is inadequate capacity in terms of human resources. Negotiation is less formal than traditional dispute resolution mechanisms such as litigation. Furthermore, negotiation does not place as great a burden on human resource capacity of the EACC as compared to litigation which requires more human resource capacity.

Another challenge in the fight against corruption is slow judicial processes. Litigation can be a tedious and long process whereby the parties' advocates prolong the process even further. Negotiation is less time consuming than litigation and it gives the parties a speedy resolution to the dispute. The parties have more control over the process in ADR as compared to litigation. EACC would therefore save time when negotiation is used rather than litigation. One of the challenges faced in fighting corruption is political interest/interference. There is more likelihood of interference in litigation through influencing of the

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<sup>21</sup> <https://www.iprb.org/journals/index.php/EJBSM/article/view/18/57>

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neutral third party, that is, the judge. In negotiation, there is less likelihood of political interference as there is no neutral third party involved in the case. As negotiation is less adversarial, there is a higher chance of the parties making concessions as opposed to litigation which is very adversarial.

As seen in the above case studies, ADR, and Negotiation specifically, has yielded impressive results especially in the area of recovery of illegally acquired assets. ADR can, in particular cases, yield faster and desirable results in recovery of alienated public properties. This has led the EACC to develop and adopt a Policy on Alternative Dispute Resolution in November 2017 after broad stakeholder consultations. There is no doubt that ADR and especially Negotiation has greatly facilitated EACC's objectives of fighting against corruption.



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## **Applicability of the Doctrine of Sovereign Immunity in Investment Arbitration: Is It a Threat to the Enforcement of Arbitral Awards?**

By: *Dennis M. Nkarichia\** & *Muiruri E. Wanyoike\**

### **Abstract**

*According to the latest United Nations Conference on Trade and Development (UNCTAD) data, the involvement of states in international commercial transactions with private parties through Bilateral Investment Treaties (BITs) and other international treaties is more pronounced.<sup>1</sup> The research operates on the premise that disputes between parties in any commercial interactions are bound to arise. Hence, different methods of solving such disputes, like arbitration, exist. Arbitration in international commercial transactions is an alternative to solving disputes via litigation between parties. The parties that engage in international commercial transactions rely on the use of contracts to conduct business. Often, the contracts contain (a) dispute resolution clause(s) which provide(s) guidance to the parties on the manner that they should conduct themselves in cases of disagreements resulting from their commercial transactions. It means that most instances of international commercial arbitration are voluntary, given the contraction agreements, obligations, and rights of the parties involved. International commercial arbitration is important in cases where the parties to transactions are states and international entities like companies. However, the most significant drawback to arbitration between states/ state-controlled entities and private ones is the former's commitment to it and honoring the arbitral awards. The genesis of this is the fact that the states use their sovereignty as a shield in cases of international commercial disagreements. The article will use this background to examine the applicability of the*

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<sup>1</sup> United Nations Conference on Trade and Development Data (2018, June 2018), *Investors-State Dispute Settlement: Review of Developments in 2017, Issue 2*. [http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf) , Accessed on 20<sup>th</sup> July, 2018.

*doctrine of sovereign immunity in international commercial arbitration vis á vis the enforcement of arbitral awards.*

## 1. Introduction

Sovereign immunity is a doctrine derived from the British common law. It stems from the ancient principle that the monarch can do no wrong. The judicial doctrine prevents the government or its political subdivision, departments, and agencies from being sued without its consent. The concept of sovereign immunity, when raised as a defense in investment arbitration between a private party and a State, is often contentious. The private party oft expects the State to behave like any other commercial partner when conducting business. However, the State resorts to its ultimate defense of sovereignty especially when there is a dispute between it and the investor(s). In the course of the evolution of investment arbitration as an alternative method of dispute resolution, States were seen to practice self-restraint in invoking sovereign immunity in arbitration.<sup>2</sup> The International Convention of Settlement of Investment Dispute Convention (ICSIDC) that deals with investment arbitration between a State and a private party fortified the same position that a State cannot invoke sovereign immunity in arbitration<sup>3</sup>. The Convention explicitly states that in a dispute between a State and a private party, the State will not raise the defense of sovereign immunity.<sup>4</sup>

Arbitration experts and bodies have maintained a similar position in international commercial arbitration for several years.<sup>5</sup> The issue resurfaced in

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<sup>2</sup> Hensler, Deborah R., and Damira Khatam. "Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication." *Nev. LJ* 18 (2017): 381.

<sup>3</sup> The ICSID Convention was formulated by the Executive Directors of the World Bank. It came into force on 14 October 1966. See ICSID Convention, Article 1(2).

<sup>4</sup> ICSID Convention, Articles 25-27.

<sup>5</sup> The USA adopted the Foreign Sovereign Immunity Act (1974), and the UK legislated the State Immunity Act (1978), which set the trend that a State cannot claim immunity for its commercial activities. This may be said to be the established approach, at least in

the Court of Appeal case, *FG Hemisphere Associates LLC and Democratic Republic of Congo and others*<sup>6</sup>. In the case, the Democratic Republic of Congo (DRC) raised the defense of sovereign immunity at the enforcement stage when an arbitral award was brought for enforcement in Hong Kong. However, the same defense was never raised at the arbitration stage, which was conducted according to the Rules of the International Chamber of Commerce (ICC)<sup>7</sup> in Switzerland and France<sup>8</sup>. This article will examine the applicability of sovereign immunity in investment arbitration and its position in the enforcement of arbitral awards.<sup>9</sup>

## **2. The Scope of the Research**

This research will focus on the enforceability of state sovereignty in international commercial arbitration. Most literature focuses on the hindrances state immunity has on international commercial arbitration. However, this paper will only use such literature in a comparative and analytical manner. Finally, the study will not focus on a singular state because of various factors like geopolitics and socio-economic factors might counter-act the effectiveness of a specific case study in relation to the topic.

## **3. Statement of the Problem**

Private commercial parties that do business with States or entities that are controlled by the State are increasingly faced with the problem of State parties attempting to raise the defense of sovereign immunity. The State parties<sup>10</sup> or the State controlled entities<sup>11</sup> use the defense to challenge the arbitral tribunal

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the Common Law. In Civil Law countries, though absolute immunity was practiced, an exception was created for commercial activities.

<sup>6</sup> CACV373/2008 & CACV 43/2009.

<sup>7</sup> the DRC agreed to use the ICC Rules for the arbitration.

<sup>8</sup> The parties to the arbitration.

<sup>9</sup> Gus Van Harten & Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' 17 EUR. J. INT'L L. 121 (2006), pp.128. (Investment treaty Arbitration as a Species of Global Administrative Law)

<sup>10</sup> The government undertaking commercial activities on its own as one of the parties.

<sup>11</sup> Legal entity that undertakes commercial activities on behalf of an owner government.

jurisdiction and to delay or fail to enforce arbitral awards. It results in difficulties when handling arbitral disputes that involve private parties and sovereign entities. Therefore, there is a need to critically analyze the nexus and contradiction arising from the application of the doctrine of sovereign immunity in investment arbitration.

#### **4. Hypothesis**

The core hypothesis of this article is that investment arbitration between a State party and a private party in its role of providing a remedy to private parties through arbitral awards is severely hampered by the law of sovereign immunity. Due to the doctrine of sovereign immunity, there exists the risk of undermining by a State which refuses to voluntarily honor the arbitral awards. Consequently, this results to the article question on whether the doctrine of sovereign immunity threatens the enforcement of arbitral awards when used as a defense in investment arbitration.

#### **5. The Research Methodology**

This paper will apply the qualitative research method in the analysis of primary and secondary data from articles, municipal law, international law, and judicial precedent. Hence, the analytical aspect of the research will focus on interpreting and comparing data from various primary and secondary sources of data. To achieve this, the research methods will rely on two doctrines of international law. The doctrines include the “treaty obligations under the international investment law (*pacta sunt servanda*)<sup>12</sup> and the doctrine of sovereign immunity (*par in parem non habet jurisdiction*)”<sup>13</sup>. Understanding the basic terms of the doctrine helps distinguish the claims of “*acta jure imperii* and *acta jure gestionis*” under a

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<sup>12</sup> It is a Latin word, meaning that “agreements must be kept”; See also W. Park and A. Yanos, ‘Treaty Obligations and National Law: Emerging Conflicts in International Arbitration’ 58 *Hastings Law.Rev.* 251 (2006); J. Yackee, ‘PACTA SUNT SERVANDA and state promises to foreign investors before bilateral investment treaties: Myth and reality’ 32 *Fordham Int’l L. J.* 1550 (2009).

<sup>13</sup> See H. Lauterpacht, ‘The problem of jurisdictional immunities of foreign states’ 28 *Brit.Y.B. Int’l L.* 220 (1951); J. Crawford, ‘International law and foreign sovereigns: Distinguishing immune transactions’ 54 *Brit.Y.B. Int’l L.*75. (1983)

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restrictive immunity. Adopting this approach implies that a state cannot raise the defense of sovereign immunity in claims involving commercial acts of the state.

On the other hand, the doctrine of treaty obligations necessitates a review of Article 31-33 of the Vienna Convention on the Law of Treaties<sup>14</sup> which set out the rules of treaty interpretations. Article 31(3) (c) of the Vienna Convention clarifies that “any relevant rules of international law applicable in the relations between the parties.” Thus, the doctrine of sovereign immunity, a well-recognized doctrine in international law, has been instrumental in interpretation of the provisions of treaties regarding international investment arbitration.<sup>15</sup>

A comparative legal research methodology would expose the doctrinal reasons behind the success or failure of particular arbitration approaches versus their impacts on how parties to arbitration react to arbitral awards.<sup>16</sup> This would also allow the study to appreciate the uniqueness or commonality of various instances of arbitration. In comparative legal research, the methodological approach focuses on national laws and international treaties. The distinction of the relationship between national laws and international treaties helps to scrutinize the extent to which they limit or assure the enforcement of arbitral awards in national courts.

## **6. Nature and Scope of Sovereign Immunity and Investment Arbitration**

The doctrine of sovereign immunity or state immunity implies that a “sovereign state cannot be subjected to the jurisdiction of another state”.<sup>17</sup> It also has the legal implications that no international entity can bring legal action a State within its borders. The doctrine constitutes an established principle of international law

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<sup>14</sup> 5 Vienna Convention on the Law of Treaties, signed at Vienna, 23 May 1969: UN DocA/Conf39/28.

<sup>15</sup> C. McLachlan, ‘The principle of systemic integration and article 31(3)(c) of the Vienna Convention’, 54 ICLQ 279 (2005).

<sup>16</sup> G. Wilson, ‘Comparative Legal Scholarship’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, Edinburgh 2010).

<sup>17</sup> *Ibid.*



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that is majorly based on the quality and independence of states.<sup>18</sup> The consequence of applying this principle of international law is that in taking legal action against a sovereign state, including any form of dispute resolution, a legal entity must obtain such a state's consent.

International investment arbitration exists purposely to settle international commercial disputes between states, state-controlled entities, and private parties that constitute of individual investors. For effective investment arbitration, three aspects must be fulfilled. First, an agreement by the parties to refer any dispute that might arise to arbitration must exist. The arbitration agreement is "governed by law, a similar law that governs the substantive contract in which an arbitral clause is embedded". However, the parties have the discretion to choose different laws for the main contract and the arbitration agreement. Secondly, an arbitral award that should be honored by one of the party must be made. Lastly, the decision or award made by the arbitration must be legally supported so as to be recognized and enforced by the courts. Nonetheless, an arbitral tribunal should strictly act according to the arbitral procedure to ensure that any award rendered by it is enforceable. However, the tribunal's mandate is limited to deciding awarding or denying arbitral awards based on the evidence, procedure, laws that the parties agreed to subscribe to, and *jus cogens*. Therefore, the parties bear the burden of discharging the arbitral awards if the tribunals award the complainant(s).<sup>19</sup>

Therefore, international investment arbitration is a vital mechanism for settling disputes between investors and states or state-controlled entities through "arbitral institutions like the International Center for the Settlement of

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<sup>18</sup> Lewis, J. Mistelis and Krollis, *Comparative International Commercial Arbitration*. The Hague, London, New York, Kluwer Law International, 2003, p. 744.

<sup>19</sup> Sharma, Rajesh. "Enforcement of Arbitral Awards and Defense of Sovereignty: The Crouching Tiger and the Hidden Dragon." In *March 2010, the Chair of Legal Linguistics, the Legal Linguistics Association of Finland and the University of Lapland hosted a conference on legal linguistics. The focus was on law and language in international partnerships and conflicts. The members of the organizing committee were Professor Tarja Salmi-Tolonen (Chair), Ms Iris Tukiainen and Mr Richard Foley.*, p. 252. 2011.

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Investment Disputes (ICSID), the International Chamber of Commerce Court of Arbitration (ICC), the London Court of International Arbitration (LCIA) and the Stockholm Chamber of Commerce (SCC). Additionally, ad hoc tribunals such as the United Nations Commission on International Trade Law (UNCITRAL)" can also be used for investment arbitration.<sup>20</sup>

#### **7. International Commercial Arbitration Framework**

The defense of sovereign immunity in investment arbitration exists at two levels, at the jurisdictional level, and secondly, at the level of execution. However, there is a need to make distinctions between acts of States occurring in its capacity as *jure imperii*<sup>21</sup> and those occurring as *jure gestionis*<sup>22</sup>. The distinction is important for clarity since some States tend to claim absolute immunity, that is, immunity for all acts carried out by the State or on behalf of the State. Some other States claim restrictive immunity which means immunity only for the public acts carried out by the State.

In determining whether the defense of sovereign immunity will stand at any of the two levels, the jurisdiction level, and the execution level, courts and tribunals have considered the distinction of States acting as *jure gestionis*, its commercial capacity. This was hinged on earlier European courts noting that when a state enters into a market place, the same treatment administered to private parties must also be given to the State, therefore, restricting the use of sovereign immunity especially in investment arbitration.

#### **8. Immunity at the Jurisdiction Level**

Arbitration agreements that are voluntarily entered and signed by a State imply that the State accepts the jurisdiction of an arbitral tribunal. The State is therefore required to comply with the arbitral tribunal final and binding award. By signing

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<sup>20</sup> Ibid 9.

<sup>21</sup> State acting in its public capacity

<sup>22</sup> State acting in its commercial capacity

the arbitration agreement, a State is seen to have waived its immunity regardless of whether the immunity is absolute or restrictive.<sup>23</sup>

## **9. Immunity at the Execution Level**

Problems are inevitable in investment arbitrations especially when the winning private party attempts to enforce or execute its awards against a State or a State controlled entity. Successful private party claimants have increasingly found their victory to be insignificant if the losing State refuses to honor the arbitral awards. States that wish to evade their obligations of honoring arbitral awards can do so by claiming immunity from execution<sup>24</sup>. Enforcement of international investment arbitral awards in national courts depends on several treaties. The most prominent of the international treaties are; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards also referred to as the New York convention<sup>25</sup> and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States sometimes referred to as the Washington convention<sup>26</sup>. The Washington convention ensures enforcement in signatory countries of International Centre for Settlement of Disputes while the New York convention governs most of the other international investment arbitrations.<sup>27</sup>

## **10. Recommendations**

The paper recommends that states adopt more restrictive immunity doctrine that will enable them to distinguish between sovereign acts and commercial acts. The restrictive doctrine can be extended to enable the states to also distinguish state property used for public purposes and that used for commercial purposes.

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<sup>23</sup> This should extend to the jurisdiction of the relevant national court at the seat of the arbitration to supervise the arbitration taking place in its territory

<sup>24</sup> Law and Practice of International Commercial Arbitration (4th ed.) London, Sweet and Maxwell, 2004, pp. 551 to 552

<sup>25</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 21 UST 2517, 330 UNTST

<sup>26</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of other States, March 18, 1965, 17 UST 2517, 330 UNTS

<sup>27</sup> C. Schreuer, *The ICSID Convention: A commentary*, (CUP UK 2009) pp. 1077.

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The article strongly recommends that going forward, the international community needs to amend the existing international conventions dealing with state-investor disputes. Municipal laws and international treaties on sovereign immunity can at times be vague in interpretation hence need to be reformed to become more effective and reliable. The interpretations and rulings on sovereign immunity cases are often surrounded with controversies that sometimes lead to inconsistencies. This stems from the difficulty faced in identification of what constitutes a public act<sup>28</sup> of a state in international law of state immunity. Thus, international and municipal laws need to be structured to help distinguish private acts of a state from the public acts. The article advises investors to first consider if the state they wish to contract with is a signatory to the New York Convention of 1958. The New York convention has been ratified by many states. The convention makes it easy for investors to enforce arbitral awards against member states.

Lastly, the article suggests the use of waiver as a solution to the problem of execution of immunity by states. The waivers can either be introduced in bilateral investment treaties or in the form of a contract that the investor has agreed on with a state or a state-controlled entity.

### **11. Conclusion**

It is clear that the success of any investment arbitration depends on the question of whether arbitral awards are voluntarily enforceable against losing states in national courts.<sup>29</sup> It is evident that winning parties are not always successful in their attempts of enforcing arbitral awards against states not voluntarily willing to honor the awards. This may be as a result of the losing state refusing to pay monetary awards or the national courts failing to execute the assets in the country where the arbitral award has been rendered. Thus, the losing states claim sovereign immunity as a defense. The investor, who is the winning party, is faced

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<sup>28</sup> Ibid 21

<sup>29</sup> A. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The re-politicization of International Investment Disputes', 21 *Am.Rev.Int'l. Arb.* 211 (2010). (Sovereign Immunity as a Barrier)

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with the hurdle of dealing with the defense of sovereign immunity, claimed by the losing state when enforcing arbitral awards. Therefore, to eliminate this hurdle the international investment players ought to create more comprehensive international mechanisms and structures in respect to investment protection.

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## **Mediation as A Profession in Kenya: A Call for Regulation**

**By: Jemimah Keli\***

### **Abstract**

*<sup>1</sup>The article examines the practice of mediation as profession in Kenya. The practice of mediation as a profession has come of age. Article 159 (2) (c) of the Constitution recognizes the application of alternative dispute resolution methods such as reconciliation, mediation, arbitration and traditional justice mechanisms by the Judiciary. All methods of settling disputes outside court are known as alternative dispute resolution methods. The focus of the article is on mediation which has gained substantial momentum in the past years since the promulgation of the 2010 Constitution.*

*A commentator Joseph Grynbaum said, “An ounce of mediation is worth a pound of arbitration and a ton of litigation”.*

*Court annexed mediation is provided for under the Civil Procedure Act. The Judiciary led in the promotion of mediation as an alternative dispute resolution method by establishing the court annexed meditation in 2015 through the amendment of the Civil Procedure Act to provide for referral of cases filed in court to mediation.*

*There are other statutes that have recognized mediation as an alternative method of resolving disputes such as the Community Land Act 2016 and the Marriage Act 2014. However, among all the laws that provide for mediation in dispute resolution, the Civil Procedure Act providing for court annexed mediation is the most comprehensive and operational. Mediation is a unique process with special characteristics which give it an edge over other forms of dispute resolution methods. These special characteristics of mediation revolve around six C’s being choices, calendar time, cost, confidentiality, control and closure. These special characteristics of mediation make it the most favorable in alternative dispute resolution.*

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*\* Accredited mediator by the Chartered institute of Arbitrators London and accredited mediator under the court mandated mediation program.*



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*Mediation is prominently utilized by the Federation of Women Lawyers in Kenya in resolution of family related disputes for their clients. Increasingly, parties in commercial disputes are engaging mediators in attempt to get solutions to disputes before resorting to court processes. The growth of the mediation practice calls for regulation to protect users of the process from professional malpractices and enforce standards and ethics. The regulation ought to include standards and guidelines on the training of mediators, professional regulations on mediation and ethics for mediators, registration of certified mediators, remuneration of the mediators and advocates involved in the process. The regulations should not impede the growth of mediation by creating unnecessary barriers to entry. Currently, there are several unregulated institutions training on mediation. The court annexed mediation is regulated by the Judiciary Mediation Accreditation Committee (MAC) while the Nairobi Center for International Arbitration is a body set up under an Act of Parliament, to among others, put in place policy and legal framework for alternative dispute resolution.*

*The outstanding institutions training on mediation are the Chartered institute of Arbitrators London and Kenya branch, Strathmore University and mediation training institute (MTI) East Africa. The institutions have different curriculum content which makes it difficult to authenticate the quality of the training. Some of the institutions offer the 40-hour mediation training plus assessment of the candidates and while others have no requirement for assessment. The Article submits that time is ripe for regulation and standard setting of mediation as a profession in Kenya.*

### **Key words**

*Mediation, standards, ethics, disputes, mediators, training, regulation*

### **1. Introduction**

A commentator Joseph Grynbaum said, “An ounce of mediation is worth a pound of arbitration and a ton of litigation”.<sup>2</sup> Mediation is one of the most recognized alternative dispute resolution (ADR) methods. The other common ADR methods in Kenya are arbitration, adjudication, conciliation and

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<sup>2</sup> Dispute Resolution Quotes available at [www.adrtoolbox.com](http://www.adrtoolbox.com).

negotiation. Alternative dispute resolution refers to all methods of dispute resolution outside court.

The Article focuses on mediation as an emerging profession in Kenya and is inspired by the personal experiences of the Author as professional mediator with FIDA Kenya and accredited under the court mandated mediation. There is also increased public interest in mediation as a highly preferred alternative dispute resolution method. The article calls for regulation and uniform standards in mediation practice to ensure quality professional service in the country.

### 1.1 Key Definitions

**Mediation** is basically assisted negotiation by neutral third party. “Mediation is a structured dispute settlement process facilitated by a neutral third party who engages in ‘shuttle diplomacy’.”<sup>3</sup> Christopher Moore defines mediation 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.”<sup>4</sup>

Mediation has special universal advantages which make it the most favourable method of dispute resolution regardless of whether the underlying dispute is over domestic relations, employees or other legal disputes by all persons<sup>5</sup>. Philip argues that, these advantages around what he calls the six C’s, being choices, calendar time, cost, confidentiality, control and closure. In mediation the parties involved have choices that don’t exist in litigation such as the place of mediation, date, time and ground rules, as well as selection of the mediator. The confidentiality clause creates confidence in the process and facilitates honest dialogue. The parties may leave the mediation at any time if they are not satisfied

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<sup>3</sup> Brannen, D. (2012). “Why mediation is a preferred method of resolving disputes “. Available at <https://fisherphillips.com>.

<sup>4</sup> Moore, C., (1996). *The Mediation Process: Practical Strategies for Resolving Conflict*. P.15, 2<sup>nd</sup> Edition, San Francisco: Jossey-Bass Publishers.

<sup>5</sup> Phillips, F., (2012). “Why mediation is a preferred method of resolving disputes” Available at <https://www.lexology.com>

with the process. Court cases can take years to be processed through the judicial system encumbered with budgetary limitations on courts and an overwhelming caseload. When parties agree to mediate, they can get their “day in court” much sooner.<sup>6</sup>

**Mediation as a profession:** Mosten cites and adopts the description of the word ‘profession’ by Cheryl Picard (2000) in her work ‘*emergence of mediation as a profession*’ to describe the attributes of a profession to be:- systematic theory, professional authority, sanction of the community, regulative codes of ethics and professional culture”.<sup>7</sup> This article adopts these attributes in discussing mediation as a profession.

## 1.2 Legal framework on mediation in Kenya

There is no statute governing the practice of mediation as a profession in Kenya. What exists are provisions of the law providing for mediation as a dispute resolution mechanism. Article 159 (2) (c) of the Constitution recognizes the application of alternative dispute resolution methods such as reconciliation, mediation, arbitration and traditional justice mechanisms by Judiciary. Articles 112 and 113 of Constitution provides for settlement of disputes through mediation. Article 112 provides that,

*“if one House passes an ordinary Bill concerning counties and the second House rejects the Bill, it shall be referred to a mediation committee appointed under Article 113”.*

Article 113 specifically establishes a mediation committee consisting of equal numbers of members of each house to attempt to develop a version of a Bill that both Houses will pass. The Supreme Court of Kenya in its advisory opinion in the case of *The Speaker of the Senate and another v Attorney General and 4 others*<sup>8</sup>

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<sup>6</sup> Ibid

<sup>7</sup> Mosten,F, (2004). “Institutionalization of Mediation”, in *Family Court Review* Vol.42 No. 2 pages 292-303 Available at <http://onlinelibrary.wiley.com>

<sup>8</sup> (2013) eKLR.

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upheld the provisions of Article 112 and 113 and advised on the need of establishment of the said mediation committee.

The Civil Procedure Act<sup>9</sup> sought to implement Article 159(2) (c) and most important introduced court mandated mediation. Section 2 was amended to add definitions of the words mediation, mediation rules and mediator. Mediation is defined in the Act to mean “an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto. Mediation rules are defined to be the mediation rules made under the Act.<sup>10</sup> Mediator is defined to mean an impartial third party selected to carry out mediation.

Section 59A was introduced to the Act and established the Mediation Accreditation Committee (MAC) and its functions defined to be: determine the criteria for the certification of mediation, propose rules for the certification of mediators, maintain register of qualified mediators, enforce such code of ethics for mediators as may be prescribed, and set up appropriate training programmes for mediators. The code of ethics was included in the 2015 Mediation (Pilot Program) Rules. The MAC meets the attributes of a regulator but its role is restricted to the court mandated mediation.

The Community Land Act of 2016 under section 40 provides for mediation in a dispute relating to community land by the concerned parties. The law provides comprehensive process of mediation in community land and this is commendable as such lands are generally governed by existing customary laws. Mediation also helps to address underlying issues causing the dispute for restoration of relationships in the community which shares resources. The Marriage Act of 2014 introduces mediation for resolution of disputes in Christian marriages and customary marriages.<sup>11</sup> The court may refer the couples to

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<sup>9</sup> Revised edition 2012

<sup>10</sup> Legal Notice No. 197 The mediation (pilot project) Rules, 2015.

<sup>11</sup> Sections 64 and 68 of the Marriage Act No. 4 of 2014.

mediation when a petition for divorce is filed. The Labour Relations Act of 2007, under Section 67 (2), provides that for the purposes of resolving any trade dispute, the conciliator or conciliation committee may - (a) mediate between the parties.

The Nairobi Center for International Arbitration (NCIA) is established pursuant to the Nairobi Centre for International Arbitration Act.<sup>12</sup> It is an Act of Parliament to provide for the establishment of regional center for international commercial arbitration and the Arbitral Court and to provide for mechanisms for alternative dispute resolution and for connected purposes. A close scrutiny of its mandate under Section 5 reveals that the body has a regulatory role to play in mediation being: to develop rules encompassing conciliation and mediation; coordinate and facilitate, in collaboration with other lead agencies and non-State actors, and the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation. Clearly all these are regulatory roles which body is expected to implement.

The Author opines that the NCIA has not lived to its mandate in managing the practice of mediation in Kenya, for besides setting its own mediation rules to govern its mediators, it has neither put in place mediation rules to govern the entire practice nor has it put in the necessary policy framework for mediation practice. It is against this background this article examines the status of mediation practice in Kenya, best practices in the profession and makes a case for regulation and uniform standards.

## **2. Mediation Practice in Kenya**

Is mediation a profession? Addressing this question is important as this article seeks for the regulation of mediation profession in Kenya. Mosten<sup>13</sup> cites the works of Cheryl Picard (2000) '*emergence of mediation as a profession*' and quotes her work as follows, "mediators work is not solely based on scientific knowledge

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<sup>12</sup> No. 26 of 2013 Revised Edition 2015 [2013].

<sup>13</sup> Ibid 6.

or technically specialized skills. Instead their knowledge is largely tacit and their skills potentially available to others. This means that the basis upon which they claim authority to practice is regularly open to challenge.”

Mostem argues that, “mediators are forced to gain credibility by projecting an impression of professionalism they try to foster the impression that they are experts and manage their rapport to build trust with parties”.<sup>14</sup>

Generally speaking, professions in Kenya have statutory regulators that control entry and monitor quality of services offered by members. In return, these professionals enjoy monopoly to practice granted by the law and regulator. For example, only advocates who hold practicing certificates are allowed to practice before the courts. The Law Society of Kenya has the statutory mandate to monitor the practice by advocates.

It is thus debatable whether mediation as practiced in Kenya is a profession. This article treats mediation practice in Kenya as an emerging profession requiring regulation by policy makers to fully evolve into a profession.

### **2.1 Mediation Training institutions in Kenya**

The source of information on the training institutions is informed by personal knowledge of the author as a mediator and information available online. The Chartered Institute of Arbitrators Kenya<sup>15</sup> is the oldest institution in the training of mediators and ADR in general in Kenya. For instance, the author is an alumnus of the institution, holding introductory certificate in mediation and 40 hour mediation training. She is an accredited mediator of the Institute (London and Kenya), having successfully completed the institute’s mediation accreditation assessment. The institute boasts of wealthy experience in mediation training, experienced tutors and holds an international detailed curriculum in mediation training. The mediation training curriculum entails introduction to mediation course, 40 hour mediation training and thereafter assessment by two

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<sup>14</sup> Ibid.

<sup>15</sup> See <https://www.ciarbkenya.org>

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panels. The cost of training and assessment under the institute is very costly but of high quality. The institute's mediation training is focused on commercial disputes. The institution is one among the many branches of the institute whose headquarter office is located in London.

Up and until 2016 the Chartered Institute of Arbitrators Kenya had monopoly in training of mediators. In 2016 and following the implantation of the court mandated mediation onwards other institutions emerged to train on mediation. The most popular is the MTI Mediation Training Institute (I) East Africa<sup>16</sup>. Its website lists its objective to be training in mediation and related areas through open enrolment or customized seminars and workshops. The curriculum and process of certification is not stated. However, advertisement calling for training indicates that it offers 40 hour mediation training. The Institution website does not indicate if the training is focused on a particular area of practice. There is no assessment exam offered. The institute offers low cost training and no assessment hence very popular among lawyers. The Pan Africa Christian university (PAC) offers post graduate certificate in mediation studies. The training entry is limited to persons holding a first degree in a professional area. The training is focused on family mediation as per the website content.<sup>17</sup>

The Strathmore Dispute Resolution Centre is another recent mediation training institute. It is hosted at the Strathmore law school in Strathmore University.<sup>18</sup> The website does not state whether its training is focused on any particular area. There are other small emerging organizations offering mediation training like the Dispute and conflict Resolution International patronized by Justice Lee Muthoga, a veteran in ADR practice.

It is evident there is remarkable growth in the training facilities for mediators. It is notable that these institutions have neither uniform standards for the training programs nor the criteria for certification. There are no defined criteria of

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<sup>16</sup> see <https://www.mtieastafrica.org>

<sup>17</sup> See <https://www.pacuniversity.ac.ke>

<sup>18</sup> see <https://sdrcentre.wordpress.com/>

determining the qualifications of the mediators posing as professionals in the Kenyan market.

## 2.2 Mediation practice in Kenya

### 2.2.1 The Court mandated mediation

This is the most defined practice of mediators in the country and regulated by the Mediation Accreditation Committee (MAC) under the Judiciary. It is established under Section 59A of the Civil Procedure Act and its key role is to accredit mediators for the Judiciary court mandated mediation program. MAC has in place accreditation standards which it uses to accredit the mediators under the judiciary program being: -

*“any person seeking to be accredited as a mediator shall need to comply with the following basic requirements: (a) Possess an undergraduate degree from a University accredited by the Commission for University Education. (b) Be a current member, in good standing of a Professional body. (c) Be Certified as Professional Mediator from established Mediation Training Centres. (d) Attended and completed a mediation course of not less than 40 hours training. (e) Completed at least 3 Mediations”<sup>19</sup>*

According to statistics available at the Judiciary website<sup>20</sup>, as at 18<sup>th</sup> January 2018 MAC has accredited 98 mediators for commercial disputes and 81 for family disputes. The program began in April 2016, hence this is commendable progress.

The Court mandated program has been successful according to statistics contained in *The State of the Judiciary and the Administration of justice Annual Report 2016-2017*. The report indicates that on 4<sup>th</sup> April 2016, the Judiciary initiated a Pilot Program in the Family and Commercial Divisions of the High Court in Milimani on Court Annexed Mediation. During the period under review, 93 matters were concluded through mediation. In summary, the value of matters

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<sup>19</sup> Mediation Accreditation Committee: Mediator Accreditation Standards. Available at <http://kenyalaw.org>

<sup>20</sup> <https://www.judiciary.go.ke>



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with mediation agreements was indicated to be Kshs 566,734,116 and matters were concluded on average of 66 calendar days. This is a positive contribution to the economy of the country.

#### **2.2.2 Private Sector Mediation**

The other notable mediation programme is that by Federation of Women Lawyers in Kenya (FIDA Kenya) in solving family disputes excluding divorce. The program has been in place for decades and their experience greatly informed the setup of the Court Mandated mediation program. The author wrote extensively on the FIDA Kenya mediation program in her article titled, *“Professional mediation in Family Disputes: The Experience of FIDA Kenya”*<sup>21</sup>.

Increasingly, Kenyans, inspired by the success of the court mandated mediation, are approaching mediation in attempt solve their disputes before approaching the courts or arbitration. Lawyers are also including mediation as the first mode of dispute resolute in contract dispute clauses. In 2017, Kenyans were a beneficiary of mediation in solving the dispute by Kenya Medical Practitioners, Pharmacists and Dentists Union with the Government, over collective bargaining agreement which led to 100 days strike by the Doctors early in the year. The case had been in the court for the entire period of strike without a solution. When the dispute was referred to mediation a solution was found in less than 3 weeks and the doctors resumed work.<sup>22</sup>

The foregoing leads to a conclusion that mediation is an emerging profession in Kenya that needs policy guidance or regulation.

### **3. Regulation of Mediation Profession**

There is no Mediation statute in Kenya. However, Section 5(F) of the NCIA Act can be interpreted to mean that the body has a mandate to regulate the ADR practice in Kenya including mediation. Section 5 (F) requires NCIA to “coordinate and facilitate, in collaboration with other lead agencies and non-

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<sup>21</sup> Keli, J., (2017). *Alternative Dispute Resolution Journal, Vol.5 No.2*, CIArb evolving to resolve, Kenya Branch

<sup>22</sup> see <https://www.aljazeera.com>

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State actors, the formulation of national policies, laws and plans of action on alternative dispute resolution and facilitate their implementation, enforcement, continuous review, monitoring and evaluation". The call for regulation is thus supported by this provision of the law which the NCIA is yet to implement as provided.

Research in existing literature indicates that there is no consensus on the regulation of mediation profession. Those against argue that regulation will stifle the growth of the profession which has done fairly well without state intervention. A leading scholar on anti-regulation of mediation Stamato<sup>23</sup> argues that mediation is a complicated process in which individual parties attempt to meet their needs as they see and define them and parties generally come to view their own needs as the process evolves. According to Stamato, mediation outcome depends on whether the parties are acting on their own or through surrogates, the nature of dispute, the context in which the dispute arises, prior history and relations of the parties, the nature and influence of their constituencies, experience of the parties in prior attempts to settle the dispute, and issues of parties' bargaining styles or personality. Against this background, Stamato poses the question, "Do mediators need guidance in managing a process that is complicated by all these elements?" Her answer is in the affirmative, yes mediators need guidance.

However, Stamato says that policy and regulation of mediation profession is not the solution. She argues that the value of self-determination in mediation is the main challenge and opportunity for the mediator. Stamato argues that the trend of government officials determining the standards is problematic to the extent that it is driven by values other than those of mediation. The government is driven by public pressure for low cost training and efficient solutions which compete with quality practice. Stamato also argues that regulation of mediation practice would limit access to mediation profession by legal and other

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<sup>23</sup> Stamato, L. (1994). "Easier said than Done: Resolving Ethical Dilemmas in Policy and Practice" *Journal of Dispute Resolution* Volume (1994) Issue 1 Article 18 Available at <https://scholarship.law.missouri.edu>

gatekeepers. Positively, she suggests that policy makers should require rigorous training for mediators to be eligible to practice both initially and continuously to maintain standards, and that policy makers should enforce voluntary participatory character of the mediation process in the programs they create. In Stamato's opinion, the state responsibilities in policing mediation should include program design (curriculum) support and evaluation consistent with philosophical underpinnings of mediation. The substantive training and practice component of mediation should rest with the profession and individual mediators and not policy makers.

This article is very relevant to this paper as it gives a thorough critique of regulation of mediation profession in a holistic manner. The pro-regulation arguments are to the effect that time is ripe for regulation of the mediation profession by setting uniform standards for training and certification and the enforcement of the code of ethics. There is increased number of training institutions on mediation and certification without uniform standards. The quality of these certified mediators is uncertain posing a risk of quacks in the market. It is thus in public interest to have a statutory body to set uniform standards for the training and certification of mediators and to monitor compliance with the code of ethics and receive any malpractice complains from the consumers of the process.

In his article titled "Promoting professionalism in ADR practice"<sup>24</sup>, Karori notes that NCIA should discharge its mandate under section 5(m) of the NCIA Act. However, before embarking on the task of training, the Centre must confront the following key issues: who will undertake the task of training?; Whether there is a sufficient number of trainers in Kenya who can undertake training of ADR practitioners; and, who will determine the curricula including the setting and marking of requisite exams."<sup>25</sup>

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<sup>24</sup> Karori, K., (2015). "Promoting professionalism in ADR practice". *Alternative Dispute Resolution Vol.3 No.1*. Chartered institute of arbitrators Kenya

<sup>25</sup> Ibid

Karori suggests that NCIA can liaise with regional and international institutions such as the Chartered Institute of Arbitrators Kenya to secure technical assistance to enable it carry out its mandate of training. The author notes that since Karori wrote his article there has emerged other institutions carrying out training on mediation besides the Chartered Institute of Arbitrators, Kenya.

This article takes the position that that NCIA is still in its infant stages in implementing its mandate. The article by Karori gives insights on what NCIA can do to regulate the training and development of the profession, though he addresses alternative dispute resolution practice in general. However, it should be noted that the training curricula should accommodate non-lawyers by being simple and non-legalistic:

*“The training of ADR practitioners should be focused towards ensuring that they have the necessary expertise and skills to resolve disputes. The training should combine elements of theory and law with skill training and development. .... Another aspect of training is requiring ADR practitioners to take part in continuous professional development programs. The goal of such programs would be to train and keep the practitioners informed in the latest developments in practice as well as best practices. After building sufficient capacity the NCIA must create a database of ADR practitioners based on their areas of practice or experience. It must also create a system of evaluation where ADR practitioners have an opportunity to evaluate each other and for the parties to comment (in confidence) on arrears of improvement”.*<sup>26</sup>

Lastly, Karori argues that ADR should be professionalized and become a full time profession. This will go a long way in ensuring consistency in what consumers expect from ADR service providers. Karori calls on NCIA to develop a code of practice and set the standards expected of the practitioners which standards can be expressed as codes, Models or best practices. He notes that at minimum, the code should address counselling of clients about the various

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<sup>26</sup> Ibid page 124.

options of dispute resolution, confidentiality of mediation, conflict of interest and compliance with the process outcome.

The paper by Karori supports this article position in calling for standards for training and certification of mediators as well as code of ethics to regulate conduct of mediators in the market.

#### **4. Best and Model Practice in Mediation**

The mediation profession in Kenya is in its infancy stages compared to other jurisdictions like the United States of America. It is therefore important to borrow from the experienced jurisdiction with established mediation standards. The author focused on the United States of America which has uniform law on mediation and model standards for family and divorce mediation. On the 19<sup>th</sup> February 2001, upon the recommendation of both the Family Law and Dispute Resolution Section, the American Bar Association's (ABA) House of Delegates adopted the 'model standards of practice for family and divorce mediation'.<sup>27</sup> Schephard, who was the reporter for the House Committee, argues that the aim of the standards is to promote public confidence in an evolving interdisciplinary profession by defining good mediation practice:

*"The Model standards signify that the family mediation profession accepts the responsibility of conducting high quality practice that meets the special needs of the participants and children involved in family and divorce disputes. Important legal rights such as child custody, child support, and property distribution are affected by agreements reached in mediation. The context of family disputes can include domestic violence, child abuse, participant incapacity due to mental illness or substance abuse, cultural differences between family members and between participants and mediator. The model standards provide mediation practitioners with the generally agreed upon and recommended approaches to performing their roles in these challenging circumstances."*<sup>28</sup>

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<sup>27</sup> Schepherd, A. (2001). "An Introduction to the Model Standards of Practice for Family and Divorce Mediation". 35 FAM.L.Q.1. Available at [HTTPS://scholarlycommons.law.hofstra.edu](https://scholarlycommons.law.hofstra.edu)

<sup>28</sup> Ibid.

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The author finds these model standards adopted by ABA to be very relevant to the Kenyan market as they apply to all mediation practitioners not necessary those with legal background. Further, they address key legal issues pertinent to family disputes which persons without legal background may lack knowledge about to the detriment of the participants and especially the vulnerable parties like abused women and children.

The model standards consist of thirteen principles followed by specific practice considerations in implementing each principle. According to Schepherd, “the model standards are designed to provide guidance to family disputes and divorce mediators on the problems they may encounter in their day to day practice and for training current and future mediators. They are also designed to help the public and allied professionals in the courts, law offices, therapy centers and community groups define what they and their clients expect from the mediators. They apply to all mediators – lawyers and therapists alike –regardless of the mediators’ profession of origin”.<sup>29</sup>

It is highly recommended that Kenya borrows these model standards in family mediation with modification more so to guide non-lawyer mediators on important legal issues meant to protect the vulnerable in the process.

The NCIA Act Section 5 (F) envisages the passing of a law on ADR which would include mediation. The United States of America provides precedent. The passage of the Uniform Mediation Act (UMA) in 2001 by the Commission of Uniform State Law marked a watershed in the national institutionalization of mediation.<sup>30</sup> According to Mosten this model law deals with issues such as definition of mediation, affirmation that mediators need not be lawyers and addresses extensive confidentiality provisos. Mosten reports that several States such as Nebraska and Illinois have adopted and passed their version of UMA and is likely to be adopted by other states. The UMA was adopted with collaboration of the ABA.

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid 6.

According to Mosten, the law provides uniformity for organizations training and certifying mediators and that the uniformity should provide increased predictability and confidence in the mediation process leading to greater acceptance. The author hopes the discussed best practices will help policy makers create necessary instruments to guide mediation practice/ profession in Kenya.

## **5. Conclusion and Recommendations**

The article has extensively examined mediation profession practice and regulation with special focus to Kenya. It has emerged from the study that there is urgent need for uniform standards in training and certification of the mediators in Kenya. It is also evident that mediation as a profession in Kenya has gained immense growth since 2016 when the court mandated mediation pilot project kicked off and time is ripe to put in place relevant policy and legal framework to guide the mediation training institutions and mediation practitioners.

The study established that there is strong opposition globally to strict regulation by the state of the mediation profession. The profession is fairly young in Kenya hence limited literature on the topic. What was not disputed was the fact that mediation is a young profession globally that does require uniform standards which must be consistent with the philosophical underpinnings of mediation. Further it was found that mediation institutions have been issuing certificates to mediators as a symbol of competence. Consequently, it becomes important to have uniform standards not only for the training of mediators but also the certification. The study found out that the various institutions offering mediation training and certification to mediators are not guided by uniform standards creating uncertainty on the competence of the mediators in the market.

Mediation profession in Kenya is growing at a fast rate without any basis structures to guide the players. This papers calls for limited regulation in terms of guidelines and standards by the state to protect the consumers of the process and ensure professionalism in mediation.

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The increased growth of mediation training institutes is an indicator that there is demand for mediation services in the country. The study makes the following recommendations towards regulation of mediation profession in Kenya: - The Law Society of Kenya needs to take a front row in coming up with the policy and legal framework and uniform standards as well as model standards to guide the mediation practice. The organization should be inspired by the role of American Bar Association in formulating the model standards for family and divorce mediation and the Uniform Mediation Act.

The NCIA ought to take urgent steps to put in place uniform standards for training and certification of mediators as per its statutory mandate and in consultation with stakeholders in the mediation profession and especially the mediation training institutions.

The NCIA should come up with guidelines for accrediting institutions to train mediators. This is necessary to ensure that these institutions have the necessary capacity for quality training. NCIA should come up with professional code of ethics for mediators which should be a compulsory subject in the training of mediators. This should also include a complaint mechanism in event any party is aggrieved by the conduct of a mediator. The fact that mediation profession is interdisciplinary cannot be overemphasized to ensure that any set uniform standards do not impede entry into the profession by non-lawyers or create unnecessary entry barriers based on advanced education.

The NCIA in consultation with the mediation training institutions and the Law Society of Kenya should come up with a mediation bill to regulate the profession in the country. Lastly, the growth of mediation practice in Kenya has happened largely without state intervention, and consequently, policy makers should be wary of creating barriers in state interest. Any policy and legal framework put in place should be consistent with the philosophical underpinnings of mediation



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## **Taxonomy of the Public Policy Defence in the Recognition and Enforcement of Arbitral Awards**

*By: Allan A. Abwunza\**

### ***Abstract***

*The public policy defence against the recognition and enforcement of arbitral awards remains an active subject in the majority of the cases submitted in court. Based on qualitative content analysis of 42 court rulings, the researcher sought to establish trends in the development of the public policy in Kenya. Results show that there was a clear distinction between cases with defences rooted in the Constitution and the law, and general defences. Findings also suggest that the public policy leans more towards the finality of arbitral awards that conform to the Constitution and the law, providing a trend towards an accepted national definition and scope of public policy in the process of recognising and enforcing arbitral awards. Additionally, cases with public policy defences rooted in the Constitution and the law had a higher chance of being voided than cases with general defences. Finally, defences rooted in the Constitution had a lower chance of being voided than similar defences rooted in statutes and regulations. Recommendations have been provided on how training institutions can develop skills that minimise chances of overturning awards based on public policy defences, increase the chances of success where merited and how they can assist the courts in scoping the definition of the national public policy.*

### **1. Introduction**

The concept of public policy remains one of the most widely cited defences against the recognition and enforcement of arbitral awards. Yet, it is so wide in scope that a party seeking to rely on it must fully understand the extent to which it affects the award in question. The main challenge faced by most parties seeking to rely on this principle is a clear understanding of the meaning of the concept so that the parties can classify their cases into the appropriate categories

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with a view of preventing the haphazard application of the doctrine. These categories also help in understanding the necessity of court intervention. While several attempts have been made to categorise outcomes of the various cases of public policy challenges, these attempts have not been systematically tested in the context of public policy outcomes arising from arbitral cases.<sup>1</sup> In this paper, the researcher presents a taxonomy of public policy outcomes as established in arbitral cases arising from the court system in Kenya. The taxonomy classifies arbitration cases based on the sources of the public policy defences in the process of recognising and enforcing arbitral awards, and analyses these cases to establish the degree of success of each category.

The evolution of the public policy doctrine and how it affects the effectiveness of arbitration since the promulgation of the new Constitution in 2010 is a phenomenon that can be investigated by considering arbitration cases that have been challenged, successfully or otherwise, based on such public policy grounds. Article 159(2c) of the 2010 Constitution of Kenya encourages the use of alternative dispute resolution.<sup>2</sup> Additionally, Section 10 of the Arbitration Act limits court intervention only to matters governed by the Act.<sup>3</sup> Further, under Article 10(1) of the Constitution, all decision-making organs, officers and persons are bound by the national values and principles of governance in their course of applying or interpreting the Constitution; enacting, applying or interpreting any law; or making or applying any public policy decisions.<sup>4</sup> Thus, an understanding of the public policy decisions emanating from the courts shall help in deciphering

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<sup>1</sup> David Adam Friedman, "Bringing Order to Contracts Against Public Policy," *Florida State University Law Review* 39 (2011), accessed 11 June 2018, <https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1026&context=lr>; Henry Drummonds, "The Public Policy Exception to Arbitration Award Enforcement: A Path Through the Bramble Bush," *Willamette Law Review* 49 (2012), accessed 30 May 2018, <https://willamette.edu/law/resources/journals/review/pdf/Volume%2049/WLR%2049-1%20Drummonds.pdf>.

<sup>2</sup> Republic of Kenya, *The Constitution of Kenya* (Republic of Kenya: Laws of Kenya, 2010).

<sup>3</sup> Republic of Kenya, *The Arbitration Act*, No. 4 of 1995 vols. (Republic of Kenya: Laws of Kenya, 1995).

<sup>4</sup> Republic of Kenya, "The Constitution of Kenya." *supra* note 2.

to what extent the courts' decisions are supportive of Article 159(2c) with respect to arbitration.

## 2. The Nature of Public Policy

The difficulty most parties seeking to rely on the public policy defence against the recognition and enforcement of arbitral awards rests in its "open-textured nature."<sup>5</sup> This open-textured nature makes public policy an unpredictable concept without any known universal definition.<sup>6</sup> The main factor contributing to this state of affairs is Article V (2b) of the New York Convention.<sup>7</sup> Rather than providing a guiding definition, this Article restricts the concept to the State in which a party seeks award enforcement. This lacuna leaves public policy as "inconsistent, unpredictable and variable."<sup>8</sup> Thus, each country has its own set of public policy principles that may not be applicable to any other country where similar defences are raised.

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<sup>5</sup> Andrew Tweeddale, "Enforcing Arbitration Awards Contrary to Public Policy in England," *International Construction Law Review* 2000 (2000): 159, accessed 21 May 2018, <http://corbett.co.uk/wp-content/uploads/Enforcing-Arbitration-Awards-Contrary-to-Public-Policy-in-England.pdf>.

<sup>6</sup> Farshad Ghodoosi, "The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements," *Nebraska Law Review* 94, no. 3 (2016): 698, <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2833&context=nlr>; Tony Marks and Julio César Betancourt, "Rethinking Public Policy and Alternative Dispute Resolution: Negotiability, Mediability and Arbitrability," *Arbitration* 78, no. 1 (2012), [http://www.ciarb.org/docs/default-source/all-publications/the-journal/vol78/no-1/arb2012\\_vol78no1february005.pdf](http://www.ciarb.org/docs/default-source/all-publications/the-journal/vol78/no-1/arb2012_vol78no1february005.pdf); David M Glanstein, "A Hail Mary Pass: Public Policy Review of Arbitration Awards," *Ohio State Journal of Dispute Resolution* 16, no. 2 (2001), accessed 21 May 2018, [https://kb.osu.edu/dspace/bitstream/handle/1811/80084/1/OSJDR\\_V16N2\\_297.pdf](https://kb.osu.edu/dspace/bitstream/handle/1811/80084/1/OSJDR_V16N2_297.pdf).

<sup>7</sup> UNCITRAL, *Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New 1958)* (United Nations, 2015), accessed 10 March 2015, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>8</sup> Saber Habibisavadkouhi and Sadegh Habibisavadkouhi, "The Position and Problem of Public Policy in Indian Arbitration and Conciliation Act 1996," *Research Journal of Recent Sciences* 3, no. 12 (2014): 92, accessed 21 May 2018, [www.isca.in/rjrs/archive/v3/i12/14.ISCA-RJRS-2013-1047.pdf](http://www.isca.in/rjrs/archive/v3/i12/14.ISCA-RJRS-2013-1047.pdf).

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The dynamic nature of the public policy defence lends the concept to varied definitions. For instance, public policy has been variously defined as “the set of socio-cultural, legal, political and economic values and principles that are deemed so essential that no deviation therefrom can be tolerated,”<sup>9</sup> and “[a] principle of judicial legislation or interpretation founded on the current needs of the community.”<sup>10</sup> Violation of these principles constitutes what is deemed to be against or contrary to public policy. Such violations include acts that are illegal, “injurious to the public good”<sup>11</sup> and “wholly offensive to the ordinary reasonable and fully informed member of the public”<sup>12</sup> and “situations where private legal acts become unenforceable.”<sup>13</sup> Hence, an award that is against public policy is of no effect.

### 3. Definition of Public Policy in Kenya

Due to the fluid nature of the public policy defence, a number of court decisions in Kenya have attempted to develop a local definition of the term. One of the most cited cases is *Christ for All Nations v Apollo Insurance Co. Limited*.<sup>14</sup> In this case, Justice Ringera defined violations of public policy to include acts that are “(a) inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality.” Justice Ringera expanded acts that are inimical to the national interest of Kenya to include “the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya.” He further expanded acts that are contrary to justice or

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<sup>9</sup> Samaa A.F. Haridi and Mohamed S. Abdel Wahab, "Public Policy: Can the Unruly Horse be Tamed?," *Arbitration* 83, no. 1 (2017): 36, accessed 21 May 2018, [http://www.ciarb.org/docs/default-source/all-publications/the-journal/vol83/no-1/2017\\_83\\_arbitration\\_issue\\_1\\_print\\_final\\_7.pdf](http://www.ciarb.org/docs/default-source/all-publications/the-journal/vol83/no-1/2017_83_arbitration_issue_1_print_final_7.pdf).

<sup>10</sup> Percy H. Winfield, "Public Policy in the English Common Law," *Harvard Law Review* 42, no. 1 (1928): 92, accessed 30 May 2018, <http://dx.doi.org/10.2307/1330010>.

<sup>11</sup> *Deutsche Schachtbau-und Tiefbohrergesellschaft mbh v Ras Al Khaimah National Oil Company*, 2 *Lloyd's Rep.* (1987).

<sup>12</sup> *Ibid.*, 246; *Egerton v Brownlow*, 10 *Eng. Rep. (H.L.)* (1853), 437.

<sup>13</sup> Ghodoosi, 700. *supra* note 6.

<sup>14</sup> *Christ for All Nations v Apollo Insurance Co. Limited*, 2 *EA* 366 (2002).

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morality to include “considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals.” This latter clarification is also anchored in Section 35(2)(a)(vi) of the Arbitration Act,<sup>15</sup> which, however, requires the applicant seeking to challenge an award to furnish proof that “the making of the award was induced or affected by fraud, bribery, undue influence or corruption.” However, due to the difficulty in providing such proof, most of the parties seeking to rely on allegations of such fraud, bribery, undue influence or corruption prefer to leave the matter to the court’s discretion to establish the extent to which the award contravenes public policy under Section 35(2)(b)(ii) of the Act.<sup>16</sup>

Other definitions have been developed subsequent to *Christ for All Nations v Apollo Insurance Co. Limited*. For instance, in *Glencore Grain Ltd v TSS Grain Millers Ltd*,<sup>17</sup> violation of public policy was defined as an act that is “immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society.” In *Rwama Farmers Co-operative Society Limited v Thika Coffee Mills Limited*,<sup>18</sup> such violation was defined as that which is “injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society.” These definitions suggest that an award must not only carry all the trappings of legality but also be morally just. But it is the definition in *Evangelical Mission for Africa & another v Kimani Gachuhi & another*,<sup>19</sup> that can present the stiffest challenge to most of the awards arising from arbitration. In this case, an award that is contrary to public policy was defined as an award which is “devoid of justice, and cannot be explained in any rational manner.”<sup>20</sup> Hence there is a need for arbitrators to

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<sup>15</sup> Republic of Kenya, "The Arbitration Act." supra note 3.

<sup>16</sup> Ibid.

<sup>17</sup> *Glencore Grain Ltd v TSS Grain Millers Ltd.*, 1 KLR 606 (2002).

<sup>18</sup> *Rwama Farmers Co-Operative Society Limited v Thika Coffee Mills Limited*, vol. Civil Case 836 of 2003, eKLR (2012).

<sup>19</sup> *Evangelical Mission for Africa & another v Kimani Gachuhi & another*, vol. Misc Civil Application 479 of 2014, eKLR (High Court at Nairobi, 2015).

<sup>20</sup> Ibid.

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strike a proper balance between the evidence presented before them and the final award. In other words, the final award must be capable of being explained based on the evidence adduced.

### 4. Previous Research

Previous researchers have attempted to categorise public policy case outcomes based on various criteria. The first criterion is based on the role of public policy. This criterion classifies public policy into three categories: (a) public interest, which tries to strike a balance between private and public arrangements; (b) public morality, which attempts to safeguard the ties and mutual identities between citizens that shape and maintain societal life; and (c) public security, which aims to protect citizens from external aggression.<sup>21</sup> Ghodoosi calls for greater court intervention in cases involving public morality and public security than in public interest cases. Under this taxonomy, Ghodoosi argues that the three categories aim at protecting parties, third parties and redistributive justice.<sup>22</sup> In Kenya, such roles include “safeguarding the public good, upholding justice and morality and preserving the deep-rooted interest of a given society.”<sup>23</sup>

The second criterion is based on the source of public policy. This criterion classifies public policy into two categories: (a) statutory sources, which is rooted in the objectives of the statutes as contained in their preambles and (b) judicial sources, which emanates from court decisions.<sup>24</sup> The multitude of statutes with varying objectives essentially makes it impossible to develop a universal public policy. Consequently, judicial interpretations of these statutes routinely result in conflicting outcomes.<sup>25</sup> The end result is a public policy that can be as inconsistent as the number of statutes and judicial decisions.

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<sup>21</sup> Ghodoosi, 689. *supra* note 6.

<sup>22</sup> *Ibid.*, 713-17.

<sup>23</sup> *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited*, vol. Misc. Application No. 158 of 2016, *eKLR* (High Court at Nairobi, 2017).

<sup>24</sup> Ghodoosi, 704-05.

<sup>25</sup> *Ibid.*, 706.

Relying on the source of public policy to categorise and establish the success rate of the various court decisions based on a sample of 103 cases in the United States, Friedman<sup>26</sup> established that 48 percent of the cases invoked statute or regulation, 48 percent were general while the rest were a hybrid of both. Content analysis established that 45 percent of the cases were successfully voided on public policy grounds. Additionally, 59 percent of the cases involving contravention of statute or regulation were successfully challenged. Further, 31 percent of the general public policy defences succeeded. While the study excluded cases involving arbitration, Friedman concluded that judges exercised stronger discretion on general public policy defences than in defences supported by statute or regulation. Friedman's taxonomy provides a useful framework upon which classification of public policy defences can be applied transnationally, because of the existence of statutes or regulations upon which such defences are anchored.

## 5. Methodology

In this study, a case study research design was employed because of the qualitative nature of the research question: qualitative because it involved the collection of data in form of words, rather than numbers.<sup>27</sup> A case study "investigates a contemporary phenomenon...in depth and in its real-world context,"<sup>28</sup> the real world context of which must be bounded.<sup>29</sup> In this research, the public policy defence as a phenomenon was investigated as it naturally manifests itself in the outcomes of the court challenges to the recognition and enforcement of arbitral awards in Kenya.

Arbitration cases were considered because of the researcher's interest and professional experience in the subject matter. However, only cases decided since

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<sup>26</sup> Friedman. *supra* note 1.

<sup>27</sup> Alan Bryman, *Social Research Methods*, 5th ed. (Oxford: Oxford University Press, 2016), 38; See also John W. Creswell, *Qualitative Inquiry and Research Design: Choosing among five approaches*, 4th ed. (Thousand Oaks, CA: Sage Publications, Inc, 2018), 51.

<sup>28</sup> Robert K Yin, *Case Study Research and Applications: Design and Methods*, 6th ed. (Thousand Oaks, CA: SAGE Publications, Inc., 2018), 15.

<sup>29</sup> Creswell, 96. *supra* note 27.



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27 August 2010 were considered to establish the extent to which court decisions on public policy have been supportive of Article 159(2c) of the Constitution.<sup>30</sup> Thus the content of court decisions was analysed to establish how the courts have been making decisions on public policy defences against the recognition and enforcement of arbitral awards in Kenya. Such qualitative content analysis was crucial to the process of identifying the various categories of public policy defences, the frequency of occurrence of each category and the success rate.<sup>31</sup>

The process of identifying candidate cases involved searching in the database of cases reported by the National Council for Law Reporting (Kenya Law). An advanced search conducted on its website *www.kenyalaw.org* on 10 May 2018 revealed a total of 1702 rulings containing the phrase “public policy.” Out of all these cases, 134 cases were handled by the High Court at Nairobi (Milimani Commercial Courts: Commercial and Tax Division). Cases handled by this court were considered because of the specialised nature of the court in handling commercial disputes, including matters referred to arbitration, arising from arbitration or to be referred to arbitration. However, these 134 rulings included seven multiple postings of some of the cases. Thus, the database contained 127 valid candidate cases for further analysis. This process involved purposeful selection of cases that were likely to best address the research question.<sup>32</sup>

The content of the 127 rulings was further analysed by searching each ruling for the presence of the word “arbitration.” Through this search, 54 rulings were identified, distributed as shown in Table 1 below. The table reveals that majority of the rulings (85 percent) involved recognition and enforcement of arbitral awards. However, the search also revealed that twelve of these rulings merely quoted the phrase “public policy” as contained in Section 35(2)(b)(ii) of the

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<sup>30</sup> Republic of Kenya, "The Constitution of Kenya." supra note 2.

<sup>31</sup> David Silverman, *Interpreting qualitative data*, 5th ed. (Thousand Oaks, CA: SAGE Publications Ltd, 2014), 109.

<sup>32</sup> Joseph A Maxwell, *Qualitative research design: An interactive approach*, 3rd ed. (Thousand Oaks, CA: Sage Publications, Inc, 2013), 99; Creswell, 147. supra note 27.

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Arbitration Act.<sup>33</sup> These rulings were excluded because the subject matter of the rulings was not anchored in public policy. Consequently, 42 cases that were relevant to this study were identified, the majority of which (95 percent) involved the recognition and enforcement of arbitral awards.

**Table 1: Nature of rulings involving arbitration matters**

S.No.	Nature of the ruling	Number of rulings	Rulings anchored on public policy
1	Arbitrator appointment	1	0
2	Recognition and enforcement	46	40
3	Leave to appeal	1	1
4	Execution or stay of execution	3	1
5	Constitution of a bench	1	0
6	Injunctions	1	0
7	Striking out legal proceedings	1	0
<b>Total</b>		<b>54</b>	<b>42</b>

### 6. Categories of Public Policy Decisions

The content of the 42 rulings was then analysed to establish patterns in the categories of public policy based on a modified taxonomy as advanced by Ghodhoosi.<sup>34</sup> Table 2 below summarises the various categories of these cases, the approaches used by the parties in raising their public policy defences and the case outcomes. Results from the table show that more than half of the rulings (60 percent) involved defences rooted in the Constitution, statute and regulation while the rest were general defences.

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<sup>33</sup> Republic of Kenya, "The Arbitration Act." supra note 3.

<sup>34</sup> Ghodoosi. supra note 6.

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**Table 2: Categories, approaches and outcomes of public policy arbitral decisions**

S.No.	Category	Number of cases	Parties' approach		Outcome	
			Pleaded	Not pleaded	Successful	Unsuccessful
1	Constitution, statute or regulation based	25	24	1	7	17
2	General	17	14	3	2	15
<b>Total</b>		<b>42</b>	<b>38</b>	<b>4</b>	<b>9</b>	<b>32</b>

The content of each case was qualitatively analysed to establish whether the issue of public policy was raised by either party or it was exercised under the discretion of the court as contemplated under Section 35(2)(b)(ii) of the Arbitration Act.<sup>35</sup> In the majority of the rulings (90 percent), the parties exercised their right to plead their public policy defence instead of leaving the matter to the court's discretion. These pleadings were rooted in the Constitution, statute, regulation or a combination of these. It is instructive to note that majority of the cases where parties did not plead involved general arguments on public policy. The court exercised its discretion under this category of cases.

Generally, public policy defences were successfully argued in only nine out of the 42 cases (21 percent). Out of these nine, seven were anchored in the Constitution, statute and regulation while the remaining two were general arguments. The 32 unsuccessful cases were relatively balanced between those involving defences rooted in the Constitution, statute and regulation (53 percent) and general defences (47 percent). This finding suggests that public policy arguments have a slightly higher chance of succeeding when properly rooted in the Constitution, statute and regulation than when generalised.

There were no details of the arbitrators who handled two of the nine cases that were successfully challenged, one of which was an international arbitration

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<sup>35</sup> Republic of Kenya, "The Arbitration Act." supra note 3.

handled by the International Chamber of Commerce, the other a domestic arbitration. The remaining seven cases were handled by members of the Chartered Institute of Arbitrators, including one Chartered Arbitrator, three Fellows and three Members. Although the Chartered Institute of Arbitrators has recently restructured its curriculum, arbitrators who handled these cases were trained based on the old pathways that consisted of four modules. Under this old pathway, a candidate ought to have successfully completed Modules 1 and 2 to qualify as a Member.<sup>36</sup> Members wishing to upgrade to Fellowship must have successfully completed Modules 3 and 4 and a peer interview<sup>37</sup> while Fellows intending to become Chartered Arbitrators must pass a Chartered Arbitrators interview.<sup>38</sup> Module 2 requires candidates to have grasped the requirements for an enforceable award while Module 4 trains candidates on writing a final award. Thus, Members must demonstrate an understanding of the statutory requirements for an enforceable award while Fellows must demonstrate the ability to write a final award.

### **6.1 Arguments Rooted in the Constitution, Statute and Regulation**

Ten cases included defences anchored in the Constitution. Although the cases also cited other statutory provisions of the law, such arguments were navigated in the context of the Constitution. Constitutional defences in nine of these cases were based on Articles 2, 10(2), 25(2), 40, 50, 159(2a), 159(3), 164, 165(6) and 201(e) while one was a general Constitutional argument. The analysis revealed that the general Constitutional argument was dismissed.<sup>39</sup> This dismissal suggests that

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<sup>36</sup> Chartered Institute of Arbitrators, "Join as a Member," Chartered Institute of Arbitrators, accessed 15 August 2018. <http://www.ciarb.org/membership/how-to-join/join-as-a-member>.

<sup>37</sup> Chartered Institute of Arbitrators, "Upgrade to Fellow," Chartered Institute of Arbitrators, accessed 15 August 2018. <http://www.ciarb.org/membership/how-to-join/upgrade-to-fellow>.

<sup>38</sup> Chartered Institute of Arbitrators, "Chartered Arbitrator," Chartered Institute of Arbitrators, accessed 15 August 2018. <http://www.ciarb.org/membership/how-to-join/upgrade-to-chartered-arbitrator>.

<sup>39</sup> *T K M Maestro Limited v Kenya Railways Corporation*, vol. Miscellaneous Suit 512 of 2016, eKLR (High Court at Nairobi, 2017).

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the court was not prepared to entertain vague constitutional arguments intended to overturn arbitral awards.

Seven cases with defences rooted in the Constitution, statute and regulation were successful (28 percent), while only one of the ten cases that pleaded specific Articles of the Constitution (10 percent) succeeded.<sup>40</sup> In this particular case, the Claimant relied on Articles 10 and 165 of the Constitution.<sup>41</sup> Article 165 bestows on the High Court “supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function...”<sup>42</sup> In essence, the Claimant called upon the High Court to intervene in the arbitration by setting aside the award because, in the process of performing his quasi-judicial function, the arbitrator did not observe national values and principles of governance. While the case did not report on which particular values and principles were violated, it can be inferred that the case was anchored on inequity and social injustice that the Claimant was likely to suffer if the award was enforced.

Indeed, in Paragraph 37 of the ruling, Justice E.K.O. Ogola observed that “the process of arbitration, because it is so insulated from outside interference, must also deliver justice. Where the process cannot be faulted, yet the Award is *prima facie* unjust, this court’s hands cannot be tied. Injustice has no place in the corridors of justice.”<sup>43</sup> In setting aside the award, the Judge noted that “A decision which, on the face of the record, is so devoid of justice, and cannot be explained in any rational manner, can only be set aside on account of failure to satisfy public policy consideration.”<sup>44</sup> Thus, the Claimant succeeded in convincing the court to set aside the award for violating the Constitution.

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<sup>40</sup> "Evangelical Mission for Africa & another v Kimani Gachuhi & another." supra note 19.

<sup>41</sup> Republic of Kenya, "The Constitution of Kenya." supra note 2.

<sup>42</sup> Ibid. Article 165(6).

<sup>43</sup> "Evangelical Mission for Africa & another v Kimani Gachuhi & another." supra note 19.

<sup>44</sup> Ibid.

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The remaining nine Constitutional defences were dismissed. Three of these cases cited Article 50 of the Constitution while two cases cited Article 159(3).<sup>45</sup> Article 50 underscores the importance of fair hearing by stating that "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."<sup>46</sup> Other public policy arguments against the recognition and enforcement of the awards included an error of law;<sup>47</sup> overlooking Section 25(4) of the Arbitration Act and Article 50 of the Constitution<sup>48</sup> and being condemned unheard.<sup>49</sup> Public policy arguments for the remaining five cases were based on the applicant's right to appeal against arbitral awards under Articles 2 and 164 of the Constitution;<sup>50</sup> the principle of delivering justice to all irrespective of status;<sup>51</sup> unjust enrichment in contravention of Article 201(e) of the Constitution on responsible financial management and clear fiscal reporting<sup>52</sup> and being inconsistent with the Constitution and the law, contrary to Article 159(3).<sup>53</sup> In these cases, the courts' decisions aligned with the principle of finality by declining to intervene in applications to set aside the arbitral awards.

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<sup>45</sup> *Justus Nyang'aya v Ivory Consult Limited*, vol. Miscellaneous Civil Application 504 of 2013, *eKLR* (High Court at Nairobi, 2015); See also *EPCO Builders v Kenya Bureau of Standards*, vol. Misc. Cause No. 470 of 2016, *eKLR* (High Court at Nairobi, 2017); "Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited." *supra* note 23.

<sup>46</sup> Republic of Kenya, "The Constitution of Kenya." Article 50(1). *supra* note 2.

<sup>47</sup> "Justus Nyang'aya v Ivory Consult Limited." *supra* note 45.

<sup>48</sup> "EPCO Builders v Kenya Bureau of Standards." *supra* note 45. Republic of Kenya, "The Arbitration Act." *supra* note 3. Republic of Kenya, "The Constitution of Kenya." *supra* note 2.

<sup>49</sup> "Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited." *supra* note 23.

<sup>50</sup> *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Ltd*, vol. Misc Civil Application 129 of 2014, *eKLR* (High Court at Nairobi, 2015).

<sup>51</sup> *Victoria Furnitures Limited v Zadock Furniture Systems Limited*, vol. Miscellaneous Civil Application 32 of 2016, *eKLR* (High Court at Nairobi, 2017).

<sup>52</sup> *Flambert Holdings Limited v Kenyatta National Hospital*, vol. Miscellaneous 202 of 2016, *eKLR* (High Court at Nairobi, 2016).

<sup>53</sup> *Kiogora Mutai v Chartwell Holdings Limited & Fred N. Ojiambo*, vol. Miscellaneous Cause 566 of 2016, *eKLR* (High Court at Nairobi, 2017); See also *Lucy Njeri Karangu (Personal*

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One of the sticky issues that have dominated debate in arbitration is the question of appeal against court decisions on applications to set aside arbitral awards. Section 39 of the Arbitration Act allows appeals on questions of law arising out of arbitral awards.<sup>54</sup> However, the question in *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Ltd*,<sup>55</sup> revolved around whether a party could appeal against a decision in which the High Court had declined to set aside an arbitral award.<sup>56</sup> In dismissing the application for leave to appeal, the Court appears to have leaned on the principle of finality of arbitral awards.

Fourteen cases anchored their public policy arguments on statutory provisions and regulations. This category included cases that cited various statutory provisions and regulations without making any reference to the Constitution as the Supreme law. The Court was convinced with the public policy defences in five of these cases<sup>57</sup> but dismissed such arguments in eight other cases.<sup>58</sup>

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*Representative of the Estate of Charles Mungai Ngunjiri v Julius Ndungu Kaberere*, vol. Miscellaneous Cause 590 of 2014, *eKLR* (High Court at Nairobi, 2015).

<sup>54</sup> Republic of Kenya, "The Arbitration Act." supra note 3.

<sup>55</sup> "Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Ltd." supra note 50.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Foxtrot Charlie Inc v Afrika Aviation Handlers Limited & Another*, vol. Civil Suit 557 of 2004, *eKLR* (High Court, Nairobi, 2012); *Cape Holdings Limited v Synergy Industrial Credit Limited*, vol. Miscellaneous Civil Application 114 & 126 of 2015 (Consolidated), *eKLR* (High Court at Nairobi, 2016); *Kenya Post Office Savings Bank & another v The Advertising Company Limited & another*, vol. Miscellaneous Civil Suit 350 of 2015, *eKLR* (High Court at Nairobi, 2017); *Centurion Engineers & Builders Ltd v Kenya Bureau of Standards*, vol. Misc Application No. 506 of 2012, *eKLR* (High Court at Nairobi, 2016); *Kenya Agricultural and Livestock Research Organization (formerly Kenya Agricultural Research Institute v Njama Limited*, vol. Civil Suit 514 of 2014, *eKLR* (High Court at Nairobi, 2015).

<sup>58</sup> *Gichohi Macharia & another v Kiai Mbaki & 2 others*, vol. Winding up Cause 1 of 2000, *eKLR* (High Court at Nairobi, 2015); *Julius Ndungu Kaberere v Lucy Njeri Karangu*, vol. Miscellaneous Cause 13 of 2015, *eKLR* (High Court at Nairobi, 2015); *National Oil Corporation of Kenya Limited v Prisko Petroleum Network Limited*, vol. Miscellaneous Civil Case 27 of 2014, *eKLR* (High Court at Nairobi, 2014); *Superior Homes (K) Limited v Joyce Cherotich Sang*, vol. Miscellaneous Civil Application 570 of 2012, *eKLR* (High Court at Nairobi, 2014); *Africa Project Co-ordination Agency v Government of Kenya through The Permanent Secretary, Ministry of Local Government & another*, vol. Civil Case 375 of 2014,

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However, the same Court referred one case to the Employment and Labour Relations Court.<sup>59</sup> Save for the referred case, there were mixed outcomes (36 percent successful) for cases that anchored their arguments in statutory provisions and regulations. This percentage is significantly higher than that of the Constitutional arguments, suggesting that Constitutional arguments required a higher threshold to overturn an arbitral award compared to arguments anchored on statutory provisions and regulations.

In *Provincial Construction Co. Ltd v Attorney General on Behalf of the Ministry of Health*,<sup>60</sup> the respondent did not specifically plead its public policy defence but cited statutory provisions relating Section 4(1)(c) of the Limitation of Actions Act that requires any action for the enforcement of an Arbitral Award to be filed within six years from the date of the Award.<sup>61</sup> Thus the respondent did not place its defence in the context of public policy, leaving it to the court to exercise its discretion. In its ruling, the court agreed with the respondent and declined to enforce an award.

### 6.2 General Arguments

There were seventeen cases (40 percent) involving general public policy arguments, the majority of which (82 percent) were pleaded. Thus the court exercised its discretion in 18 percent of the cases where respondents did not plead. Such discretion dominated cases in which applicants sought recognition

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*eKLR* (High Court at Nairobi, 2016); *Dilshad Sadrudin Mohamed As The Legal Representative Of The Estate Of Sadrudin H. Mohamed (Deceased) v K & A Self Selection Stores Limited & 3 others*, vol. Winding Up Cause 57 of 2001, *eKLR* (High Court at Nairobi, 2014); *Kenya Tea Development Agency Ltd & 7 others v Savings Tea Brokers Limited*, vol. Misc. Civil Application 129 of 2014, *eKLR* (High Court at Nairobi, 2015); *Samow Edin Osman v Rashid Bukura Somo*, vol. Miscellaneous Civil Application 423 of 2015, *eKLR* (High Court at Nairobi, 2016).

<sup>59</sup> *Cmc Aviation Limited & another v Anastassios D. Thomos*, vol. Miscellaneous Application 559 of 2016, *eKLR* (High Court at Nairobi, 2017). This case explains why the number of cases in the last two columns of Table 2 above adds to 41 instead of 42.

<sup>60</sup> *Provincial Construction Co. Ltd v Attorney General on Behalf of the Ministry of Health*, vol. Miscellaneous Cause No. 208 of 2015, *eKLR* (High Court at Nairobi, 2017).

<sup>61</sup> Republic of Kenya, *Limitation of Actions Act*, Cap 22 vols. (Kenya: Laws of Kenya, 1967).



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and enforcement of the award. Overall, public policy defences were successful in only two out of the seventeen cases (12 percent).<sup>62</sup> This percentage is just about half of the successful cases with defences rooted in the Constitution, statute and regulation. These findings indicate that the chance of succeeding when a party rooted its public policy defence in the relevant legislation was about twice higher than when the defendant glossed generally. Equally, navigating public policy defences against the recognition, enforcement and execution of arbitral awards was extremely difficult in cases where such defences were merely generalised.

In *Sunil Sachdev & another v Kitisuru Country Villas Ltd*,<sup>63</sup> the court refused to recognise the award because there was “no subject matter for the Court to enforce.” Once again, the respondent did not place their defences in the context of public policy. Thus the respondent did not directly plead its public policy defence against the enforcement of the award. However, just like in *Provincial Construction Co. Ltd v Attorney General on Behalf of the Ministry of Health*,<sup>64</sup> the court opted to exercise its discretion by considering the extent to which enforcement of the award was inconsistent with the laws of Kenya, as encapsulated in *Christ for all Nations v Apollo Insurance Co. Ltd*.<sup>65</sup>

Only one case in which the general public policy defence was pleaded succeeded, but on grounds other than public policy.<sup>66</sup> In this case, whereas the defendant succeeded in convincing the court to stay the execution of the award, the court stayed such execution because the respondent had “deposited the decretal

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<sup>62</sup> *Sunil Sachdev & another v Kitisuru Country Villas Ltd*, vol. Miscellaneous Civil Application No. 414 of 2015, *eKLR* (High Court at Nairobi, 2016); *Zingo Investments Limited v Kenya Meat Commission*, vol. Civil Suit 20 of 2012 (O.S), *eKLR* (High Court at Nairobi, 2015).

<sup>63</sup> "Sunil Sachdev & another v Kitisuru Country Villas Ltd." supra note 62.

<sup>64</sup> "Provincial Construction Co. Ltd v Attorney General on Behalf of the Ministry of Health." supra note 60.

<sup>65</sup> "Christ for All Nations v Apollo Insurance Co. Limited." supra note 14.

<sup>66</sup> "Zingo Investments Limited v Kenya Meat Commission." supra note 62.

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amount in court.”<sup>67</sup> Thus the defendant did not succeed in its public policy defence which alleged that the arbitrator had applied double standards.

Out of the fourteen cases in which parties pleaded their public policy defences, thirteen (93 percent) were unsuccessful. Some of the reasons dismissed by the courts include the arbitrator failing to apply proper law to the circumstances of the case,<sup>68</sup> delay in delivering the award,<sup>69</sup> tribunal having dealt with a dispute not contemplated by or not falling within the terms of reference and containing decisions on matters beyond the scope of reference,<sup>70</sup> tribunal having used its own evidence,<sup>71</sup> erroneous award,<sup>72</sup> award being contrary to justice and morality,<sup>73</sup> unjust enrichment,<sup>74</sup> unequal treatment of the parties<sup>75</sup> and violation of the law.<sup>76</sup>

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<sup>67</sup> Ibid.

<sup>68</sup> *Mohamed Salim Shamsudin v Trishcon Construction Limited*, vol. Civil Case 200 of 2007, *eKLR* (High Court at Nairobi, 2015).

<sup>69</sup> *Tcat Limited v Joseph Arthur Kibutu*, vol. Miscellaneous 213 of 2014, *eKLR* (High Court at Nairobi, 2015).

<sup>70</sup> *Equity Bank Limited v Adopt a Light Limited*, vol. Miscellaneous Civil Application 435 of 2013, *eKLR* (High Court at Nairobi, 2014).

<sup>71</sup> *Samuel Kamau Muhindi v Blue Shield Insurance Company Ltd*, vol. Miscellaneous Civil Application 166 of 2009, *eKLR* (High Court at Nairobi, 2010).

<sup>72</sup> *Oloolaiser Water And Sewerage Company Limited v Masosa Construction Limited*, vol. Miscellaneous Application 355 of 2014, *eKLR* (High Court at Nairobi, 2015); *Sandhoe Investments Kenya Limited v Seven Twenty Investments Limited*, vol. Miscellaneous Case 373 of 2014, *eKLR* (High Court at Nairobi, 2015).

<sup>73</sup> *Total Kenya Limited v Kenya Pipeline Company Limited*, vol. Misc. Application 17 of 2013, *eKLR* (High Court at Nairobi, 2014).

<sup>74</sup> *Santack Enterprises Limited v Kenya Building Society Limited*, vol. Miscellaneous Application 372 of 2012, *eKLR* (High Court at Nairobi, 2015); *Murithiwanjao (T/A Wanjao & Wanjau; Advocates) v Samuel Mundati Gatabaki & another*, vol. Misc. Civil Suit Application 42 of 2014, *eKLR* (High Court at Nairobi, 2015).

<sup>75</sup> *Airtel Networks Kenya Limited v Nyutu Agrovet Limited*, vol. Miscellaneous Civil Cause 400 of 2011, *eKLR* (High Court at Nairobi, 2011).

<sup>76</sup> *Mall Developers Limited v Postal Corporation Of Kenya*, vol. Misc Civil Appl 26 of 2013, *eKLR* (High Court at Nairobi, 2014).

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Two of the unsuccessful cases contained general defences that were pleaded but not supported. Dismissing the general public policy argument in *Kenya Bureau of Standards v Geo-Chem Middle East*, Justice Fred A. Ochieng held that “it would actually be against the said public policy to have the court sit on an appeal over the decision of the arbitral tribunal,” adding that such public policy “loudly pronounces the intention of giving finality to Arbitral Awards.”<sup>77</sup> In the second case,<sup>78</sup> Justice Havelock declined to set aside the award because the application did not satisfy the public policy criteria outlined in *Christ for All Nations v Apollo Insurance Co. Limited*.<sup>79</sup>

The court also exercised its discretion in two of the four unsuccessful cases in which the general public policy defence was not pleaded. The court opted to vary the award in one case, having determined that the award was “neither contrary to public policy nor against public policy.”<sup>80</sup> The second case was dismissed on public policy grounds because litigating “in instalments” was “inimical to public policy.”<sup>81</sup> This ruling is an important lesson for parties to ensure that they adequately prepare their public policy defences before submitting the same to the courts for determination.

## 7. Discussion

The above analysis reveals a pattern of findings that indicate a trend in the way courts interpret the concept of public policy in the context of the Kenyan law. Articles 159(2c) and 159(3) of the Constitution encourage the use of alternative forms of dispute resolution in a way that does not contravene the Bill of Rights, is not repugnant to justice and morality or results in outcomes that are repugnant

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<sup>77</sup> *Kenya Bureau of Standards v Geo-Chem Middle East*, vol. Miscellaneous Cause 455 of 2016, *eKLR* (High Court at Nairobi, 2017).

<sup>78</sup> *Nyayo Tea Zones Development Corporation v Njuca Consolidated Co. Ltd.*, vol. Miscellaneous Civil Application 711 of 2012, *eKLR* (High Court at Nairobi, 2014).

<sup>79</sup> “*Christ for All Nations v Apollo Insurance Co. Limited.*” *supra* note 14.

<sup>80</sup> *Vakkep Building Contractors Ltd v Trustees of Central Bank of Kenya Pension Fund*, vol. Civil Suit 101 of 2014, *eKLR* (High Court at Nairobi, 2015).

<sup>81</sup> *Dilshad Sadrudin Mohamed v K & A Self Selection Stores Limited & 3 others*, vol. Winding Up Cause 57 of 2001, *eKLR* (High Court at Nairobi, 2017).

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to justice or morality, or inconsistent with the Constitution or any written law.<sup>82</sup> Findings show a general trend that “leans towards the finality of arbitral awards”.<sup>83</sup> Thus courts are not willing to entertain flimsy appeals or public policy defences aimed at reversing arbitral awards beyond the narrow range of reasons encapsulated under Section 35 of the Arbitration Act.<sup>84</sup>

Results of the analysis revealed a consistent pattern in dealing with the cases. For instance, cases with defences rooted in the Constitution, statutes and regulations appear to have had a higher chance of success than cases with general public policy defences. It was, therefore, easier to overturn an arbitral award that appeared to have violated the Constitution and the law than an award that was generally perceived to be unfair. This finding could explain why most of the parties (60 percent) attempted to root their public policy defences in the Constitution and the law rather than glossing over the defence generally. Overall, the aim may have been to increase the chances of securing a successful challenge.

Where parties were not able to demonstrate the extent to which the award violated the Constitution and the law, the court exercised its discretion in establishing whether the award in question was contrary to or against public policy. In such cases, the court required the alleging party to provide evidence of the public policy that the awards had violated. In *Richardson v Mellish*,<sup>85</sup> Justice Burrough described public policy as “a very unruly horse, and...once you get astride it, you never know where it will carry you.” Indeed, the majority of the applications or defences were dismissed due to lack of such evidence. These dismissals demonstrate the unruly nature of the public policy defence where those who got astride found themselves in unknown territories without cogent evidence to adduce.<sup>86</sup> Thus the public policy defence was unavailable where a

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<sup>82</sup> Republic of Kenya, "The Constitution of Kenya." supra note 2.

<sup>83</sup> "Christ for All Nations v Apollo Insurance Co. Limited." supra note 14.

<sup>84</sup> Republic of Kenya, "The Arbitration Act." supra note 3.

<sup>85</sup> *Richardson v. Mellish*, 130 Eng. Rep. 294 (1824), 303.

<sup>86</sup> Friedman, 617. supra note 1.

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party was unable to invoke relevant provisions of the Constitution and/or the law that had been violated.<sup>87</sup>

Although the concept of public policy is dynamic and will develop from time to time as more cases are determined, the trend towards a clearer categorisation of cases appeared to emerge from the court cases. Consistent with findings of earlier studies,<sup>88</sup> there were clear delineations of cases with public policy defences rooted in the Constitution and the law and cases with general defences. Thus, it was possible to classify a case based on its source of public policy defence and use such classification as the basis for determining chances of succeeding.

Additionally, a national definition of public policy appears to emerge from the cases. Given that twenty-three cases (55 percent) were persuaded by the definition of public policy in *Christ for All Nations v Apollo Insurance Co. Limited*,<sup>89</sup> it is evident that a national definition of public policy seems to be developing as anticipated in Article V(2b) of the New York Convention.<sup>90</sup> This definition "leans towards finality of arbitral awards... subject only to the right of challenge within the narrow confines of section 35 of the Arbitration Act."<sup>91</sup> However, such awards must not be (i) inconsistent with the constitution or other laws of Kenya, (ii) inimical to the national interest of Kenya, or (iii) contrary to justice and morality.

Further, courts seem to play a more proactive role in discovering the scope of public policy as determined by the legislature. However, as Ghodoosi<sup>92</sup> argued, some of the outcomes arising from the courts were conflicting. For instance, it was held in *Christ for All Nations v Apollo Insurance Co. Limited*,<sup>93</sup> that:

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> "Christ for All Nations v Apollo Insurance Co. Limited." supra note 14.

<sup>90</sup> UNCITRAL. supra note 7.

<sup>91</sup> "Christ for All Nations v Apollo Insurance Co. Limited." supra note 14.

<sup>92</sup> Ghodoosi. supra note 6.

<sup>93</sup> "Christ for All Nations v Apollo Insurance Co. Limited." supra note 14.

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*"...a court will not interfere with an award of the arbitrator on the question of public policy on the ground that there is an error of law apparent on the face of the record even if the view taken by the Arbitrator does not accord with the view of the court."*

Additionally, in *Flambert Holdings Limited v Kenyatta National Hospital*,<sup>94</sup> the court held:

*"While it may be true that the principles of Public Policy are ever evolving they cannot be so elastic as to cover every occasion a party to an arbitration believes that the Arbitrator reached a wrong decision in law."*

Further, in *Kenya Bureau of Standards v Geo-Chem Middle East*,<sup>95</sup> the court observed as follows:

*"If the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue."*

However, in *Foxtrot Charlie Inc v Afrika Aviation Handlers Limited & Another*,<sup>96</sup> the court held:

*"...this court has jurisdiction to subject the Partial and Final Awards herein to judicial filtration to re-confirm that the awards are consistent with written Kenyan law as well as the country's basic notions of justice and morality. This filtration in my view extends beyond a mere "gloss over" and binds the court to ask itself whether the conclusions reached by the arbitral tribunal would have been consistent with a decision of the court had the same facts of the underlying dispute been placed before the court for determination."*

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<sup>94</sup> "Flambert Holdings Limited v Kenyatta National Hospital." supra note 52.

<sup>95</sup> "Kenya Bureau of Standards v Geo-Chem Middle East." supra note 77.

<sup>96</sup> "Foxtrot Charlie Inc v Afrika Aviation Handlers Limited & Another." supra note 57.

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These contradictions underscore the difficulties parties may have experienced in presenting their arguments in court, and may to a large extent explain why most of the public policy defences failed. Indeed, when faced with arguments supported by conflicting cases, the court appears to have leaned towards the public policy on the finality of arbitral awards as opposed to setting aside the same.

#### **8. Conclusions**

This paper focused on the concept of public policy in relation to the recognition and enforcement of arbitral awards in Kenya. The study relied on the qualitative content analysis of 42 court cases decided in the High Court at Nairobi (Milimani Commercial Courts: Commercial and Tax Division) between 27 August 2010 and 10 May 2018. Findings suggest that the public policy defence in Kenya in the cases considered was either rooted in the Constitution and the law or defended generally. Thus a clear taxonomy of public policy defences was evident.

Generally, it was more difficult to succeed in overturning an arbitral award based on public policy defence. This difficulty suggests that courts are less willing to interfere with arbitral awards, rendering some degree of effectiveness to arbitration as a dispute resolution mechanism. However, public policy defences rooted in the Constitution and the law had a higher chance of success compared to general defences. Further, defences rooted in the Constitution were less successful than defences rooted in statutes and regulations. Thus Constitutional defences required a higher threshold than similar defences anchored in statutes and regulations. The difficulty of presenting general defences may have emboldened the court to exercise its discretion in such cases compared to cases where specific provisions of the Constitution and the law were pleaded. This discretion suggests a dynamic legal environment in which public policy outcomes may keep shifting.

However, based on the cases analysed, a national definition of public policy in Kenya appears to emerge. Consistent with the new Constitution, this definition not only leans towards the finality of arbitral awards, but also recognises that

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such awards must conform to the relevant provisions of the Constitution and the law, and neither inimical to the national interest of Kenya nor contrary to justice and morality. The findings suggest that courts are largely supportive of Article 159 of the Constitution.<sup>97</sup> However, in the process of determining the extent to which the cases conformed to this definition, there were some contradictions in the outcomes, suggesting a shifting policy.

Based on these findings, arbitrators must pay attention to the decisions of the court in relation to the definition of public policy to ensure that their awards are properly aligned. In order to achieve this, institutions specialised in training arbitrators, such as the Chartered Institute of Arbitrators should re-examine their continuous professional development (CPD) curricula with a view of enriching such curricula with content on how to make unquestionable awards. Given that some of the awards that were successfully challenged had been made by Members, Fellows and Chartered Arbitrators suggests a weakness in award writing skills in those respective awards. Training institutions should thus hold regular continuous professional development seminars with a view of imparting knowledge and skills on emerging trends in public policy development in the recognition and enforcement of arbitral awards.

Additionally, considering that majority of the defences were unsuccessful, to increase the chances of succeeding based on the public policy defence, parties and their representatives should in as much as possible root their defences in the relevant provisions of the Constitution and the law, rather than glossing over the defence generally. Through CPD, party representatives should develop relevant skills in preparing successful defences. The Law Society of Kenya and the Chartered Institute of Arbitrators should thus review their CPD content and to a large extent arrange special training sessions on how to prepare successful public policy defences. This approach will not only help parties to avoid unnecessary costs on weak defences but also assist the courts in providing a clear direction on the scope of public policy of Kenya.

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<sup>97</sup> Republic of Kenya, "The Constitution of Kenya." *supra* note 2.



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The findings of this study are limited to the 42 cases drawn from the rulings of the High Court at Nairobi as reported by the National Council for Law Reporting (Kenya Law). Nevertheless, they provide a useful guide of what can be expected from the rulings of other courts in the country, given that Nairobi remains the country's commercial hub. At the same time, the findings are limited to the public policy defence as it applies to the recognition and enforcement of arbitral awards. Further, the findings are limited to the taxonomy of public policy rulings based on the sources on which such rulings are based. Future researchers might consider applying the concept to other aspects of the arbitral process (other than recognition and enforcement), to the role of the public policy and to a higher number of cases encompassing other courts in the country to establish the public policy trends countrywide.

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