

# Alternative Dispute Resolution



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Chartered Institute of Arbitrators, Kenya  
Nicholson Drive, Off Ngong Road  
Between Bemuda Plaza and Central Church of Nazerene  
P.O. Box 50163-00200, Nairobi  
Tel: 2712481, 2722724, Fax: 2720912  
Mobile 0734-652205 or 0722-200496  
Email: [info@ciarbkkenya.org](mailto:info@ciarbkkenya.org)  
Website: [www.ciarbkkenya.org](http://www.ciarbkkenya.org)

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## Editor's Note

Welcome to the *Alternative Dispute Resolution Journal Vol. 6 No. 1*, a publication of the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K). The Journal was rebranded in 2017 to reflect the new colours of CIArb and in line with our goal of continuous improvement.

We publish the Journal in hard copy and also online at [www.ciarkenya.org](http://www.ciarkenya.org). Our worldwide audience has grown tremendously. Articles from this Journal have been widely cited. We are proud to be able to provide much needed information on the place and value of negotiation, mediation, arbitration and Traditional Justice Systems in the quest for Access to Justice.

The Journal is peer reviewed and refereed so as to ensure quality and validity of data. This Volume contains articles on relevant topics and contemporary issues in the Alternative Dispute discourse from a Kenyan and also a global perspective.

The key themes covered in the issue include: Right of appeal in arbitration matters in Kenya; The limits of court intervention in arbitration; Co-building China-Africa Joint Arbitration Centres in Different Legal Systems; Dispute resolution in the construction industry; Stay of proceedings pending arbitration; Traditional Dispute Resolution Mechanisms and other Community Justice Systems; Use of ADR to address Inter-Governmental Disputes in Kenya; Security for Costs in Arbitration; Challenges facing enforcement of arbitral awards in Kenya; Evolution, Role and Effects of Dispute Boards in Construction Contracts; Challenges and Opportunities for arbitration practice in Africa; and the Feasibility of an Online Dispute Resolution Portal for E-commerce Disputes in Kenya.

Alternative Dispute Resolution (ADR) has now taken root in the Kenyan context. The debate on how best to utilize it to empower the populace and enable them to access justice is on. There is also the question of how to institutionalise it within the framework of the laws of Kenya, the Bill of Rights and Article 159 of the Constitution.

*Alternative Dispute Resolution Journal* is now an invaluable resource for scholars, ADR practitioners and other academics who seek information on conflict management.

The feedback we receive is vital as it enables us to reflect, improve the product and enhance the researchers' experience.

CIArb-K takes this opportunity to thank the Publisher, contributing authors, Editorial Team, Reviewers, scholars and those who have made it possible to realise our original dream of publishing a quality scholarly Journal that is relevant and useful to scholars, ADR practitioners and general readers the world over.

**Dr. Kariuki Muigua, Ph.D., FCIArb (Chartered Arbitrator)**

**Editor**

**Nairobi, February, 2018.**

# Alternative Dispute Resolution

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## **Revisiting the Right of Appeal to the Court of Appeal under the Arbitration Act\***

*By: Eric Thige Muchiri*

### **1.0 Introduction**

The right of appeal to the Court of Appeal ('Court') in arbitration matters would have appeared settled by the five-bench decision by the Court in *Nyutu Agrovet Limited v. Airtel Networks Limited*.<sup>1</sup> In that case, all the five judges were unanimous in holding that no right of appeal lies to the Court against a decision of the High Court under section 35 of the Arbitration Act ('the Act')<sup>2</sup>.

The matter seems to have rested as such for more than two years until the Court, albeit differently-constituted, rendered its recent decision in the case of *DHL Excel Supply Chain Kenya Limited v. Tilton Investments Limited*.<sup>3</sup> The Learned Judges in the *DHL Excel* case unanimously took a position which was in stark contrast to the *Nyutu* decision: they decided that there is a right of appeal to the Court against a High Court decision under section 35 of the Act.

These two conflicting decisions by the Court not only fuel the uncertainty about the role of courts in arbitration but also lead to further questions about the principles of party autonomy, and finality of arbitral awards. Supremacy of the Constitution of Kenya ('the Constitution') over arbitration is also brought to the fore. This paper is an attempt to clarify the right of appeal to the Court under the Constitution and the Act as exemplified in various decisions.

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\*LL.B (Hons) (The University of Nairobi); LL.M (International Trade and Investments Law) (Candidate, the University of Nairobi); PG Dip. In Law (Kenya School of Law); Advocate of the High Court of Kenya; Associate Member - Chartered Institute of Arbitrators.

<sup>1</sup> [2015] eKLR.

<sup>2</sup> Arbitration Act No. 4 of 1995, Government Printer, Nairobi.

<sup>3</sup> [2017] eKLR.



## **2.0 Right of Appeal under the Constitution and the Appellate Jurisdiction Act**

The Court is established under Article 164 of the Constitution. The jurisdiction of the Court is now firmly anchored on Article 164 (3) of the Constitution. The stated Article provides that the Court has jurisdiction to hear appeals from –

- a) the High Court; and
- b) any other court or tribunal as prescribed by an Act of Parliament.<sup>4</sup>

Article 164 (3) has been interpreted to mean that as far as decisions of the High Court are concerned, there exists a general right of appeal to the Court. On the other hand, for decisions of courts or tribunals established by the Constitution or Act of Parliament under Article 164 (3) (b), the right of appeal may be required to be further established by legislation.

This general right of appeal to the Court from the decisions of the High Court obviates the need to identify a specific legislation granting the right of appeal before the Court can acquire jurisdiction. Such was the holding in the case of *Equity Bank Limited v. West Link Mbo Limited* where the Court stated that,

*'The new Constitution can be said to have broadened the right of appeal, in the sense that the Constitution itself has expressly provided a general right of appeal from decisions of the High Court, but left it to legislation, if necessary to provide additional right of appeal from decisions of tribunals and other courts established by the Constitution.'*<sup>5</sup>

This general right of appeal is not automatic; it does not allow all decisions of the High Court to be appealable to the Court. The right of appeal – which is emblematic of the constitutional rights of access to justice, fair hearing, and judicial authority – may be limited.<sup>6</sup> Such limitations may be espoused in a statute, or in the Constitution itself. Either way, the limitations to the right of

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<sup>4</sup>Such other courts include the specialized courts established pursuant to Article 162 (2) of the Constitution e.g. the Employment and Labour Relations Court, and the Environment and Land Court.

<sup>5</sup> [2013] eKLR per M'Inoti J.A. Also see the ruling of Kiage J.A. in the same case.

<sup>6</sup> Per M'Inoti J.A. in the *Equity Bank Limited* case.

appeal must accord with Article 24 of the Constitution which provides for the limitation of rights and fundamental freedoms. On this point, and whilst relying on the *Equity Bank Limited* case, the Court in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others*<sup>7</sup> expressed itself as follows,

*'It is enough to say that the right of appeal must be statute or other law-based and so viewed, there is nothing doctrinally wrong or violative of the Constitution for such right to be circumscribed in ways that render certain decisions of courts below non-appellable.'*

Further, the right of appeal is elaborated under section 3 (1) of the Appellate Jurisdiction Act.<sup>8</sup> The section provides that, *'the Court shall have jurisdiction to hear and determine appeals from the High Court, and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.'* The words *'to cases in which an appeal lies to the Court of Appeal under any law'* have been interpreted to mean that not only has section 3 (1) restricted the right of appeal but also that such a right has to be granted by statute.<sup>9</sup>

Accordingly, whereas the right of appeal is firmly entrenched in the Constitution, it may also be conferred by statute. In addition, the right of appeal can be restricted by law as long as the limitations and restrictions accord with the Constitution. We now turn to discuss the right of appeal under the Act and the restrictions thereof.

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<sup>7</sup> [2013] eKLR

<sup>8</sup> Chapter 9 of the Laws of Kenya, Government Printer, Nairobi.

<sup>9</sup> Per Githinji J.A. in the *Equity Bank Limited* case at paragraph 16. See also the decisions of the Court in *Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others* [2014] eKLR at paragraph 48; and *Judicial Service Commission & another v. Hon. (Lady) Justice Kalpana H. Rawal & 3 others Civil Application No. NAI. 308 of 2015* generally.

### **3.0 Right of Appeal under the Act**

#### **3.1 Appeals on Questions of Law Arising in Domestic Arbitration - Section 39 of the Act**

Section 39 of the Arbitration Act provides for a right of appeal to the Court but subject to several restrictions. The first restriction is that the appeal can only be on questions of law arising out of a domestic arbitration, and still then it has to be by agreement of the parties to such arbitration.<sup>10</sup> This eliminates appeals on matters of fact, and also appeals arising from international arbitrations. The rationale for restricting the appeals to questions of law may be because the arbitral tribunals are the ones that sift through the evidence and are better-placed to make awards thereof, awards are supposed to be 'final and binding'<sup>11</sup>, and the Court or the High Court may be incapacitated to review such evidence. In addition, international arbitrations may have been resolved pursuant to, and may have involved questions of, the laws of other countries which the Court or the High Court may not be conversant with.

The second restriction is that the High Court must first determine the question of law arising; or confirm, vary or set aside the arbitral award, or remit it back to the arbitral tribunal for reconsideration.<sup>12</sup> Only upon such a decision by the High Court, will the right of appeal to the Court arise subject to the parties having agreed, or if the Court is of the opinion that a point of law is involved, the determination of which will substantially affect the rights of one or more parties and as such grants leave to appeal.<sup>13</sup>

Regarding this section 39, the Court in *Anne Mumbi Hinga v. Victoria Njoki Gathara*<sup>14</sup> stated as follows,

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<sup>10</sup> Section 39 (1) of the Act.

<sup>11</sup> Per Lady Justice J. Kamau in *Narok County Government v SEC & M Company Limited* [2014] eKLR at paragraph 18.

<sup>12</sup> Section 39 (2) of the Act.

<sup>13</sup> Section 39 (3) (a) and (b) of the Arbitration Act.

<sup>14</sup> [2009] eKLR at page 11

*'It is clear from the above provisions [section 39], that any intervention by the court against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to Section 39 (2) of the Arbitration Act 1995. In the matter before us there was no such advance consent by the parties. Even where such consent is in existence the consent can only be on questions of law and nothing else. Again an appeal to this Court can only be on matters set out in Section 39 (2) ... or with leave of this Court. All these requirements have not been complied with and therefore the appeal is improperly before us and is incompetent.'*<sup>15</sup>

### **3.2 Appeals from Decisions of the High Court under Sections 35 of the Act**

Section 35 of the Act provides for instances in which a party may apply to the High Court to set aside an arbitral award. Unlike Section 39, section 35 does not explicitly state whether a decision of the High Court is appealable to the Court. On the other hand, section 35 does not have an explicit provision that a decision of the High Court thereof is final and shall not be subject to appeal; this is dissimilar to sections 12 (8), 14 (6), 15 (3), 16A (3), 17 (7), 32B (6) of the Act which have such express provisions.

The silence at Section 35 on the issue of appeal has led to the two conflicting decisions on whether there exists a right of appeal to the Court, to wit the *Nyutu* and *DHL Excel* decisions. In the *Nyutu* decision, the Court interpreted Section 35 in a narrow manner and decided that there existed no right of appeal under that section. In such restrictive interpretation, the Court found that the general theme running through the arbitration regime is that of finality and binding nature of arbitration awards, and limitation of access to courts. In reaching its decision, the Court relied on the following among other grounds and authorities;

- a) Section 10 of the Arbitration Act which limits intervention by courts in arbitration matters except as provided by the law<sup>16</sup>;

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<sup>15</sup> See also the decision of the Court in *National Cereals & Produce Board v Erad Suppliers & General Contracts Limited* [2014] eKLR

<sup>16</sup> See the ruling of Mwera J.A. in the *Nyutu* case.

- b) the concept of finality embodied in the UNICITRAL Model arbitration law and the local arbitration statutes<sup>17</sup>;
- c) the usage of the words ‘*notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal...*’ at section 39 (3) of the Arbitration Act means that the right of appeal under section 35 is curtailed, and which curtailment upholds the non-interventionist theme of the Act<sup>18</sup>; and
- d) the limitations on access to courts, and by implication on the right to appeal under section 35, in arbitration matters are not illegal or unconstitutional.<sup>19</sup>

The *Nyutu* decision appears to further the principles of finality of arbitral awards, and party autonomy. Informed by these principles, the Court went ahead to read restrictions on the right of appeal under section 35.

In the *DHL Excel* case, the Court took a different view from the *Nyutu* decision. It is noteworthy to clarify that in the *Nyutu* decision, an appeal had already been filed against a decision of the High Court under section 35, which appeal the respondent successfully applied to be struck out on the basis that there was no right of appeal. In the *DHL Excel* case, the Applicant was seeking leave to appeal against a decision of the High Court made under section 35. Ostensibly informed by the decision in the *Nyutu* case, the Applicant sought the leave pursuant to section 39 of the Arbitration Act.

The Court in the *DHL Excel* case undertook a broad interpretation of section 35. Beginning with Article 164 (3) of the Constitution, the Court held that the right of appeal flows from the Constitution but that the right can be limited by statute as long as the limitations conform to Article 24 of the Constitution.<sup>20</sup> Relying on the case of *Justice Kalpana H. Rawal vs. Judicial Service Commission & 3 Others*<sup>21</sup> the Court held that the constitutional right of appeal can only be ‘denied, limited or

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<sup>17</sup> See the ruling of W. Karanja and J.Mohammed JJ.A. in the *Nyutu* case.

<sup>18</sup> Per Musinga and M’Inoti JJ.A. in the *Nyutu* case.

<sup>19</sup> See the ruling of M’Inoti J.A. in the *Nyutu* case.

<sup>20</sup> *DHL Excel* case at paragraphs 15 – 19.

<sup>21</sup> [2016] eKLR.

restricted by express statutory provision properly justified as required by the Constitution itself'. While appreciating the limitations of access to courts in arbitration matters, the Court stated that the lack of an express limitation against appeal under section 35 – unlike at sections 12 (8), 14, 16A, and 17 of the Act – meant that a decision of the High Court thereof was appealable to the Court according to the Constitution. In the words of the Court,

*'In our view, the fact that section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution.'*<sup>22</sup>

The *DHL Excel* case underscores the supremacy of the Constitution over arbitration.<sup>23</sup> It can be seen that the Constitution has now expanded the basis for approaching the Court. There is no further need to refer to the statute law granting the right of appeal. Arbitration laws, practice and procedure have to be read in light of their subservience to the Constitution. Any limitations to right of appeal arising from arbitration laws, practice or procedure now have to be express, or at the very least certain.

### **3.3 Appeal against Decision of the High Court while it exercises its original Jurisdiction under the Act**

The High Court has unlimited original jurisdiction in criminal and civil matters except for matters reserved for the exclusive jurisdiction of the Supreme Court or the specialized courts under the Constitution.<sup>24</sup> Notwithstanding the foregoing, this unlimited original jurisdiction is limited by sections 10 and 32A of the Act.

The Arbitration (Amendment) Act No. 11 of 2009 introduced new grounds for setting aside awards at section 35. These were fraud, bribery, undue influence

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<sup>22</sup>*DHL Excel* case at paragraph 24

<sup>23</sup>See generally Kariuki Muigua, 'Constitutional Supremacy over Arbitration in Kenya', (2015) 3(2) Alternative Dispute Resolution at 10.

<sup>24</sup> Articles 165 (3) (a) and 165 (5) of the Constitution.

or corruption. The Court in *National Cereals & Produce Board v Erad Suppliers & General Contracts Limited*<sup>25</sup> held that the High Court would be exercising its original jurisdiction while it takes evidence in proof of such grounds. The Court stated as follows,

*'In order to arrive at a decision whether an arbitral award was induced or affected by fraud, bribery, undue influence or corruption, the High Court must, in our view, be guided by evidence. For that purpose, it is open for parties to present evidence before the High Court and for the High Court to take and consider such evidence. In doing so and to that extent, we consider for purposes of Rule 29 that the High Court is called upon to exercise original jurisdiction.'*<sup>26</sup>

In exercise of such original jurisdiction regarding whether an award is affected by fraud, bribery, undue influence or corruption, and in light of the expanded right of appeal, the decisions thereof by the High Court would seem appealable to the Court.

The same reasoning can be extended to applications for interim measures of protection under section 7 of the Act. In *Safaricom Limited v. Ocean View Beach Hotel Limited & 2 others*<sup>27</sup> the majority of the Court had to rely on Rule 5 (2) (b) of the Court of Appeal Rules to grant interim measures of protection which had been denied by the High Court. Whereas it still granted the interim measures of protection, the minority relied on the recognition of arbitration as an alternative to litigation, the overriding objective of the Appellate Jurisdiction Act and the Civil Procedure Act<sup>28</sup>, and the inherent jurisdiction of the Court to do so. Needless to say, the *Safaricom Limited* case was decided prior to the promulgation of the current Constitution.

In the present-day, the *Safaricom Limited* decision may be decided on the basis of the expanded right of appeal averting the clash among the judges on the sources of the jurisdiction for the Court to grant interim measures of protection.

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

<sup>26</sup> *National Cereals & Produce Board* case at paragraph 31

<sup>27</sup> [2010] eKLR

<sup>28</sup> Chapter 21 of the Laws of Kenya, Government Printer, Nairobi.

This was the reasoning followed by the Court in the case of *Mohammed Hassan Maalim & 2 others v Gravet Limited*<sup>29</sup> where the majority stated as follows,

*'I also take the view that the grant of stay orders even when a party alleges applicability of an arbitral process is not at all indicative of antipathy towards ADR. It seem[s] to me that as long as the right of appeal exists from decisions of the High Court, even those such as the one before us, then our Rule 5 (2) (b) jurisdiction can in appropriate cases be invoked and deployed with a view to meeting the ends of justice.'*<sup>30</sup>

The minority judgment in the *Mohammed Hassan Maalim* case is of significance for its pro-arbitration stance akin to the unanimous *Nyutu* decision. Justice Gatembu Kairu held that section 7 of the Act was designed to enable the High Court to preserve the status quo pending arbitration. Further, he held that if a party had an arguable case as is required by Rule 5 (2) (b) of the Court of Appeal Rules, then such a case is arguable before the arbitrator and not before the High Court or the Court. Lastly, he held that the arbitrator had the power to rule on their jurisdiction as per section 17 of the Act. This decision resonates with the minority judgment of Justice Nyamu in the *Safaricom Limited* case.

Section 37 of the Act lists ground upon which the High Court would refuse to recognize or enforce an arbitral award. It is almost a replica of Section 35 of the Act, and as might be expected, it does not expressly state whether the decision of the High Court thereof is final and binding. Therefore, depending on whether one undertakes a narrow or broad interpretation of section 37, the right of appeal to the Court may be seen as absent (narrow interpretation), or present (broad interpretation).

The Court undertook a narrow interpretation of section 37 in the case of *Tanzania National Roads Agency v Kundan Singh Construction Limited*<sup>31</sup> and held that no

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<sup>29</sup> [2014] eKLR

<sup>30</sup> *Mohammed Hassan Maalim* case at page 4.

<sup>31</sup> [2014] eKLR



right of appeal exists from a decision of the High Court under section 37. In the words of the Court,

*'That provision [article 164 (3) (a) of the Constitution] does not confer an automatic right of appeal to litigants such that any judgment, order or decree made by the High Court is appealable to the Court of Appeal. Thus there is a clear distinction between jurisdiction or power to hear and determine an appeal which is vested in the court and a right to appeal which is vested on a litigant... In this case the right of appeal from the order of the High Court is not automatic but must be vested on the appellant by the Arbitration Act and Rules which regulates the procedure in arbitration matters, or in the case of international arbitration, the general rules of International Law, treaty or convention ratified by Kenya which form part of the Law of Kenya under Article 2(5) & (6) of the Constitution.'*<sup>32</sup>

Under section 37, the High Court may have to take evidence as to whether an award is tainted by fraud, bribery, undue influence or corruption.<sup>33</sup> A decision thereof may be appealable to the Court in light of the constitutionally-enshrined right of appeal.

#### **4.0 Conclusion**

The right of appeal from the High Court has now been entrenched in the Constitution. The right can be limited in statutes or practice but in strict accordance with the Constitution. While some Courts are of the view that the right has to be expressly limited in the enabling statutes such as in the *DHL Excel* case, other Courts are of the view that there is no such requirement in the face of the severe limitations of access to courts in the Act, treaties, and principles of arbitration.

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<sup>32</sup> Further, see Francis Kariuki 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community' [2015] available at <http://www.kmco.co.ke/attachments/article/163/Paper%20on%20Recognition%20and%20Enforcement%20of%20Foreign%20Arbitral%20Awards.pdf> <accessed 3 January 2017>.

<sup>33</sup> See the *National Cereals & Produce Board* case.

The existence of the two conflicting decisions muddy jurisprudence as either decision is binding on the lower courts based on the doctrine of precedence, and persuasive to other benches of the Court of Appeal on the principle of uniformity in making of decisions, good order and proper administration of justice.<sup>34</sup> Whereas an appeal has been preferred against the *Nyutu* decision to the Supreme Court, the decision remains the law until the Supreme Court overturns or affirms it.

The *DHL Excel* case exposes the loopholes in the Act necessitating for the same to be amended to bring it into conformity with the Constitution. The decision is authority for the submission that unless the right of appeal is expressly curtailed in the Act, then the constitutional right of appeal subsists against any decision of the High Court under the Act. There exist several decisions to the contrary. Such a hazy state calls for clarity through relevant amendments to the Act in as much as the Supreme Court may make a decision on the issue well before.

Further, the challenges on the right of appeal can be seen whenever there is an appeal against a decision of the High Court exercising its original jurisdiction. Several benches of the Court have differed on whether there is such a right or not. Other scenarios may arise e.g. under section 37 where the Court may be divided as to the right of appeal.

Other than amendments concerning the right of appeal, it is also up for consideration whether the High Court is the only superior court that should handle arbitration matters, or whether the other specialized courts such as the Employment and Labour Relation Courts, and the Environment and Land Court should handle issues regarding arbitral awards in their areas of specialty.

It is of note that the last amendments to the Act were carried out vide the Arbitration (Amendment) Act No. 11 of 2009 which commenced well before the promulgation of the current Constitution. Thus, it is fair to conclude that the

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<sup>34</sup> See Hannington Amol, 'Revisiting *Dodhia v. National Grindlays Bank: A Search for Judicial Philosophy on Stare Decisis*' (2017) 13 (1), *The Law Society of Kenya Journal*.

amendments were not informed by the constitutional moulding of current arbitration law, practice, and procedure.

Care must be taken while amending the Act so that the right of access to appellate justice is not unnecessarily curtailed especially so in cases where the High Court exercises its original jurisdiction under the Act. For the instances where the High Court exercises its appellate or setting aside jurisdiction, the amendments would be aimed at emboldening the principles of party autonomy, finality of awards, and restrictions on involvement by the courts in arbitration. Moreover, the amendments would also have to conform to the treaties, general rules of international law, and be informed by the best practices obtaining from around the world. With such amendments, dispute resolution through arbitration will be clearer and certain which will spur further investments in Kenya.

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## **Expanding the Limits of Court Intervention in Arbitration through Judicial Review, The Constitution of Kenya 2010 and the Fair Administrative Action Act**

*By: Gad Gathu Kiragu\**

### **Abstract**

*Section 10 of the Arbitration Act No. 4 of 1995 limits court intervention in arbitration except as provided for in the Act. However, the Constitution of Kenya 2010 provides for the right to fair administrative action pursuant to which the Fair Administrative Action Act number 4 of 2015 was enacted. This paper addresses the question of whether a party to arbitration can seek judicial review remedies and the procedure and grounds for doing so. It ultimately concludes that section 10 of the Arbitration Act in its plain form is misleading and/or unconstitutional and calls for its amendment.*

### **1.0 Introduction**

This paper examines whether the limitation to court intervention in arbitration found at section 10 of the Arbitration Act can limit a party's right to seek judicial review in arbitration. It examines the provisions of the Constitution of Kenya 2010 and the Fair Administrative Action Act<sup>1</sup> as they relate to arbitration.

### **1.1 Background**

Court intervention in arbitration matters has traditionally been limited to areas including but not limited to appointment of arbitrators, stay of proceedings, interim measures of relief, determination of points of law and enforcement or setting aside of arbitral awards. The fundamental reasoning behind this is to protect the arbitral process and guarantee party autonomy.<sup>2</sup> It is important to note that even prior to the enactment of the Constitution of Kenya 2010 and the

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\* LL.B Hons. (U.O.N), LL.M (U.O.N) Dip. K.S.L. MCI Arb, CPS (K).

<sup>1</sup> Act No. 4 of 2015.

<sup>2</sup> Muigua, K. Role Of The Court Under Arbitration Act 1995: Court Intervention Before, Pending And After Arbitration In Kenya, Page 3. Available at [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 on 15th January 2018.

Fair Administrative Action Act, the constitution of 1963 provided for various safeguards which a party to arbitration could use to approach the court. An example of this was in Section 77(9) of the Constitution of Kenya 1963 which provided that:-

*“A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”*

One could therefore have approached the court citing violation of article 77(9) and seeking the court’s intervention as happened in the case of *EpcO Builders Limited-v-Adam S. Marjan-Arbitrator & Another*<sup>3</sup> where Justice Deverell noted that a party to arbitration had recourse to the constitutional court. However, he noted that such recourse should be discouraged by the courts purposely to encourage more parties to engage in arbitration.

With the enactment of the Constitution of Kenya 2010 and the Fair Administrative Action Act the scope of intervention by courts in arbitral proceedings has arguably been widened. The Constitution of Kenya 2010 introduced the right to fair administrative action under Article 47. This right was not in the previous 1963 constitution.

## **2.0 The Constitutional Right to Fair Administrative Action**

The Constitution of Kenya 2010 is the supreme law of Kenya and binds all persons including state organs.<sup>4</sup> Any law that is inconsistent with the provisions of the constitution is null and void to the extent of the inconsistency.<sup>5</sup>

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<sup>3</sup> Civil Appeal No. 248 of 2005 (unreported)

<sup>4</sup> Article 2(1) of the Constitution of Kenya 2010

<sup>5</sup> Article 2(4) of the Constitution of Kenya 2010

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The right to fair administrative action was not in the previous 1963 constitution. It is provided for under article 47 of the Constitution of Kenya 2010 and is stated as:-

- “1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.  
(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”<sup>6</sup>*

Article 47(3) of the Constitution of Kenya 2010 requires Parliament to enact a law that provided for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal and promote efficient administration. Fair administrative action is pegged on judicial review by the courts. It has been argued that with the enactment of the Constitution of Kenya 2010 the focus of judicial review has moved from Parliamentary supremacy to Constitutional supremacy.<sup>7</sup>

Section 10 of the Arbitration Act provides that *“except as provided in this Act, no court shall intervene in matters governed by this Act.”* This section in its plain form seems to suggest that if there is no provision for approaching the court under the Arbitration Act, then a party cannot approach the court under any other law over matters arbitration. This wrongly suggests that a party whose constitutionally guaranteed rights are violated in an arbitration cannot approach the courts in the absence of direct provisions to that effect. Indeed, the courts even prior to the enactment of the Constitution of Kenya 2010 had held that they would not just stand aside and watch as constitutional guarantees

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<sup>6</sup>Article 47(1) and (2) of the Constitution of Kenya, 2010.

<sup>7</sup>Ochiel J, D. Transformation of Judicial Review in Kenya under The 2010 Constitution. Masters of Laws Thesis, University of Nairobi (2015) available at [http://erepository.uonbi.ac.ke/bitstream/handle/11295/98393/Ochiel\\_Transformation%20Of%20Judicial%20Review%20In%20Kenya%20Under%20The%202010%20Constitution.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/98393/Ochiel_Transformation%20Of%20Judicial%20Review%20In%20Kenya%20Under%20The%202010%20Constitution.pdf?sequence=1&isAllowed=y) accessed on 14<sup>th</sup> January 2018.



were violated.<sup>8</sup> Indeed, it has been argued that Constitutional guarantees do not only apply to public law but also to private law.<sup>9</sup>

### **3.0 The Fair Administrative Action Act Number 4 of 2015**

Pursuant to article 47(3) of the Constitution of Kenya 2010, Parliament passed the Fair Administrative Action Act which was assented to on 27<sup>th</sup> May 2015 and came into effect on 17<sup>th</sup> June 2015.

#### **3.1 The Application of Judicial Review to Arbitration under the Fair Administrative Action Act**

Under the Fair Administrative Action Act, judicial review is the appropriate remedy for a party who feels aggrieved by the acts of an administrative authority. Prior to the enactment of the Constitution of Kenya 2010 and the Fair Administrative Action Act, the jurisdictional scope of the remedy of judicial review was limited to public bodies.<sup>10</sup>

The court in *Cradle – Children Foundation (suing through the Trustee Geoffrey Maganya) v Nation Media Group Limited ex parte Cradle – Children Foundation (suing through Geoffrey Maganya)*<sup>11</sup> held that:-

*“Judicial review is the process by which the court exercises its supervisory jurisdiction over the proceedings and decision of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.....this means*

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<sup>8</sup>See *Sadrudin Kurji & another v. Shalimar Limited & 2 others* (2006) eKLR

<sup>9</sup>Muigua, K. *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises*. Page 18. Available at <http://www.kmco.co.ke/attachments/article/122/Emerging%20Jurisprudence%20in%20the%20Law%20of%20Arbitration%20in%20Kenya.pdf> accessed on 15<sup>th</sup> January 2018.

<sup>10</sup> Ongoya, E. *The Changing Character of Judicial Review Jurisdiction under The Constitutional And Statutory Order In Kenya*. Available at <http://lsk.or.ke/Downloads/Elisha%20Ongoya%20-%20Judicial%20Review.pdf> accessed on 15<sup>th</sup> January 2018.

<sup>11</sup>[2012] eKLR

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*that the remedy of judicial review is only available against subordinate courts, inferior tribunals, public bodies or persons who perform public duties. This exposition of the scope of judicial review has been confirmed by a number of decisions made by both the High Court and the Court of Appeal."*

The Cradle case (supra) was decided prior to enactment of the Fair Administrative Action Act. The Act now provides a legislative basis for expanding the scope of arbitration to cover private bodies. In recognition of this expanded scope, the court in *Commission on Administrative Justice v Insurance Regulatory Authority & another*<sup>12</sup> held that:-

*"Parties, who were once denied judicial review on the basis of the public-private power dichotomy, should now access judicial review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights"*

Administrative authority is not defined in the Fair Administrative Action Act. The only related definition can be found in section 2 of the Act which defines administrative Action as including:-

*"(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or  
(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;"*

The question arises therefore whether arbitration proceedings fit within the test of a non state agency that is within the scope of judicial review proceedings. The Act applies to both state and non state agencies as long as the agency meets the following test:-

1. It must be exercising administrative authority;

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<sup>12</sup>[2017] eKLR

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2. It must be performing a judicial or quasi-judicial function under the Constitution or any written law; or
3. The action, omission or decision of the agency affects the legal rights or interests of any person to whom such action, omission or decision relates.<sup>13</sup>

The wording of the test means that the second and third tests are alternate. The question that now arises is whether arbitral proceedings meet the two fold test. Administrative authority may be defined as the power to enforce laws, exact obedience, command, determine, or judge. This definition sits in well with the functions of an arbitral tribunal which include the determination of a dispute which may arguably also amount to a quasi-judicial function under the Arbitration Act. Moreover, the act of an arbitral tribunal is bound to affect the legal rights or interests of a party to arbitration.

The courts have also accepted the view that judicial review is a remedy that is open to a party who feels aggrieved by the decision of an arbitrator.

In *Sadrudin Kurji & another v. Shalimar Limited & 2 others*<sup>14</sup> the court stated that it will not stand by and watch helplessly when cardinal rules of natural justice are breached in arbitration. In *Sylvana Mpabwanayo –VS- Allen Waiyaki Gichuhi & another*<sup>15</sup> the court rendered itself as follows:-

*“That an arbitrator is a non-state agency whose action, omission or decision affects the legal rights or interests of the parties before him to whom the arbitral proceedings relate cannot be doubted. It is therefore my view and I so hold that pursuant to the provisions of Article 47 as read with the provisions of the Fair administrative Action Act, 2015 judicial review orders may where appropriate issue against the decisions of an arbitrator.”*

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<sup>13</sup> Section 3 of the Fair Administrative Action Act

<sup>14</sup> (2006)eKLR

<sup>15</sup> (2016)eKLR

It is therefore appropriate to conclude that in spite of section 10 of the Arbitration Act, courts can intervene in arbitration under the provisions of article 47 of the Constitution of Kenya 2010 and the provisions of the Fair Administrative Action Act.

### **3.2 Procedure for seeking Judicial Review under the Fair Administrative Action Act**

Any person who is aggrieved by an administrative action has recourse to a court for orders of judicial review.<sup>16</sup> Judicial review is a special procedure that has been held to be neither civil nor criminal in nature.<sup>17</sup> The procedure for filing applications for judicial review is provided for in the Civil Procedure Rules (2010)<sup>18</sup>. The first procedural requirement is leave or permission. An applicant must first seek leave of the court to institute judicial review proceedings.<sup>19</sup> This is done by filing a chamber summons application that is normally heard *ex parte*. However, the judge may require that the application be served upon the respondents before leave is granted.<sup>20</sup> The application is accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.<sup>21</sup>

Upon grant of leave, the applicant has twenty one days from the date that leave is granted to file the substantive application detailing the appropriate orders that he seeks.<sup>22</sup> The Applicant is required to serve the application upon all respondents. The applicant should also serve the respondents with the *ex parte*

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<sup>16</sup> See sections 7 and 9 of the Fair Administrative Action Act No. 4 of 2015.

<sup>17</sup> See *Commissioner of Lands vs. Kunste Hotels Ltd* (1995-1998) 1 EA 1

<sup>18</sup> Order 53 of the Civil Procedure Rules 2010.

<sup>19</sup> Order 53 (1) of the Civil Procedure Rules 2010

<sup>20</sup> Order 53(4) of the Civil Procedure Rules 2010

<sup>21</sup> Order 53(2) of the Civil Procedure Rules 2010

<sup>22</sup> Order 53(3) of the Civil Procedure Rules 2010

application for leave.<sup>23</sup> There is normally a period of at least eight clear days from the date of service of the notice of motion and the date of hearing.<sup>24</sup> At the hearing, the Applicant has the right to begin and then the respondent. The court has discretion to allow anyone else to be heard notwithstanding that he has not been served with the notice or summons<sup>25</sup>

### **3.3 Grounds for seeking Judicial Review under the Fair Administrative Action Act**

The Fair Administrative Action Act has set out a number of conditions non-compliance with which gives an aggrieved party a basis upon which to seek judicial review. The Act provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator, in this case, the arbitrator, shall give the person affected by the decision-

- a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- b) an opportunity to be heard and to make representations in that regard;
- c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d) a statement of reasons pursuant to section 6 of the Fair Administrative Action act;
- e) notice of the right to legal representation, where applicable;
- f) notice of the right to cross-examine or where applicable; or
- g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.<sup>26</sup>

Further, the arbitrator is required to accord the person against whom administrative action is taken an opportunity to:-

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<sup>23</sup> Order 53(4) of the Civil Procedure Rules 2010

<sup>24</sup> Order 53(3) of the Civil Procedure Rules 2010.

<sup>25</sup> Order 53(6) of the Civil Procedure Rules 2010

<sup>26</sup> Section 4(3) of the Fair Administrative Action Act.

- a) attend proceedings, in person or in the company of an expert of his choice;
- b) be heard;
- c) cross-examine persons who give adverse evidence against him; and
- d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.<sup>27</sup>

The Arbitration Act<sup>28</sup> does not have equivalent grounds to guarantee fair administrative action although it is recognized that parties ultimately have autonomy to determine matters of procedure including the calling of any witnesses.<sup>29</sup> This therefore brings the Arbitration Act specifically section 10 thereof into direct conflict with the provisions of the Fair Administrative Action Act and article 47 of the constitution.

For example, under the Arbitration Act recourse to the High Court against an arbitral award may only be by an application to set aside an award for reasons that are very limited.<sup>30</sup> Some of the reasons are covered by the Fair Administrative Action Act either expressly or impliedly. However, in an instance where a party requests an adjournment which the arbitrator refuses, or where a party is not given adequate notice of a hearing, would such a party have to wait until the final award is delivered so as to seek to set it aside or the party can approach the court for judicial review? The simple answer to that would be affirmative. However, in reality courts have placed limitations on access to judicial review in part which are examined next.

### **3.4 Limitation of the Court's intervention in Arbitration under the Fair Administrative Action Act.**

Prior to issuing any judicial review remedies, the court is bound to ensure that the applicant has exhausted any other available remedies under any other

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<sup>27</sup>Section 4(4) of the Fair Administrative Action Act.

<sup>28</sup>Act number 4 of 1995

<sup>29</sup>Section 20 (1) of the Arbitration Act No. 4 of 1995

<sup>30</sup>Section 35(2) (a) and (b) of the Arbitration Act Number 4 of 1995.

written law.<sup>31</sup> The Court is supposed to direct the applicant to seek such other remedies if it is satisfied that the applicant for judicial review has not exhausted such other remedies.

In *Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE*<sup>32</sup> the court held thus:-

*“...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.”*

In *Republic v Architectural Association of Kenya & 3 others Ex Parte Paragon Ltd*<sup>33</sup> the court stated that judicial review should be a remedy of last resort after all other remedies have been exhausted. The court also avoided dealing with the constitutionality or otherwise of section 10 of the Arbitration Act stating that there was no express prayer for the court to determine the same.

However, the court may in exceptional circumstances exempt an applicant from exhausting such other alternative remedies if the court considers such exemptions to be in the interests of justice.<sup>34</sup>

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<sup>31</sup>Ibid section 9(2) and (3)

<sup>32</sup>(2014)eKLR

<sup>33</sup>[2017] eKLR

<sup>34</sup>Section 9(4) of the Fair Administrative Action Act No. 4 of 2015.

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In *Jocinta Wanjiru Raphael v William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 others*<sup>35</sup> the Court held that an applicant for judicial review orders will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. The Court of Appeal in *Republic v National Environmental Management Authority*<sup>36</sup> agreed with the High Court's findings that the existence of alternative remedies were not in themselves a bar to the issuing of judicial review orders. The Applicant only had to show that it has to be exempted from the alternative remedies.

The catch therefore seems to be the provision for a party to exhaust all other available remedies. This brings challenges because the traditional approach to judicial review has been that the same is not concerned with the merits of the decision but rather on the process and procedures leading up to the decision. This position has been challenged as being contrary to the spirit of the constitution of Kenya 2010.<sup>37</sup> Indeed, courts have issued conflicting decisions on the subject on one hand holding that judicial review is only concerned with the process leading up to a decision<sup>38</sup> and on the other holding that judicial review can and should be concerned with the merits of a decision.<sup>39</sup>

The question of exhaustion of the existence of alternative remedies as well as merit *vis a vis* procedure in judicial review is crucial in arbitration because it blurs the line between an appeal and judicial review.

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<sup>35</sup>[2014] eKLR

<sup>36</sup>[2011] eKLR

<sup>37</sup>Ochiel J, D. Transformation of Judicial Review In Kenya Under The 2010 Constitution. Masters of Laws Thesis, University of Nairobi (2015) at page 29. Available at [http://erepository.uonbi.ac.ke/bitstream/handle/11295/98393/Ochiel\\_Transformation%20Of%20Judicial%20Review%20In%20Kenya%20Under%20The%202010%20Constitution.pdf?sequence=1&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/98393/Ochiel_Transformation%20Of%20Judicial%20Review%20In%20Kenya%20Under%20The%202010%20Constitution.pdf?sequence=1&isAllowed=y) accessed on 14<sup>th</sup> January 2018

<sup>38</sup> Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002]eKLR

<sup>39</sup> Kenya Human Rights Commission v NonGovernmental Organisations Co-Ordination Board(2015)eKLR



Under the Arbitration Act, appeals against the decision of an arbitrator on matters of fact are not allowed.<sup>40</sup> A party can only apply to set aside an arbitral award.<sup>41</sup> Therefore, if a party approached the court under judicial review on the ground that he was not given adequate notice of a hearing yet the arbitrator had considered such a representation by the party and ruled against it in an interim award, it is clear that in such a case the judicial review court would not only be sitting on appeal against a factual decision of an arbitrator contrary to the provisions of the Arbitration Act but would also be looking at the merit of a decision and the procedure leading up to the decision.

#### **4.0 Conclusion.**

The wording of section 10 of the Arbitration Act is at best misleading or meaningless and at worst unconstitutional. It is misleading and meaningless because in reality as this paper has shown courts can intervene in arbitration through judicial review contrary to the provisions of the Arbitration Act. It is unconstitutional in so far as a plain reading of the same indicates an attempt to fetter the right to fair administrative action as provided for as provided for under article 47 of the Constitution of Kenya 2010. Indeed the courts have held that the arbitration process is subject to judicial review. While so far the courts have attempted to limit their intervention in arbitration under judicial review through the requirement of alternative remedies, it still remains in the statute books and open to interpretation by a court as to prevent any intervention in arbitration through judicial review notwithstanding the merit. It still it is recommended that an amendment to the said section is passed to bring it into conformity with the constitution of Kenya 2010.

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<sup>40</sup> Section 32A of the Arbitration Act No. 4 of 1995.

<sup>41</sup> Section 35(1) of the Arbitration Act No. 4 of 1995.

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## **The Vision of Co-building China-Africa Joint Arbitration Centres in Different Legal Systems**

*By: Francis Kariuki<sup>1</sup>*

### **1.0 Introduction**

Disputes are bound to arise in human interactions.<sup>2</sup> However, due to the fact that development is not feasible in a conflict situation,<sup>3</sup> it is necessary to identify ways in which such disputes can be resolved in an efficient and effective manner, for example, through international commercial arbitration. It has become, therefore, necessary to come up with arbitral institutions that are context-specific, for example, the China-Africa Joint Arbitration Centre (hereinafter 'CAJAC'). The CAJACs are aimed at providing efficient arbitral facilities that are tailored to the China-Africa relationship in view of the fact that China is currently Africa's largest trading partner.<sup>4</sup>

The paper discusses this subject in four parts. Part 1 is this brief introduction and outline of the paper. Part 2 gives a background to the building of CAJACs while Part 3 discusses the challenges that must be overcome in establishing CAJACs. Part 4 concludes the paper and makes suggestions on issues to bear in mind in building CAJACs.

### **2.0 Background to the Co-Building CAJACs**

The China-Africa Arbitration Centres (CAJACs) are arbitral centres created out of the need to find the most appropriate arbitral forum for disputes between

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<sup>1</sup> Francis Kariuki holds an LLB, LLM (University of Nairobi), Postgraduate Diploma in Law (Kenya School of Law), and MCI Arb. He is an Arbitrator, an Accredited Mediator and a Lecturer at Strathmore University Law School.

<sup>2</sup> Sudeshna Sarkar, 'China-Africa Arbitration bodies sidestep international courts' *African Business Magazine*, 9 May 2017

<http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/> accessed, on 13 May 2017.

<sup>3</sup> Kariuki Muigua and Francis Kariuki, 'Alternative dispute resolution, access to justice and development in Kenya' *Strathmore Law Journal* Vol. 1 (1), (2015), 1.

<sup>4</sup> *African Business Magazine*, 9 May 2017

<http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/> on 13 May 2017.

nationals, legal entities and authorities from China and Africa.<sup>5</sup> It is a product of the Beijing Consensus, signed in June 2015, which called for the development of a joint dispute resolution framework between China and Africa. The aim of the Beijing Consensus was to:

*'...review the traditional friendship existing between China and Africa; to observe the latest development trends of international arbitration: and to envision the cooperative prospects of establishing the China-Africa Joint Dispute Resolution Mechanism.'*<sup>6</sup>

This was followed by the Johannesburg Consensus, and consequently the creation of the China-Africa Joint Arbitration Centre Johannesburg. The Johannesburg CAJAC was a result of the agreement between the Arbitration Foundation of Southern Africa (AFSA), Africa ADR, the Association of Arbitrators and the Shanghai International Trade Arbitration Centre.<sup>7</sup> The Nairobi CAJAC has also been established pursuant to an agreement between the Beijing Arbitration Commission and the Nairobi Centre for International Arbitration (NCIA), under the guidance of the China Law Society.<sup>8</sup>

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<sup>5</sup>CAJAC-Johannesburg, 'Founding Statement and Rules for the Conduct of Arbitration,' available at <http://www.cajacjhb.com/rules>, accessed on 11 May 2017. See also Dentons, 'The China Africa Joint Arbitration Centre' 26 January 2017 <https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/the-china-africa-joint-arbitration-centre>, accessed on 13 May 2017.

<sup>6</sup> Saadia Bhatti, 'The China Africa Joint Arbitration Centre: A Natural Step to Sustain the Exponential Growth of Sino African business and trade' Africa International Legal Awareness (AILA) Blog, 22 March 2017 <http://blogaila.com/2017/03/22/the-china-africa-joint-arbitration-centre-a-natural-step-to-sustain-the-exponential-growth-of-the-sino-african-trade-saadia-bhatti-esq-mciarb/> on 13 May 2017.

<sup>7</sup>The Arbitration Foundation of Southern Africa, '17 August 2015 Announcement of the China-Africa Joint Arbitration Centre Johannesburg (CAJAC)' <http://www.arbitration.co.za/pages/CAJAC.aspx> on 13 May 2017.

<sup>8</sup>Beijing Arbitration Commission, 'Inaugural Conference of China-Africa Joint Arbitration Centre - Beijing and Nairobi & Symposium on Dispute Resolution of Sino-African Infrastructure Construction Project Successfully Hosted' 31 March 2017 <http://www.bjac.org.cn/english/news/view?id=2934> on 13 May 2017.

The membership of the arbitral committees of the Shanghai, Johannesburg and Nairobi CAJACs will consist of individuals nominated by China, South Africa and Kenya, and disputants can pick arbitrators from these committees. Initially, the CAJACs are working using their local rules of arbitration as steps are underway to develop the standard CAJAC arbitration rules by all the centres, conjunctively.<sup>9</sup> The dispute resolution services provided by the CAJACs include arbitration, mediation and conciliation.<sup>10</sup>

The vision of creating and opening of dedicated arbitration centres for resolving trade disputes between Chinese and African companies in their own territories has been accentuated by a number of factors. First, China is now Africa's largest trading and investment partner.<sup>11</sup> For instance, in 2016, China's investment in Africa was more than 14 billion US dollars, while the capital investment had gone up by 515 per cent by July 2016 in comparison with that of the whole of 2015.<sup>12</sup> In the first quarter of the year 2017, the China-Africa trade equally experienced a 16.8 percent boost.<sup>13</sup> Consequently, the vision of co-building joint arbitration centres is a 'natural step to sustain the exponential growth of Sino African business and

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<sup>9</sup>Dentons, 'The China Africa Joint Arbitration Centre' 26 January 2017 <https://www.dentons.com/en/insights/newsletters/2017/january/26/south-africa-newsletter/south-africa-newsletter-january-edition/the-china-africa-joint-arbitration-centre>, accessed on 13 May 2017.

<sup>10</sup> Ibid.

<sup>11</sup>Sudeshna Sarkar, 'China-Africa Arbitration bodies sidestep international courts' *African Business Magazine*, 9 May <http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/> accessed, on 13 May 2017.

<sup>12</sup>Saadia Bhatti, 'The China Africa Joint Arbitration Centre: A Natural Step to Sustain the Exponential Growth of Sino African business and trade' Africa International Legal Awareness (AILA) Blog, 22 March 2017 <http://blogaila.com/2017/03/22/the-china-africa-joint-arbitration-centre-a-natural-step-to-sustain-the-exponential-growth-of-the-sino-african-trade-saadia-bhatti-esq-mciarb/> on 13 May 2017.

<sup>13</sup> China Daily, 'China-Africa trade enjoys 16.8 percent boost in Q1' 12 May 2017 [http://english.gov.cn/state\\_council/ministries/2017/05/12/content\\_281475652908925.htm](http://english.gov.cn/state_council/ministries/2017/05/12/content_281475652908925.htm) on 13 May 2017.

trade'<sup>14</sup> while ensuring that those relationships are maintained, optimum benefits are derived and that arising disputes are resolved efficiently.<sup>15</sup>

Second, the Sino-Africa legal relations, particularly the vision of developing CAJACs, was motivated by a great dissatisfaction with the established international tribunals outside of Africa, occasioning huge delays and expenses, and where in most cases African parties are always unsuccessful in spite of hiring high-profile lawyers.<sup>16</sup> For example, it is reported that after the Gabonese government took back an oilfield it had licensed to Addax in 2013, alleging breach of contract, the Chinese company went to the International Court of Arbitration in Paris, seeking damages. The court's first ruling went against Addax, which reportedly paid the Gabonese government over \$400m to settle the dispute.<sup>17</sup> This sad state of affairs arises because of a number of reasons. Already, there are old prejudices and bias against Africa explaining why most arbitrations are conducted out of Africa.<sup>18</sup> In addition, '90% of all international contracts negotiated in Africa or concerning African investment are drafted as being

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<sup>14</sup>Saadia Bhatti, 'The China Africa Joint Arbitration Centre: A Natural Step to Sustain the Exponential Growth of Sino African business and trade' Africa International Legal Awareness (AILA) Blog, 22 March 2017 <http://blogaila.com/2017/03/22/the-china-africa-joint-arbitration-centre-a-natural-step-to-sustain-the-exponential-growth-of-the-sino-african-trade-saadia-bhatti-esq-mciarb/> on 13 May 2017.

<sup>15</sup>Stuart Dutson, "Africa's Century" – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, 104.

<sup>16</sup>Saadia Bhatti, 'The China Africa Joint Arbitration Centre: A Natural Step to Sustain the Exponential Growth of Sino African business and trade' Africa International Legal Awareness (AILA) Blog, 22 March 2017 <http://blogaila.com/2017/03/22/the-china-africa-joint-arbitration-centre-a-natural-step-to-sustain-the-exponential-growth-of-the-sino-african-trade-saadia-bhatti-esq-mciarb/> on 13 May 2017.

<sup>17</sup>Africa Business Magazine, 'China-Africa Arbitration bodies sidestep international courts' available at <http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/#sthash.oMlrKxAF.dpuf>

<sup>18</sup>Wiles J, 'The Challenges of Arbitrating in Africa' London Seminar, 19 September 2012.

subjected to English Law.<sup>19</sup> This is expected because the drafters of these international contracts are either English or American and thus prefer applicable laws, seats, venues and venues they are familiar, accustomed to and comfortable with but with unrewarding outcomes for their African clients.<sup>20</sup> Moreover, in most of the disputes, 'African entities are usually the respondent in international arbitrations' and in terms of legal representation the parties in 99.9% of all African disputes are represented by lawyers and law firms based in the UK, USA or France.<sup>21</sup> In addition, arbitral experience naturally remains as the overriding concern, argument being that Africans lack enough training and experience in international commercial arbitration.<sup>22</sup>

Another reason is that the African continent has not been a key player in steering global arbitral discourse in spite of the fact that Africa generates most arbitral references.<sup>23</sup> As such, the vision of 'greater inflow of arbitral hearings with seats in the continent'<sup>24</sup> remains a mirage in spite of the huge benefits that accrue to jurisdictions that are chosen as seats of arbitration.<sup>25</sup>

Lastly, municipal laws and judicial systems have also proved inefficient, uncertain and highly regulated in dealing with matters involving foreign parties. It is as a result of some of these factors that there has been a push for arbitral

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<sup>19</sup>Edward Torgbor, 'Opening up International Arbitration in Africa' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in Africa, *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p. 21-22.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

<sup>23</sup>Emilia Onyema, 'Discussion paper' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, p. 21.

<sup>24</sup>Emilia Onyema, 'Regional Arbitration Institution for ECOWAS: lessons from OHADA Common Court of Justice and Arbitration' (2014) IALR, pp. 99 - 111.

<sup>25</sup>Emilia Onyema, 'Discussion paper' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, p. 22.

centres specifically tailored to the China-Africa trade relations.<sup>26</sup> However, the co-building of these arbitral centres in Africa must confront a number of challenges.

### **3.0 Challenges with African Arbitral Institutions**

#### **3.1 Plurality of Legal Systems**

The difference in the legal systems of the African countries is likely to pose a challenge to the CAJAC project. The legal systems in Africa vary from civil law, common law, Roman-Dutch, religious laws, customary law and hybrid jurisdictions coupled with cultural differences ranging from Anglophone, Francophone and Lusophone backgrounds, meaning that international arbitration takes different forms in different countries.<sup>27</sup> This plurality of legal systems may also pose a challenge in adopting uniform arbitration rules.

#### **3.2 Low Confidence in African Arbitrators' Competence and their Capacity**

It is worth noting that whereas there are quite a number of ADR practitioners in Africa, the practice of ADR largely remains a side job that professionals in other fields undertake from time to time.<sup>28</sup> There is also the related problem of parties having low confidence in African arbitrators thus favouring those from other regions. CAJAC and its collaborating arbitration centres in Africa such as NCIA, must therefore confront the question of whether there are sufficient and qualified arbitrators who will enable it to offer efficient and expeditious arbitral services.

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<sup>26</sup>Sudeshna Sarkar, 'China-Africa Arbitration bodies sidestep international courts' *African Business Magazine*, 9 May 2017

<http://africanbusinessmagazine.com/region/continental/china-africa-arbitration-bodies-sidestep-international-courts/> accessed, on 13 May 2017.

<sup>27</sup>Collins Namachanja, 'The Challenges Facing Arbitral Institutions in Africa,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), pp.146-147. See also Stuart Dutson, "Africa's Century" – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa' *Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa*, Addis Abba, July 2015, p. 104.

<sup>28</sup>Kamau Karori, 'Promoting Professionalism in ADR Practice,' *Alternative Dispute Resolution*, Vol.3 No.1 pp. 122-129, at p. 123.



### **3.3 Proliferation of Regional Arbitration Centres**

Recently, Africa has witnessed the proliferation of arbitration centres with each country seeking to become a regional arbitration hub.<sup>29</sup> The challenge is that each centre serves parties from that specific country. Moreover, the efforts to create these centres seem to be uncoordinated, fragmented, staff shortage, inadequate professional performance and poor service delivery.<sup>30</sup> There is need for joint efforts toward creation of fewer centres with more efficient working structure and capacity.<sup>31</sup> In addition, because the centres have not gained public confidence, most commercial disputes still end up in courts, explaining why they have low caseloads.<sup>32</sup>

### **3.4 Judicial Attitude towards Arbitration**

More often than not, the arbitral tribunal or the parties, may seek the assistance of courts in the arbitral process. It is for this reason that arbitral law allows for limited court intervention in arbitration, for instance, in the appointment, removal of an arbitrator, seeking interim relief, setting aside an award or in the enforcement of an award. This means that the attitude, whether real or perceived, of the local court system towards arbitration is quintessential in boosting international arbitration.<sup>33</sup> Therefore, concerns that the local courts are not independent, impartial, and efficient and that they are likely to favour local

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<sup>29</sup>These centres include: Congo Arbitration Centre, Cairo Regional Centre for International Commercial Arbitration (CIRICA), Court of Arbitration of Ivory Coast, Common Court of Justice & Arbitration of OHADA, Nairobi Centre for International Arbitration, Arbitration Centre of Madagascar, Permanent Court for Arbitration at the Mauritius Chamber of Commerce & Industry, Kigali International Arbitration Centre, Lagos Regional Centre for International Commercial Arbitration, and Arbitration Foundation of Southern Africa.

<sup>30</sup>Edward Torgbor, 'Privatization of Commercial Justice through Arbitration: The Role of Arbitration Institutions in Africa,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), pp. 116-117.

<sup>31</sup>Collins Namachanja, 'The Challenges Facing Arbitral Institutions in Africa,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p.145.

<sup>32</sup>Steven Finizio & Thomas Fuhrich, 'Africa's Advance'-Expert View: Surveying Africa,' *Commercial Dispute Resolution*, June 2014, pp. 27-29.

<sup>33</sup>Stuart Dutson, "Africa's Century" – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa' *Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa*, Addis Abba, July 2015, p. 105.

parties or state-owned entities over foreigners,<sup>34</sup> is a major threat to international arbitration. For example, huge backlogs in local courts, occasion delays and expenses in pursuing court assistance in the arbitral process.<sup>35</sup>

Moreover, foreign parties are also afraid where national courts use certain legal doctrines to favour national interests to the detriment of foreign parties. For example, if a court interprets the doctrine of public policy broadly, it may in effect upset cardinal principles of arbitration such as party autonomy and finality of arbitral awards, thus putting international arbitration into disarray.<sup>36</sup>

### **3.5 Political Instability**

Insecurity and political instability in the African region poses a great challenge to international investments and trade and consequently to the proper implementation of CAJAC. This is because increased incidences of ethnic violence, change of government and electoral violence are bound to interfere with conduct of arbitral and court proceedings.<sup>37</sup> For example, the eruption of the post-election violence in Kenya in the period 2007-2008 led to a lot of activities being brought to a standstill.<sup>38</sup>

### **3.6 Enforcement of Arbitral Awards**

Recognition and enforcement of arbitral awards is also a concern at the core of the arbitral process. Investors are keen to ensure that there is reciprocity. However, this is not like to be a major challenge to the CAJAC project since agreements are entered into between China and the African country in each case.

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<sup>34</sup> Ibid, p. 104.

<sup>35</sup> Ibid.

<sup>36</sup> Francis Kariuki, 'Challenges facing the Recognition and Enforcement International Arbitral Awards within the East African Community' *Alternative Dispute Resolution*, Vol. 4, No. 1, (2016), pp. 64-99, at p. 93.

<sup>37</sup>Stuart Dutson, "Africa's Century" – The rise of International Arbitration in Africa and what it means for users of Arbitral Institutions in Africa' *Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa*, Addis Abba, July 2015, p.104.

<sup>38</sup> See, Republic of Kenya, *Report of the Commission of Inquiry into the Post-Election Violence*, 2008, 90.

### **3.7 Poor Physical Infrastructure**

Apart from good legal infrastructure that is supportive of arbitration, there is need for convenient physical infrastructure to make African countries preferred arbitration hubs. Some cities in Africa are not easily accessible because of poor road (with massive traffic jams at certain hours), air and rail transport system. In addition, not all cities have secure and safe environment, excellent broadband connectivity and world-class dedicated arbitration facilities, such as hearing rooms, breakout and preparation rooms, audio-visual and videoconferencing facilities and special lounges for arbitrators and legal representatives. Moreover, services such as transcription, recording of hearings and interpretation may be lacking in some jurisdictions yet critical in arbitration.

### **4.0 Conclusion and Recommendations**

The co-building of the CAJACs in the different legal systems in a viable project which would bring benefits to the concerned countries, as highlighted above. It is also important that the challenges discussed above are looked into keenly so that the process of implementation is beneficial for China and Africa. The following are some suggestions on how to confront the highlighted challenges.

### **4.1 Role of African and Chinese Lawyers and Arbitrators in Drafting International Commercial Contracts**

Greater involvement of African and Chinese lawyers and arbitrators in the negotiation and drafting of international contracts is needed to ensure the arbitration clauses are favourable to the choice of applicable laws, seats and venues in Africa and China. This is important because, as one commentator has opined, the arbitration clause is 'the originating source and the crucial instrumental device, by and from which, Africans and their advisers wittingly or unwittingly transfer their problems and disputes for solutions abroad.'<sup>39</sup>

Moreover, to ensure adequate utilisation of CAJACs as arbitration centres, those negotiating and drafting arbitration clauses (clients and their legal representatives) must ensure that the clauses provide for referral of disputes to

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<sup>39</sup> Edward Torgbor, 'Opening up International Arbitration in Africa' Institutions in Africa Conference 2015: The Role of Arbitration Institutions in Africa, *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p. 22.

CAJAC and the seat of arbitration as the relevant African country depending, for example, where the CAJAC is based. The seat of arbitration is particularly important as it is the law of the seat that governs the conduct of arbitral proceedings, the choice of the seat can determine whether the national courts will intervene in the arbitration; whether the subject matter of the dispute is capable of being resolved by arbitration; the ease with which an arbitral award can be challenged or appealed; and the enforceability of an arbitral award in other jurisdictions.<sup>40</sup>

On being chosen as the seat of arbitration, a country derives benefits in numerous ways.<sup>41</sup> The country benefits by modernising its legal framework and earning tax from the services connected with arbitration, for example, hospitality, tourism, transportation and communication, and open up its legal services market particularly to international law firms; reputational advantage, among others.<sup>42</sup> Courts and judges are afforded the occasion to make judicial decisions on arbitration hence adding 'African voices' to global arbitral jurisprudence.<sup>43</sup> Arbitration institutions also increase their presence in the globe due to caseload while the arbitration users will get the benefit of the best practices in the arbitral process.<sup>44</sup>

## **4.2 Capacity Gaps and Infrastructural Challenges**

Training of arbitrators is vital in dealing with capacity gaps, ensure there are sufficient arbitrators who are suitably qualified, and avoid repeat appointments (which may create a perception of partiality, bias and put the credibility of the centre at risk). In this regard, CAJAC must confront issues such as: who will undertake the training in different countries? Are there sufficient trainers in the different states? Who will determine the curricula? Will the curricula be uniform

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<sup>40</sup>International arbitration briefing, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' *Ashurst*, (2013), p. 2.

<sup>41</sup> Emilia Onyema, 'Discussion paper' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in the Development of Arbitration in Africa, Addis Abba, July 2015, p. 22.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

across the different countries or will it reflect local dynamics such as culture? Who will set, mark and accredit arbitrators after the training?<sup>45</sup> This is an area where CAJAC may also need to partner with already existing regional and international ADR training centres such as the CIArb, NCIA, KIAC, et cetera, to put up cohesive training and continuous professional development programmes. After building sufficient capacity, CAJAC may need to create a database of arbitrators across the different partner states based on their areas of practice and/or experience, a brief description of the matters they have dealt with (of course without compromising on confidentiality).<sup>46</sup>

For states to be chosen as seats of arbitration, they must ensure that they have excellent road, air and rail transport system with secure and safe cities, excellent broadband connectivity and world-class dedicated arbitration facilities, such as hearing rooms, breakout and preparation rooms, audio-visual and videoconferencing facilities and special lounges for arbitrators and legal representatives. This explains why arbitration centres should seek more collaboration to pool resources together.

### **4.3 Collaboration with other Arbitration Centres in Africa**

To address the problem of proliferation of arbitration centres and fragmentation of efforts, staff shortage, inadequate professional performance and poor service delivery, there is need for realigning these efforts. Moreover, there is need for the various arbitration centres to collaborate and share experiences so as to win public confidence in the continent. CAJACs could collaborate with the various arbitration centres in Africa and benefit from joint marketing initiatives. Such initiatives could extend to holding of arbitration conferences and events in the respective countries, publication of joint websites listing the centres and maintaining the profiles of all qualified arbitrators.<sup>47</sup> This could increase caseloads to the centres and boost public confidence in arbitration.

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<sup>45</sup>Kamau Karori, 'Promoting Professionalism in ADR Practice,' *Alternative Dispute Resolution*, Vol.3 No.1 pp. 122-129, at p. 124.

<sup>46</sup>Ibid.

<sup>47</sup>Edward Torgbor, 'Opening up International Arbitration in Africa' *Arbitration*

In co-building CAJAC, there is need to ensure that the arbitration centres it collaborates with in Africa are independent from public institutions and that they operate with a promise that national governmental and judicial institutions will not interfere unduly with their independent operation and decisions.<sup>48</sup> For example, financial and technical support from the State to the Nairobi Centre for International Arbitration should not affect its neutrality, predictability, professionalism and competitiveness by being seen as promoting national as opposed to international interests<sup>49</sup> thus affecting negatively on the confidence of the business community. Where there is state support in establishing the centres, the arbitral court may be seen as lacking neutrality thus affecting confidence in the process.

#### **4.4 Overcoming The Issue of a Plural Legal System in Co-Building CAJAC**

To overcome legal barriers arising from the different legal systems in Africa and bring certainty as to what rules and procedures would be applicable to arbitration, there is need for CAJAC to consider a regional approach in developing arbitration rules. Instead of adopting the local rules of an arbitration centre, CAJAC could consider adopting harmonised rules for specific regions. A few lessons can be drawn from the Organization for the Harmonization of Corporate Law in Africa (OHADA) treaty and its system of arbitration where it has a set of simple and uniform laws prescribing the basic rules applicable to any arbitration with a seat in an OHADA member state which supersede the arbitration law of any member state.<sup>50</sup> It is instructive to note also that in cases concerning OHADA law, the Common Court of Justice and Arbitration (CCJA), which is both a judicial court

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Institutions in Africa Conference 2015: The Role of Arbitration Institutions in Africa,' *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p. 38.

<sup>48</sup>P.J. McConnaughay, 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles,' *PKU Transnational Law Review*, Vol. 1. No.1, p.11.

<sup>49</sup>F. Kariuki, 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community,' *Alternative Dispute Resolution*, Vol. 4 No.1, pp. 64-99, at p. 96.

<sup>50</sup>OHADA, Common Court of Justice and Arbitration of the Organization for the Harmonization of Corporate Law in Africa, available at <http://www.pict-pcti.org/courts/OHADA.html>

and an arbitration institution supervising the administration of arbitral proceedings, has exclusive jurisdiction to rule upon disputes relating to the application and interpretation of the uniform acts<sup>51</sup> thus taking precedence over national courts.<sup>52</sup> This could help alleviate the problem of different legal systems amongst the countries trading with China and minimise incidences of excessive intervention by municipal institutions in the arbitral process.

#### **4.5 Independence of Arbitral Courts**

Moreover, to ameliorate the difficulty that arises particularly where lawyers seek to delay and frustrate the arbitral process, for example, through applications for stay and injunctions, there is need to safeguard the independence of arbitral courts and statutorily limit instances when national courts can intervene in arbitration.

One approach, is to allow the arbitral tribunal to conduct the proceedings from beginning to the end and allow courts intervention to 'issues of confirming appointment of arbitrators, interim measures, setting aside, and enforcement of the final award.'<sup>53</sup> The CAJAC-Johannesburg seems to limit court intervention in enforcement of the arbitral awards by providing that, 'By submitting the dispute to arbitration under these Rules, the parties (subject only to Article 36) undertake to carry out any award immediately and without delay; and also waive irrevocably their rights to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may validly be made.'<sup>54</sup>

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<sup>51</sup>The Harmonisation of business law in Africa & its impact on investors'<http://www.trinityllp.com/the-harmonisation-of-business-law-in-africa-its-impact-on-investors/>

<sup>52</sup> See for instance Rule 2.3 of the CAJAC-Johannesburg Rules which provides that 'In the event of any provision of the Rules conflicting with the mandatory law applicable to the arbitration, such law shall prevail.' If the mandatory law of arbitration happens to be a national law allowing excessive leeway for courts, this may create trouble.

<sup>53</sup> Edward Torgbor, 'Opening up International Arbitration in Africa' Arbitration Institutions in Africa Conference 2015: The Role of Arbitration Institutions in Africa, *Alternative Dispute Resolution*, Vol. 3, No. 2 (2015), p. 40.

<sup>54</sup> Rule 36.3 of the CAJAC-Johannesburg Rules.

Similarly, the NCIA Act establishes an Arbitral Court<sup>55</sup> with exclusive original and appellate jurisdiction to hear and determine all disputes referred to it under the Act<sup>56</sup> and whose decision is final<sup>57</sup> but its relationship with Kenyan courts in so far as jurisdiction in arbitration matters is concerned is unclear especially in view of Kenya's Arbitration Act, 1995<sup>58</sup> which allows for court intervention in limited instances. However, while the establishment of an independent Arbitral Court or Commission is a positive step in encouraging international arbitration in Africa, there is the potential of dissatisfied parties, challenging the same on grounds of ousted jurisdiction of national courts.<sup>59</sup>

Another approach, is to detach the arbitral process from the national courts, by establishing arbitral courts. For example, the Mauritius International Arbitration Act provides for appointments and specified administrative functions to be done by the Permanent Court of Arbitration.<sup>60</sup> Under the NCIA rules, the Arbitral Court plays a role in the removal of the arbitrator,<sup>61</sup> while under the CAJAC-Johannesburg Rules, the Arbitral Commission has the power to hear challenges relating to the jurisdiction of the tribunal<sup>62</sup> and arbitrability of a matter referred to arbitration.<sup>63</sup>

#### **4.6 National Courts that are Independent, Efficient, Transparent and Pro-Arbitration**

National courts must have a reputation for efficiency, integrity, impartiality, transparency, soundness of their judgments and have a good track record of supporting and enforcing arbitral awards. They should be supportive of

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<sup>55</sup> Section 21(1), Nairobi Centre for International Arbitration Act, Act No. 26 of 2013.

<sup>56</sup> Section 22(1), Nairobi Centre for International Arbitration Act, Act No. 26 of 2013.

<sup>57</sup> Section 22(2), Nairobi Centre for International Arbitration Act, Act No. 26 of 2013.

<sup>58</sup> Section 10, Act No. 4 of 1995, Laws of Kenya.

<sup>59</sup> Kariuki Muigua & Ngararu Maina, 'Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration,' *Alternative Dispute Resolution*, Vol.4 (1), (2016), p. 169.

<sup>60</sup> See for example, Section 8(3) and 8(6) of the Mauritius International Arbitration Act, Act No. 37 of 2008.

<sup>61</sup> Rule 11(6), Nairobi Centre for International Arbitration Rules.

<sup>62</sup> Rule 6.2 of the CAJAC-Johannesburg Rules.

<sup>63</sup> Rule 6.3 of the CAJAC-Johannesburg Rules.



arbitration, with minimal judicial intervention except to uphold and support the arbitral process,<sup>64</sup> for instance by court decisions denying the setting aside of arbitral awards or preventing court proceedings from ignoring the existence of an arbitration clause. There is therefore a need for increased collaboration between courts and the arbitration fraternity and training of judges to enhance the levels of knowledge and experience in arbitral matters.

#### **4.7 Enforcement of Arbitral Awards**

Although with most arbitral centres rules, the parties by consenting to arbitration undertake to carry out an award immediately and without any delay,<sup>65</sup> it is important to note that enforcement of an award is a very crucial phase in arbitration as it is the fruit of every arbitral process. As such, there is need for CAJACs to exude efficiency, neutrality, predictability, professionalism and competence in the arbitral processes, to ensure that their awards will be easily complied with by parties, otherwise it will be futile to engage in such proceedings.

Even so, it is advisable for parties and their legal advisers to ensure that the chosen seat has ratified the New York Convention<sup>66</sup> to maximise the chances of an award being enforced in other jurisdictions.<sup>67</sup> It is therefore worrying when Rule 8 of CAJAC-Johannesburg Rules under the heading 'venue' provides that 'CAJAC Johannesburg will accept matters referred to it by agreement of the parties regardless of the seat of the arbitration.'<sup>68</sup> What happens if the chosen seat is not a part to the New York Convention or UNCITRAL Model Law?

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<sup>64</sup> Richard Tan, 'The Emergence of Singapore as a Global Arbitration Hub: Reasons for its Success,' *The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 79. No. 4 (2013), p. 438.

<sup>65</sup> See for example, Rule 21 (17) of the NCIA Rules and Rule 36.3 of the CAJAC-Johannesburg Rules.

<sup>66</sup> United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

<sup>67</sup> International arbitration briefing, 'Anatomy of an arbitration Part II: Key elements of an arbitration clause,' *Ashurst*, (2013), p.2.

<sup>68</sup> Rule 8 of the CAJAC-Johannesburg Rules.

#### **4.8 Political Stability**

It is also important that the countries ensure that there is security and political stability so that an environment conducive for trading activities and the functioning of dispute resolution structures is created. Insecurity and political instability negatively affect trading activities and, as already pointed out above, is one of the key reasons why some African countries have not been picked as seats of arbitration.

## **Dispute Resolution in the Construction Industry in Kenya: The Role of the Architect**

*By: Senator Sylvia M. Kasanga\**

### **1.0 The Preamble**

In the construction industry, due to differences in perceptions among the participants of the projects, conflicts are inevitable. If conflicts are not well managed, they quickly turn into disputes. Disputes are one of the main factors which prevent the successful completion of the construction project. Thus, it is important to be aware of the causes of disputes in order to complete the construction project in the desired time, budget and quality.<sup>1</sup>

This paper therefore aims to analyze the main causes of disputes which occur in the construction industry and the role of the architect in the dispute resolution. First, the paper looks into how disputes arise during construction management and how they can be avoided.

Secondly, it explains various alternative dispute resolution mechanisms that can be used in solving construction management disputes. Thirdly, it looks into the role of the architect in dispute resolution. Fourthly, the paper explains how all parties in the construction industry can work together to ensure minimized occurrences of disputes in the industry.

The paper concludes by giving recommendations.

### **2.0 What is a Dispute?**

A dispute can be defined as any matter or issue arising between parties which has not been resolved within 30 days (or such longer period as is agreed between the Parties) of its referral to an informal procedure or in respect of

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\* MCI Arb, Arch. (A1083) MAAK, MBA

<sup>1</sup> See Cakmak, Emre, and Pinar Irlayici Cakmak, "An Analysis Of Causes Of Disputes In The Construction Industry Using Analytical Network Process," *Procedia-Social and Behavioral Sciences* 109 (2014): 183-187 at 183.

which either Party has failed or refused to participate in an informal procedure and shall include any disputes referred to adjudication.<sup>2</sup>

### **3.0 Disputes during Construction Management: How do they arise? How can they be avoided?**

#### **3.1 How do Disputes arise during Construction Management?**

A combination of environmental and behavioral factors can lead to construction disputes.<sup>3</sup>

#### **3.2 Sources of Conflict and Dispute**

H. Murray Hohns (1979)<sup>4</sup> in his book states that the specific causes of the conflict and dispute can be largely traced to; Errors, defects or omissions in contract documents; Underestimation of the cost - by the client, the contractor, or both; Changes in conditions, (e.g. unforeseen ground conditions); Claims from end-users (legal rights of owners and tenants) and People involved in the construction process.

#### **3.3 Causes of Disputes**

H. Murray Hohns proceeds to give causes of construction disputes.

#### **3.4 Uncertainty:**

Uncertainty means that not every detail of a project can be planned before work begins. When uncertainty is high, initial drawings and specification will almost

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<sup>2</sup>[http://www.longworthconsulting.co.uk/construction\\_contracts/dispute.htm](http://www.longworthconsulting.co.uk/construction_contracts/dispute.htm)

<sup>3</sup>Younis, Grace, Gerard Wood, and M. Asem Abdul Malak, "Minimizing construction disputes: the relationship between risk allocation and behavioural attitudes," In *International Conference in Building Education and Research*" (R. Haigh and D. Amaratunga, eds.), pp. 728-740. 2008; Mydin, MA Othuman, N. Md Sani, NA Agus Salim, and N. Mohamed Alias, "Assessment of Influential Causes of Construction Project Delay in Malaysian Private Housing From Developer's Viewpoint," In *E3S Web of Conferences*, vol. 3. EDP Sciences, 2014; Peter E.D. Love, Peter R. Davis, Joanne M. Ellis, S.O. Cheung, "A systemic view of dispute causation", *International Journal of Managing Projects in Business*, Vol. 3 Issue: 4, 2010, pp.661-680.

<sup>4</sup> H. Murray Hohns, "Preventing and Solving Construction Contract Disputes", 1979.

certainly change and the project members will have to work hard to solve problems as work proceeds if disputes are to be avoided.<sup>5</sup>

### **3.5 Contractual Problems:**

Standard forms of contract also lay out risks and obligations all parties agree to take. Such rigid agreements may not be appropriate for long-term transactions carried out under conditions of uncertainty.<sup>6</sup>

Sometimes terms of contracts are amended by both parties when it becomes necessary to do so. However, an amendment could lead to terms that are unclear and ambiguous. As a result of which differences may arise between the parties.

### **3.6 Culture and Behaviour:**

The personnel required to visualise, initiate, plan, design, supply materials and plant, construct, administer, manage, supervise, commission and correct defects throughout the span of a large construction contract is substantial. Such personnel may come from different social classes or ethnic backgrounds. Forming a teamwork approach across cultures can be very difficult where each culture has its own values.<sup>7</sup>

Since contracts cannot cater for every eventuality, wherever problems arise either party may have an interest in gaining as much as they can from the other. Equally, the parties may have a different perception of the facts. At least one of the parties may have unrealistic expectations, affecting their ability to reach agreement. Alternatively, one party may simply deny responsibility in an attempt to avoid liability.<sup>8</sup>

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<sup>5</sup>See Santosh Srivastava, *Administration of Construction Contracts*, (Notion Press, 2016).

<sup>6</sup>See Santosh Srivastava, *Administration of Construction Contracts*, (Notion Press, 2016).

<sup>7</sup>University College of Estate Management (UCEM), 'Construction Disputes', available at [https://www.designingbuildings.co.uk/wiki/Construction\\_disputes](https://www.designingbuildings.co.uk/wiki/Construction_disputes)

<sup>8</sup>Ravi Amaratunga, "Towards Dispute Resolution in Construction Contracts in Sri Lanka: What is Quantity Surveyor's role on Dispute Avoidance rather than Dispute Resolution? Proceedings in Engineering, Built Environment and Spatial Sciences, 9th International Research Conference-KDU, Sri Lanka, 2016. Available at <http://www.kdu.ac.lk/proceedings/irc2016/2016/ENG-044.pdf>

### **3.7 Acceleration:**

In the Construction industry, commercial property owners sometimes insist upon acceleration of a construction project. Such examples might include the completion of a major retail scheme, and the need to meet key opening dates or tenant occupation in an office development. The construction costs associated with acceleration are likely to be less than the commercial risk the developer may face if key dates are missed.<sup>9</sup>

The circumstances surrounding acceleration are often not properly analysed at the time the decision is made, and that inevitably leads to disputes once the contractor has carried out accelerative measures and incurred additional costs only to find that the developer refuses to pay.<sup>10</sup>

### **3.8 Co-ordination:**

In complex projects involving many specialist trades, particularly mechanical and electrical installations, co-ordination is key, yet conflict often arises because work is not properly co-ordinated. This inevitably leads to conflict during installation which is often costly and time-consuming to resolve, with each party blaming the other for the problems that have arisen.<sup>11</sup>

Ineffective management control may result in a reactive defence to problems that arise, rather than a proactive approach to resolve the problems once they become apparent.<sup>12</sup>

### **3.9 Differing Goals:**

Personnel engaged on a large construction contract are likely to be employed by one of many subcontracted firms, including those engaged as suppliers and

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<sup>9</sup>Sherif M. Hafez, Remon F. Aziz, Moataz B. Elgayar, "Time Delay Disputes In Construction Industry and Prediction Model," *International Journal of Engineering Sciences & Research Technology*, 5, 8, August, 2016.

<sup>10</sup> See Santosh Srivastava, *Administration of Construction Contracts*, (Notion Press, 2016).

<sup>11</sup> Ibid.

<sup>12</sup> See Sherif M. Hafez, Remon F. Aziz, Moataz B. Elgayar, "Time Delay Disputes In Construction Industry and Prediction Model."

manufacturers. Each of these firms may have their own commitments and goals, which may not be compatible with each other and could result in disputes.<sup>13</sup>

### **3.10 Delays:**

Disputes frequently arise in respect of delays and who should bear the responsibility for them. Most construction contracts make provision for extending the time for completion. The sole reason for this is that the owner can keep alive any rights to delay damages recoverable from the contractor.<sup>14</sup>

To avoid disputes on the question delay, contractor is required to give prompt notice of any circumstances that may cause a delay.<sup>15</sup>

### **3.11 Design:**

Errors in design can lead to delays and additional costs that become the subject of disputes. Often no planning or sequencing is given to the release of design information, which then impacts on construction. Equally, the design team sometimes abrogate their responsibilities for the design, leaving the contractor to be drawn into solving any design deficiencies by carrying out that part of the work itself to try to avoid delays, and, in doing so, innocently assuming the risk for any subsequent design failures.<sup>16</sup>

### **3.12 Project Complexity:**

In complex construction projects the need to carry out a proper risk assessment before a contract is entered into is paramount: yet this is often not done.<sup>17</sup>

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<sup>13</sup> See Santosh Srivastava, *Administration of Construction Contracts*, (Notion Press, 2016).

<sup>14</sup> See Santosh Srivastava, *Administration of Construction Contracts*, (Notion Press, 2016); Getahun, Assegid, Yolente C. Macarubbo, and Alemu Mosisa. "Assessment of Construction Dispute Resolution in Ethiopian Somali Regional State Road Projects: A Case Study on Road Projects in the Region," *American Journal of Civil Engineering*, 4, No. 6 (2016), 282-289.

<sup>15</sup>University College of Estate Management (UCEM), 'Construction Disputes', available at [https://www.designingbuildings.co.uk/wiki/Construction\\_disputes](https://www.designingbuildings.co.uk/wiki/Construction_disputes)

<sup>16</sup>Getahun, Assegid, Yolente C. Macarubbo, and Alemu Mosisa. "Assessment of Construction Dispute Resolution in Ethiopian Somali Regional State Road Projects: A Case Study on Road Projects in the Region," *American Journal of Civil Engineering*, 4, No. 6 (2016), 282-289.

<sup>17</sup>See Santosh Srivastava, *Administration of Construction Contracts*, (Notion Press, 2016).

There are numerous examples of projects taking much longer than planned and contracted for because there was insufficient appreciation of the risks associated with the project's complexity. Inevitably the delay and additional costs the contractor incurs, and the owner's right to claim damages for delay, often develop into bitter disputes.<sup>18</sup>

### **3.13 Quality and Workmanship:**

In traditional construction contracts, disputes often arise as to whether or not the completed work is in accordance with the specifications. The specification may be vague on the subject of the dispute in question, and each party to the contract may have a different view on whether the quality and workmanship is acceptable.<sup>19</sup>

In design and build contracts, perhaps the greatest deficiency is in the contract documentation, particularly the employer's requirements. This inadequacy inevitably leads to claims by the contractor for additional costs, which, if not resolved, can lead in turn to costly disputes.<sup>20</sup>

### **3.14 Site Conditions:**

If the contract inadequately describes which party is to take the risk for the site conditions, disputes are inevitable when adverse site or ground conditions impede the progress of work or require more expensive engineering solutions.<sup>21</sup>

Even if the Employer, in good faith, provides detailed information on the site conditions to the contractor, if that information is discovered to be incorrect and

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<sup>18</sup>Ibid.

<sup>19</sup>Sherif M. Hafez, Remon F. Aziz, Moataz B. Elgayar, "Time Delay Disputes In Construction Industry and Prediction Model," *International Journal of Engineering Sciences & Research Technology*, 5, 8, August, 2016.

<sup>20</sup> See Santosh Srivastava, *Administration of Construction Contracts*, (Notion Press, 2016).

<sup>21</sup>Sherif M. Hafez, Remon F. Aziz, Moataz B. Elgayar, "Time Delay Disputes In Construction Industry and Prediction Model."



the contractor has relied on it and acted upon it to their detriment, the Employer may be liable to the contractor for the consequences.<sup>22</sup>

### **3.15 Tender:**

The time allowed to scrutinize the tender documents, prepare an outline programme and methodology, carry out a risk assessment, calculate the price, and conclude the whole process with a commercial review is often impossibly short. Mistakes in this process may have an adverse effect on the successful commercial outcome of the project. A culture may arise in the contractor of pursuing every claim that has a prospect of redressing any ultimate financial shortfall. This approach does nothing to foster close and co-operative working relationships between the owner and the contractor during the progress of the work, and inevitably leads to disputes.<sup>23</sup>

### **3.16 Value Engineering:**

This term often lacks definition in construction contracts and can lead to disputes, particularly where the saving is to be shared between the contractor and the owner. Savings in respect of the supply and installation of the material or product in question might be relatively easy to determine and agree, but these are not the only benchmarks, and a proper value engineering approach needs to take full account of the life cycle costs of any proposed change.<sup>24</sup>

### **3.17 Incomplete Scope Definition:**

It is the design professional's responsibility to define and design the project scope so as to meet the owner's functional, budgetary, time and environmental project criteria. When the design professional fails to meet their responsibility, the owner is almost always dissatisfied with the result, with the effect that strict correspondence soon ensues between the parties. Also, when the scope of the

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<sup>22</sup>University College of Estate Management (UCEM), 'Construction Disputes', available at [https://www.designingbuildings.co.uk/wiki/Construction\\_disputes](https://www.designingbuildings.co.uk/wiki/Construction_disputes)

<sup>23</sup>Sherif M. Hafez, Remon F. Aziz, Moataz B. Elgayar, "Time Delay Disputes In Construction Industry and Prediction Model," *International Journal of Engineering Sciences & Research Technology*, 5, 8, August, 2016.

<sup>24</sup> Ibid.

work is unclear, this presents an unhappy relation for future between the owner and the contractor, arguing about the scope and quality of the work, and whether in fact the work is properly defined by the contract documents prepared by the design professional.<sup>25</sup>

#### **4.0 How can disputes be avoided in the Construction Industry<sup>26</sup>**

Most disputes can be avoided if appropriate actions are taken such as; ensuring that there is a legally enforceable contract in place, the contract protects both parties' interests, the contract is well written without conflicting clauses or contractual loopholes and that the contract is administered in a spirit of honesty and cooperation by all parties.<sup>27</sup>

The contractor on the other hand should; endeavor to understand the contract and comply with its provisions, submit and resolve variations as soon as practical and admit when they're wrong. Maintenance of accurate records as well as ensuring expert advice is sort when necessary would also help in avoiding disputes.

Lastly, the construction contract Managers should also be made aware of potential disputes and problems on a project so that they can take the necessary action and intervene if required to avoid the problem escalating.<sup>28</sup>

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<sup>25</sup>UKEssays, "Management of Conflict and Dispute Resolution," 23rd March, 2015, available at <https://www.ukessays.com/essays/construction/the-management-of-conflict-and-dispute-resolution-construction-essay.php>

<sup>26</sup> <http://qsadvisor.com/2015/04/avoid-disputes-construction-industry/>

<sup>27</sup> Paul Netscher, "How to Avoid Disputes in the Construction Industry," available at <https://qsadvisor.com/2015/04/avoid-disputes-construction-industry/>

<sup>28</sup>See generally, Opata Christian Narh, Eric Edwin Owusu, Dr. K. Oduro-Apeatu, Tettey-Wayo John Narh, "An Exploratory Study of Professional Conflicts and Disputes within the Construction Industry," *International Journal of Managerial Studies and Research (IJMSR)* Volume 3, Issue 12, December 2015, pp. 44-65.

## **5.0 Alternative Dispute Resolution Mechanisms**

Alternative Dispute Resolution (ADR) is a collective term used to describe methods of resolving disputes which are alternatives to litigation and which usually offer a less expensive solution.<sup>29</sup> The Kenyan branch of Chartered Institute of Arbitrators, the Dispute Resolution Centre and Mediation Training Institute are currently the main bodies that offer ADR in Kenya.

However, parties are not obliged to use these bodies. They are free to state in their agreements how the ADR proceedings will be carried out and which body will oversee the proceedings. The parties are also free to choose individual qualified arbitrators.

The main alternative dispute resolution (ADR) methods available in Kenya are negotiation, conciliation, mediation and arbitration. Article 159 of the Constitution entrenches ADR as part of Kenya's dispute resolution mechanism; The Civil Procedure Act Section 59 (court Annexed mediation); Article 33 of United Nations Charter.

### **5.1 Mediation**

Mediation has appeared as an increasingly used form of dispute resolution, involving a neutral third party working to facilitate effective negotiations to enable a mutually acceptable resolution of the dispute.

In mediation, the parties explore options, measuring the strengths and weaknesses of their respective cases. The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves.<sup>30</sup>

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<sup>29</sup> UKEssays, "Management of Conflict and Dispute Resolution," 23rd March, 2015, available at <https://www.ukessays.com/essays/construction/the-management-of-conflict-and-dispute-resolution-construction-essay.php>

<sup>30</sup> 5050.1A CSL P (Extended) Using Alternative Dispute Resolution Techniques, 03/23/2005, available at <https://www.gsa.gov/directives-library/using-alternative-dispute-resolution-techniques-50501a-csl-p-extended>

## **5.2 Negotiation**

Negotiation is any form of communication between two or more people for purposes of arriving at a mutually agreeable solution to a dispute.<sup>31</sup>

In negotiations the disputants may represent themselves or may be represented by agents. Whatever the case the disputants have control of the negotiating process.<sup>32</sup> The objective of negotiations is to arrive at a “win- win” solution to the dispute at hand.<sup>33</sup>

## **5.3 Conciliation**

Conciliation is not a universally defined mechanism and may bear different meanings in different jurisdictions.<sup>34</sup> Locally it is described as a mechanism used to test the possibility of two disputing parties making up and assuming prior cordial relationship.

The Commission for conciliation, mediation and arbitration of S. Africa defines it as a process where a Commissioner meets with parties in a dispute and explores ways to settle the dispute by agreement.

The 3<sup>rd</sup> party, a Conciliator separately discusses the dispute with each party, then prepares a solution based on what he considers to be just and optimal compromise.

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<sup>31</sup>Mueni Mutunga, “In overview Of Alternative Dispute Resolution (ADR) mechanisms” available at

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjL4MTQnv\\_YAhXMbhQKHTZ\\_BoIQFgglMAA&url=https%3A%2F%2Fwww.icpsk.com%2Fseminar-presentations%2Ffinish%2F10-seminar-presentations%2F1560-an-overview-of-alternative-dispute-resolution-mueni-mutunga&usg=AOvVaw1SlBzq0uEbOZsjQ5ZwWtC2](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjL4MTQnv_YAhXMbhQKHTZ_BoIQFgglMAA&url=https%3A%2F%2Fwww.icpsk.com%2Fseminar-presentations%2Ffinish%2F10-seminar-presentations%2F1560-an-overview-of-alternative-dispute-resolution-mueni-mutunga&usg=AOvVaw1SlBzq0uEbOZsjQ5ZwWtC2)

<sup>32</sup>Mueni Mutunga, “In overview Of Alternative Dispute Resolution (ADR) mechanisms.”

<sup>33</sup> Ibid.

<sup>34</sup> Ibid

Conciliation is used to restore the parties to the pre- dispute relationship after which other ADR technique may be applied.

In conciliation, the conciliator is the Architect and designer of the solution.

#### **5.4 Arbitration**

Arbitration is a process that is subject to statutory controls i.e. Arbitration Act 1995 and the Civil Procedure Act.

In arbitration, a neutral person called an "arbitrator" hears arguments and evidence from each side and then decides the outcome of the dispute. Arbitration is less formal than a trial, and the rules of evidence are often relaxed. Arbitration may be either "binding" or "nonbinding." *Binding arbitration* means that the parties waive their right to a trial and agree to accept the arbitrator's decision as final. Generally, there is no right to appeal an arbitrator's decision. *Nonbinding* arbitration means that the parties are free to request a trial if they do not accept the arbitrator's decision.<sup>35</sup>

A court can intervene in arbitration proceedings but the level and instances of interventions are limited.

Under the Kenyan Arbitration Act the instances in which a court may intervene in arbitration proceedings include during determination of the enforceability of arbitration agreements; granting interim measures of protection; setting aside the appointment of an arbitrator; appointing an arbitrator where none has been appointed; assisting in taking of evidence; removing an arbitrator; setting aside of arbitral awards; enforcement of arbitral awards and hearing and determining appeals, where a right of appeal from the decision of an arbitral tribunal lies to the court.<sup>36</sup>

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<sup>35</sup>Judicial Council of California, "ADR Types & Benefits,"  
<http://www.courts.ca.gov/3074.htm>

<sup>36</sup>Sean Omondi and George King, "Alternative dispute resolution in Kenya," *Alternative dispute resolution in Kenya*

## **5.5 Adjudication**

Adjudication is a process of expeditiously resolving construction disputes while construction is in progress by an independent person, the Adjudicator.

The adjudication process begins when the party referring the dispute to adjudication gives written notice of its intention to do so. The Notice of Adjudication should briefly set out a description of the nature of the dispute and the parties involved, details of where and when the dispute arose, the nature of the remedy being sought, names and addresses of the parties to the contract, including addresses where documents may be served.<sup>37</sup>

The Notice of Adjudication is the first formal step in the adjudication procedure. Save for the minimum information set out above, there is no particular requirement as to the form of the document.<sup>38</sup>

Following service of the Notice of Adjudication, the next step is to appoint an adjudicator. The parties can agree on an individual to act as the adjudicator or, if agreement cannot be reached, the party who referred the dispute to adjudication may make an application to an Adjudicator Nominating Body.<sup>39</sup>

The referral notice must then be served. This is the document that sets out in detail the case of the party who is referring the dispute to adjudication and it should be accompanied by documentation in support of the claim together with expert reports (if any) and witness statements.

The adjudicator is required to reach his decision and his decision is final and binding, provided it is not challenged by subsequent arbitration or litigation.

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*-Articles -African Law and Business*, 12 January, 2016. Available at <http://www.bowmanslaw.com/wp-content/uploads/2016/08/george-and-sean-ADR-article.pdf>

<sup>37</sup>Pinsent Masons LLP, "The adjudication process," available at <https://www.out-law.com/en/topics/projects--construction/adjudication/the-adjudication-process/>

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

The parties are obliged to comply with the decision of the adjudicator, even if they intend to pursue court or arbitration proceedings.<sup>40</sup>

## **6.0 Duties and Responsibilities of the Architect in Dispute Resolution**

The role of an architect in construction disputes is to act as an arbitrator between the developer and the building contractor in case of any disputes during or after the construction period.<sup>41</sup>

### **6.1 Duty to Act in Good Faith<sup>42</sup>**

When acting as an arbitrator or making decisions as to who is correct in a dispute between the owner and the contractor, the architect's duty is not just to the owner. The architect must also consider the interests of the contractor as well.<sup>43</sup>

Even though the architect has no direct contractual relationship with the contractor, he owes a duty to the contractor to be fair and impartial when resolving a dispute. Thus, the architect has to walk a fine line between the owner and the contractor.<sup>44</sup>

### **6.2 Duty to be fair**

During dispute resolution, the architect must be fair and should obtain the complete views of both sides before making the final decision. Further, the architect's decision should be in writing and should include his reasons for the decision.

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<sup>40</sup> Ibid.

<sup>41</sup> <http://www.aak.or.ke/aak-chapters/architects-chapter/>

<sup>42</sup> P. J. Scholefield "Whose Side is the Architect On?" "San Diego Daily Transcript" (April 14, 2008)

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

### **7.0 Procedure of Resolving a Dispute<sup>45</sup>:**

When claims are asserted by either party to the construction contract, owner or contractor, the architect should immediately commence the process of resolution.

Any claim or demand by the contractor against the owner or by the owner against the contractor should be reduced to writing. It should be directed to the other party with a copy to the architect. During the architect's consideration of a claim, the contractor is required to continue diligently with the work of the contract and the owner is required to continue making payments according to the contract.

The architect's initial decision is necessary as a condition precedent to the next steps in the process. The architect should treat this contractual duty as a high priority assignment. Should the architect delay this decision, then the mediation and arbitration procedures will, by then, be set in train without the architect.

In making the decision, the architect must be fair and should obtain the complete views of both sides before making the decision. The decision must be based on the actual provisions of the contract documents, not what the architect wishes were in the documents. Sometimes the claim will be based on an alleged error or omission of the architect. This will be the litmus test of the fairness capacity of the architect.

All of the architect's decision-making procedures should be in writing. In the event that either or both of the parties are dissatisfied with the decision, or the procedure, higher authorities (arbitrators) will undoubtedly review, and possibly overturn, the architect's decision.

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<sup>45</sup>A. O'Leary "The Architects Pivotal Role in the Resolution of Construction Claims and Disputes" (1997) [http://www.dcd.com/oleary/oleary\\_jf.html](http://www.dcd.com/oleary/oleary_jf.html)



In the event the decision is considered fair and is acceptable to the parties, this resolves the claim and forestalls continuation of the procedure leading to mediation and arbitration.

The parties' acceptance of the architect's decision is usually the most economical way to end the controversy. Continuation through mediation and arbitration will undoubtedly entail considerable additional time and significant legal expense. The result, weeks or months later, might be the same as the architect's initial decision. The architect's decision-making duties do not extend to claims or controversies involving others than the owner and contractor.

## **8.0 Looking Ahead: Mechanisms to ensure Minimized Occurrences of Disputes in the Industry<sup>46</sup>.**

### **8.1 Identify Risks up front.**

Hiring experts or charging the project management team to review documents, procedures, and planned work methods not only pinpoints potential risk areas but specifies ways to eliminate or control them. Risk analysis identifies the party best prepared to assume that risk, and ways to mitigate the risk should it arise. Experts in the field armed with improved software analyze schedule and cost risks and produce a clearer picture of where dangers lie before work begins.<sup>47</sup>

### **8.2 Prevent Conflict with Constructability Reviews.**

Retaining consultants, construction managers, or contractors prior to completion of design helps assure that the design can be built both economically and in conformance to the design intent. Careful review of the design documents at various stages of development prior to a "For Construction" issuance and conducting value engineering studies improve the cost effectiveness of the design. Coordinating documents such as contracts, designs, plans, specifications, and schedules produces fewer opportunities for conflicts

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<sup>46</sup> <https://csengineermag.com/article/nine-lessons-for-avoiding-construction-disputes/>

<sup>47</sup> Civil + Structural Engineer, Nine lessons for avoiding construction disputes, January 29, 2014. Available at <https://csengineermag.com/article/nine-lessons-for-avoiding-construction-disputes/>

in the field, fewer guesses in the bids, fewer changes necessitated by conflicts, and fewer requests for more money.<sup>48</sup>

### **8.3 Build Claim Prevention into Contracts.**

When a potential cost or time risk event occurs, engineers and construction managers reduce the impact of the event with prompt schedule and claims reviews, active change order processing, and active change negotiation. Informal resolution of potential disputes or issues, based on a complete and careful analysis, assist in resolving issues before they become full blown disputes.<sup>49</sup>

### **8.4 Make Quick Decisions without Delays.**

Project management improvements eliminate inherent decision-making bottlenecks. The need for quick identification and resolution of potential issues, procedures long recognized as essential to cost control must be strengthened.<sup>50</sup>

### **8.5 Harness Technology to reduce Claims and Disputes.**

The documentation of events on a construction project is always important and new hardware and software ensure it is collected more completely and quickly.<sup>51</sup>

### **8.6 Drastically Reduce Cost with Real-Time Dispute Resolution.**

When potential disputes arise, prompt change order processing and consideration/approvals drive down costs. The advances in technology and more widespread knowledge of forensic scheduling allow quick and accurate analysis of potential disputes.<sup>52</sup>

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<sup>48</sup> Ibid.

<sup>49</sup> Civil + Structural Engineer, Nine lessons for avoiding construction disputes, January 29, 2014.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

## **9.0 Recommendations**

This research paper has illustrated that disputes in the construction industry are seriously affecting the industry. It is recommended therefore that the following recommendations be considered to help reduce the number of disputes; The parties must ensure there is legally enforceable contract in place which protects all parties interests and has no conflicting clauses or contractual loopholes and which is administered in a spirit of honesty and cooperation by all parties.<sup>53</sup>

The contractor should understand the contract and comply with its provisions and ensure that accurate records are maintained. The construction Managers should always be made aware of potential disputes and problems on a project so that they can take the necessary action and intervene if required to avoid the problem escalating.<sup>54</sup>

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<sup>53</sup> Paul Netscher, How to avoid construction disputes, 8/11/2016. Available at <http://www.pn-projectmanagement.com/construction-management-blog/how-to-avoid-construction-disputes>

<sup>54</sup> Ibid.

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## **Critical Analysis of Section 6 of Kenya's Arbitration Act: A Case for Reform**

*By: Evelyn Mbula Nzuki\**

### **1.0 Introduction**

It is accepted world-over that courts can only intervene in arbitration matters in strict conformity with the provisions of the various arbitration statutes. Therefore, there exists no inherent jurisdiction for the court to supervise arbitration outside the framework of the arbitration statutes. One of these instances where a court of law is permitted to intervene is in the stay of legal proceedings in instances where there is a valid arbitration agreement binding parties to litigation before it.

Recourse to arbitration arises from voluntary agreement by parties to have disputes between them resolved by way of arbitration. However, the same parties by mutual consent may elect to forego the arbitration agreement and have their dispute resolved through the rigmaroles of litigation. The problem however arises when one of the parties is entirely keen on exhausting the remedy afforded to it under the arbitration agreement when the other has already elected to revert to the court process. The former party in such an instance is automatically granted recourse under a stay provision available in arbitration legislations in various jurisdictions. This provision is founded on Article 8(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration ("MAL") and Article II (3) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Essentially, the grant of an order for stay of legal proceedings obliges the initiator of the court procedures with no choice but to respect the arbitration agreement they wish the dispute to be settled.<sup>1</sup> National courts in ordering stay are but upholding the reverence of the arbitration agreement.

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\*The author is a lawyer and a Master of Laws student in Public International Law.

Both Kenya and the UK have adopted the MAL.<sup>2</sup> They are also signatories to the New York Convention.<sup>3</sup> Both have enacted Arbitration Statutes that provide a stay provision.<sup>4</sup> However, they have adopted different approaches in the application of the stay pending arbitration. This article is therefore geared towards a critical analysis of how Kenya and the UK have applied Article 8 of MAL and Article II (3) of the New York Convention. Particular focus will be given to the specific wording of the stay provision in the arbitration statutes in Kenya and UK and the interpretation of the said provision by their courts.

## **2.0 Stay of Court Proceedings in Lieu of Arbitration under MAL**

The MAL under Article 8 is viewed as the pioneer legal basis for the stay clause. It provides thus:

*“(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

*(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”*

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<sup>1</sup> Muigua K., “The Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya” *Kenya Law Review* Vol II [2010], at 8.

<sup>2</sup> Kenya in 1995. The UK of Great Britain and Northern Ireland together with its overseas territories of Bermuda (1993), British Virgin Islands (2013) and Scotland also adopted the MAL; see for this

[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 on 13th September 2017.

<sup>3</sup> Kenya in 1989; UK in 1975 albeit with a reservation that they will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State. See <http://www.newyorkconvention.org/countries> accessed on 13th September 2017.

<sup>4</sup> Kenya’s stay clause is under section 6 of its 1995 Arbitration Act while the UK’s is provided under section 9 of the English Arbitration Act, 1996.



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Article 8 (1) obliges domestic courts to refer an action to arbitration under certain conditions. The first condition, which is procedural, requires that an application for referral to arbitration be made not later than when the party requesting it submits its first statement on the substance of the dispute.<sup>5</sup> With this requirement, the courts have often considered whether the applying party made the request for referral to arbitration in due time. Generally, it is agreed that the effect of MAL Article 8 (1) points to the fact that by submitting the statement of claim to the court, the plaintiff expresses his wish to abandon the arbitration agreement. It also follows that by submitting his statement of defence, the defendant accepts the offer to amend their dispute resolution mechanism by agreeing to court litigation instead of arbitration.<sup>6</sup>As will be demonstrated herein below, Kenya and UK have adopted different interpretations on the meaning of the phrase “not later than when the party requesting it submits its first statement on the substance of the dispute.”

It is noteworthy that the imperative language of MAL 8(1) suggests that unless either party to the arbitration agreement raises an objection as to the process of the court initiated by the other, the court to which a substantive claim for which arbitration was agreed cannot consider this fact on its own initiative.<sup>7</sup>The party making the application, often the defendant, to have the dispute referred to arbitration must make their application in due time.<sup>8</sup>

Article 8 further requires that the dispute must be one that is specifically agreed to be resolved through arbitration pursuant to the arbitration agreement. The arbitration agreement must also neither be null and void, inoperative nor

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<sup>5</sup> UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration, United Nations Publication, Sales No. E. 12, Volume 9 (2012), at 33.

<sup>6</sup>High Commercial Court, Croatia, Pz-5168/01, April 29, 2001.

<sup>7</sup>Uzelac A., “Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and problem areas under the UNCITRAL Model Law,” INT.A.L.R. Issue 5, Sweet and Maxwell and Contributors (2005), at 157. See also, UNCITRAL: An analytical Commentary on MAL, Article 8, paragraph 3 available on the UNCITRAL website at <http://www.uncitral.org/uncitral/en/commission/sessions/18th.html> accessed on 14th September 2017.

<sup>8</sup> Ibid.

incapable of being performed.<sup>9</sup> Thus the court before making any order must interrogate whether there exists an arbitration agreement. Further, the court must then consider the validity of the arbitration agreement if it exists. A possible argument in respect of whether the arbitration agreement is null and void would relate to the non-arbitrability of the dispute. It is worth noting that the subject matter of disputes which are not arbitrable depends on the *lex fori*.<sup>10</sup> However, as was well elucidated in *Booz Allen Hamilton v SBI Home Finance*<sup>11</sup>, issues of rights in *personam* are considered arbitrable while disputes relating to rights in *rem* are appropriately settled by courts and public tribunals. However, this is not a rigid or inflexible rule and the *lex fori* determines what is arbitrable and what is not.<sup>12</sup> Simply put, arbitrability of an issue often fluctuates. An arbitral tribunal or a court are all competent in their respective rights to determine whether an issue is arbitrable or not and this varies from country to country depending on their domestic and arbitration laws.<sup>13</sup> Other arguments as to the nullity of an arbitration agreement may include objections of the nature that the disputing parties are not the parties envisaged in the arbitration agreement or that the dispute is *ultra-vires* the scope of the arbitration agreement.<sup>14</sup> The arbitration agreement may also be null and void because it is against public policy or that it is unreasonably favours one party at the expense of the other making it legally non-binding under the law of contract.<sup>15</sup>

In respect of an arbitration clause being neither inoperative nor incapable of being performed, a party may raise objections to its enforcement on the basis of the other party's failure to comply with the time frame stipulated in the arbitration agreement or that the arbitration agreement has been terminated

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<sup>9</sup>UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration (n 5).

<sup>10</sup>Hanotiau B., "The Law Applicable to Arbitrability," 26 SAclJ (2014), at 874.

<sup>11</sup>(2011) 5 SCC 532.

<sup>12</sup> Ibid.

<sup>13</sup>Hanotiau B., "The Law Applicable to Arbitrability (n 9), at 878.

<sup>14</sup>UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration (n 5).

<sup>15</sup>Ibid.

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making recourse to arbitration abandoned.<sup>16</sup> The Federal Supreme court of Germany in the case III ZR 33/00<sup>17</sup> also held that that the arbitration agreement did not debar the plaintiff from bringing an action before a state court because the arbitration agreement had proven impracticable under the circumstances. The Court in applying section 1032 (1) German Code of Civil Procedure found that an arbitration agreement was incapable of being performed because the plaintiff was unable to afford the costs of arbitration. This according to the court only left the plaintiff with the option of pursuing his claim was in state court through legal aid mechanism for which he had qualified. Further the court took notice of the fact that the defendant had not been willing to advance the costs of arbitration. Furthermore, the court was on the opinion that, “the plaintiff was not estopped from relying on the ‘incapable of being performed’ exception because of his own previous reliance on the arbitration agreement as the use of a procedural means of defence would not amount to a violation of good faith. Unlike the plaintiff, the defendant had not brought an action before a state court. Thus, as compared to the otherwise inevitable loss of the plaintiff’s right to due process of law, legal proceedings, the defendant would not suffer any prejudice by having the dispute resolved in the state court.

It must be underscored that article 8(1) is couched in mandatory terms to the extent that where the conditions set out therein are met, courts are obliged to refer the matter to arbitration.<sup>18</sup>

Also, Article 8 (2) of the MAL further allows arbitration proceedings to be commenced or continued even where an application to refer a case to arbitration is pending in the court.<sup>19</sup> The rationale for this is to be viewed in light of Article 16 of the MAL which donates to the tribunal the competence to rule on its own

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<sup>16</sup>Ibid.

<sup>17</sup>Federal Supreme Court – Bundesgerichtshof (Germany); III ZR 33/00, September 14, 2000 (CLOUT case 404).

<sup>18</sup>UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration (n 5), at 37.

<sup>19</sup> UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration (n 5).

jurisdiction. This competence extends to ruling on objections regarding the existence or validity of the arbitration agreement.<sup>20</sup>

### **3.0 Stay of Court Proceedings in lieu of Arbitration under the New York Convention**

The stay provision under the New York Convention is very similar to the one in Article 8 (1) MAL save that there is no reference to the precise time when an application for reference to arbitration can be made. It only makes reference that such application may be made after the court has been seized of a matter. Indeed, Article II paragraph 3 of the New York Convention states:

It is inherent that the application of Article II (3) of the New York Convention poses a problem on the basis that the New York Convention's field of application is in respect of enforcement of foreign awards and not to the initial enforcement of arbitration agreements where one party chooses to resort to the courts instead. However, it has been argued that in resolving this question of when an arbitration agreement can be enforced under the New York Convention, it would be consistent to interpret Article II (3) by analogy to Article I (1) which mainly deals with non-domestic award.<sup>21</sup> Accordingly, the courts apply almost unanimously Article II (3) of the New York Convention to an arbitration agreement providing for arbitration in another (Contracting) State. No unanimity exists with respect to the applicability of Article II (3) of the New York Convention to an arbitration agreement providing for arbitration within the forum State.<sup>22</sup>

Be that as it may, just like in the MAL, the words "at the request of one of the parties" in Article II (3) indicate that a court may not refer the parties to arbitration on its own motion, but that a party should invoke the arbitration agreement. If a party does not invoke the arbitration agreement, the court will

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<sup>20</sup>Uzelac A., "Jurisdiction of the Arbitral Tribunal: Current Jurisprudence and problem areas under the UNCITRAL Model Law," (n 6).

<sup>21</sup>Albert Jan van den Berg, "The New York Convention of 1958: An Overview ICCA: Brussels, Belgium (2008), at 7.

<sup>22</sup>*Ibid.*

retain jurisdiction to hear the case, unless it lacks jurisdiction for some other reason not related to an arbitration agreement.

Importantly the New York Convention does not specify the cut off time within which a party may invoke the arbitration agreement. The wording of the New York Convention may be construed to mean the application for stay can be brought at any time during the proceedings but before judgement is delivered. This is a complete shift from the position of the MAL. Thus, under the New York convention, the fact that a court has been seized of a matter does not block a party from bringing the stay of proceedings application. The applicant may do so regardless of whether substantive litigation has commenced. This is a different approach from the positions adopted in Kenya and in the UK as we shall see shortly.

Further, just like in the MAL, Article II (3) of the New York Convention mandates a positive act by either party to move the court and bring the stay of proceedings application. The court does not act *suo moto*. Further it is generally agreed that the language of Article II (3) does not leave any discretion to a court for referring the parties to arbitration once the conditions mentioned above are fulfilled unless the court finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>23</sup>

#### **4.0 Application of stay Pending Arbitration in Kenya**

Kenya adopted the MAL in 1995.<sup>24</sup> Thus the arbitration principles and practices adopted in Kenya appear to be as a result of her endeavour to operationalise the provisions of the MAL. In particular, the stay clause in section 6 (1) of the Kenyan Arbitration Act 1995 closely mirrors the provision of Article 8 (1) of the MAL. The section provides:

*“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*

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<sup>23</sup>Ibid.

<sup>24</sup>[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 on 13th September 2017.

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*when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds –*

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

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

Initially the wording of section 6 (1) before its amendment by the Arbitration (Amendment) Act, 2009<sup>25</sup> was that the applicant would make an application not later than the time when he/she enters appearance or '*files any pleadings or takes any other step in the proceedings*'.

While Kenya's Arbitration Act is based on the MAL, section 6 (1) of the Act departs from the MAL in respect to when an application to refer a matter to arbitration can be made. Under the regime of Section 6 of the Arbitration Act 1995, a party intending to enforce the arbitration agreement must make an application to stay court proceedings at the time they enter appearance and before taking any further step of acknowledging the claim. Ideally, the wording of section 6 (1) before the 2009 amendment was considered vague thus the purpose of the amendment was to make the construction of section 6 (1) better and consistent and in particular sought to define what amounted to acknowledging a claim. However, one may construe from precedents emanating from Kenyan courts that the current formulation of section 6 (1) Arbitration Act, 1995 is still ambiguous at the very least. While most decisions are of the view that the wording of section 6 (1) of the Arbitration Act, 1995 is clear and that an application for stay stands a better chance of success when it is filed upon entering appearance, other decisions, though in the minority, are of the view that the conditions set out in the Section 6 (1) are disjunctive and should not be viewed conjunctively. This latter position holds that the correct interpretation of section 6 (1) of the Arbitration Act, 1995 is that an applicant can

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<sup>25</sup>Arbitration (Amendment) Act No. 11 of 2009, section 5.

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apply for a stay of proceedings pending arbitration after entering appearance but before filing any substantive pleadings in response to or in acknowledging the suit.<sup>26</sup> This latter interpretation seems the closest interpretation that manifestly flows from Article 8 of the MAL.

A thorough analysis of the wording of the amended section 6 (1) in 2009 is to the effect that the law sought to limit the time for making an application for stay to end when a party formally enters appearance in a suit before a court. However, it also envisages a situation where once the court has properly been seized of a matter (the applying party having acknowledged the claim) an application to stay the suit in referral to arbitration will be moot.<sup>27</sup>

Perhaps to demonstrate this we should consider various dicta emanating from Kenyan courts. In *Bedouin Enterprises Ltd v Charles Njogu Lofty and Joseph Mungai Gikonyo T/A Garam Investments*,<sup>28</sup> the High Court rejected the argument that an application for reference to arbitration can be made at three stages, namely: “at the stage of entering appearance or at any stage of filing any pleadings or at the time of taking any substantive step in the proceedings.” The Court was of the opinion that the applicant must bring their application for stay of proceedings and referral to arbitration at the time, he/she enters appearance. In *TM-AM Construction Group Africa v Attorney General*,<sup>29</sup> Mbaluto J. ruled that since the Attorney General had made his application for stay forty-one days later after he had entered appearance, his application was thus incompetent. In *Victoria Furniture Limited v African Heritage Limited & another Nairobi*,<sup>30</sup> an application for stay was dismissed because the applicant had filed the application about two months upon entering appearance or at the time it acknowledges the claim of the Plaintiff.

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<sup>26</sup>See infra below the conflicting decisions by Lesiit J. in *Treadsetters Tyres Ltd v Elite Earth Movers Ltd* [2007] eKLR and *Lavington Security Guards Ltd v Kenya Electricity Generating Company* [2009] eKLR.

<sup>27</sup>Ngotho P., “The Bastard Provision in Kenya’s Arbitration Act” (2013) 1 (1) *Alternative Disputes Resolution CiArb-Kenya Journal*, 148-162.

<sup>28</sup>(Unreported) Civil Case No. 1756 of 2000.

<sup>29</sup>[2001] eKLR.

<sup>30</sup>HCCC No.904 of 2001.

Additionally, in *Treadsetters Tyres Ltd v Elite Earth Movers Ltd*,<sup>31</sup> Lesiit J. cited with validation the case of *Charles Njogu* above and ruled that since the defendant had filed a defence after entering appearance he had consequently waived his right to rely on the arbitration clause thus his grounds for opposition to the suit did not have merit and were dismissed. However, Lesiit J. offered a different and conflicting opinion with regards to section 6 (1) of the Arbitration Act in *Lavington Security Guards Ltd v Kenya Electricity Generating Company*.<sup>32</sup> In this case Lesiit J. stated that the three conditions set under section 6 (1) of the Arbitration Act 1995 should be construed disjunctively and not conjunctively. Thus, he posited that the correct interpretation of section 6 (1) is that an applicant can apply for a stay of proceedings even after entering appearance but before delivering any pleading. As a result, since the applicant had entered appearance and never took any further step in the proceedings but filed the application for stay and referral fourteen days after entering appearance, his application was still competent.

#### **4.1 Entering Appearance**

Under common law jurisdictions and also in Kenya, where a defendant has been served with summons to appear, he shall, unless some order is made by the court, file his appearance within the time prescribed in the summons.<sup>33</sup> It is worth noting that generally where no appearance has been entered by or for a defendant on or before the day fixed in the summons, the court shall on the request of the plaintiff (s) enter default judgement against the defendant (s).<sup>34</sup> Thus by dint of this, entering appearance is nothing more than preventing the plaintiff from procuring default judgement against the defendant. It is a procedural step in avoiding an adverse judgement against a party to whose attention it has been brought that a suit has been brought against them but who does nothing in any way to at least show the court of an intention to respond to the suit.

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<sup>31</sup>[2007] eKLR.

<sup>32</sup>[2009] eKLR.

<sup>33</sup>Civil Procedure Rules 2010, Order 6 rule 1.

<sup>34</sup>See generally, Civil Procedure Rules 2010, Order 10.



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It is not a substantive step in the proceedings as it would not be right to claim that by filing a memorandum of appearance the defendant acknowledges the arising of the alleged liability. Indeed, the contents of a memorandum of appearance are that the defendant is required to give particulars of their name(s), the name of the firm or the advocate who will act for them (if any) and the addresses of either the defendant or his advocate for purposes of service, duly signed by either of them.<sup>35</sup> There is no other statement with regard to the substance of the suit itself or any averment by the defendant to acquiescence to the jurisdiction of the court.

It is also important to note that the issue of whether the court has requisite jurisdiction or is properly seized of a matter is not an issue that arises due to the filing of a memorandum of appearance. Indeed, it is common practice for example that where a party intends to object to the jurisdiction of the court he can do so either by filing and moving through the court vide a Notice of Preliminary objection (P.O) or he/she may raise his objection through his pleadings.<sup>36</sup> Indeed objections as to the jurisdiction of the court can be raised at any time before judgement is entered and thus it is irrelevant whether or not the court has been properly seized of the matter.

From the foregoing, it seems strange that the Arbitration Act, 1995 and Kenyan courts, especially with regards to stay of legal proceedings pending arbitration, construe that by entering appearance the intending applicant has taken a step in acknowledging the claim and thus he/she has waived their right to arbitration with the court being properly seized of the matter.

It is perhaps instructive to note here that under MAL or the New York Convention, entering appearance is of no consequence with respect to a stay. As a result, then, it is quite baffling why under the Kenyan arbitration law, entering appearance is a condition precedent for making an application for staying court proceeding and referring the matter to arbitration.

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<sup>35</sup>See Civil Procedure Rules 2010, Form No. 12 Appendix A.

<sup>36</sup>Civil Procedure Rules 2010, Order 2 rule 9.

## 4.2 What is a Step?

As earlier explained, entering appearance should not be construed to the effect that by that act, the intending applicant has acquiescence to the jurisdiction of the court and thus enable it to be seized of the matter. This is despite the numerous judgements that suggest that entering appearance is thus taking a step in the proceedings. In this regard, the case of *Lavington Security Guards Ltd v Kenya Electricity Generating Company* above should be the standard rather than the exception.

A step in the proceedings should arise only when for example the defendant has submitted a statement that substantively responds to the alleged infractions by the plaintiff. The plaintiff is allowed to state the facts upon which his allegations are founded on in his plaint or any other equivalent pleading for the purposes of instituting a suit.<sup>37</sup> The defendant then responds to the same through his defence to the effect that he/she either denies or accepts liability or even in cases where applicable provides a counter claim.<sup>38</sup> Thus from this, it is evident that substantive steps in proceedings are only undertaken when parties deliver and/or file a defence to the court or make formal applications to the court for extension of time to allow them to file and serve their respective defence.<sup>39</sup> Indeed in *Kenindia Assurance v Mutuli*<sup>40</sup> it was held that filing a defence disentitles the applicant the right to rely on the arbitration clause.<sup>41</sup> Similarly in the case of *Corporate Insurance Company v Loise Wanjiru Wachira*,<sup>42</sup> where the appellant had entered appearance and filed a defence, the Kenyan Court of Appeal held that he had lost his right to make an application for stay.<sup>43</sup>

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<sup>37</sup> See generally, Civil Procedure Rules 2010, Order 3, 4 and 5.

<sup>38</sup> See generally, Civil Procedure Rules 2010, Order 7.

<sup>39</sup> Ibid.

<sup>40</sup> [1993] KLR 2833.

<sup>41</sup> Laibuta K., *Principles of Commercial Law 'Commercial Arbitration and Alternative Dispute Resolution'* (Law Africa 2006) 418-440, 418.

<sup>42</sup> [1996] eKLR.

<sup>43</sup> See also *Mombasa Trade Centre Limited v Blue Shield Insurance Co. Limited (Under Statutory Management)* [2013] eKLR; *Agip (K) Limited v Kibuto* Civil Appeal No. 43 Of 1981 (unreported); *Niazsons (K) Limited v China Road & Bridge Corporation (K)* [2001] KLR 12; *Peter Mweha Kahoro & Another v Benson Maina Githethuki* (2006) eKLR.

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Indeed, some courts in Kenya have recognized the nebulous language under section 6 (1) of the Kenyan Arbitration Act when one takes into account the process of litigation before Court. Thus, in *Trishcon Construction Co. Ltd v. Leo Investments Ltd*<sup>44</sup> the court noted that it is normal for appearance to be filed first then defence filed later. The court also noted that it is through a defence that the defendant usually acknowledges and responds to any claim brought before a court.

It is thus evident from the majority of Kenyan courts' jurisprudence that currently, a party to an arbitration agreement not keen on the provisions of Section 6 of the Arbitration Act, 1995 is essentially locked out of arbitration if he/she fails to file an application for stay of legal proceedings concurrent to entering appearance.<sup>45</sup>

A pertinent question that therefore lies in this expose is whether Kenyan courts' intervention in staying legal proceedings under the current structure provided in section 6 of the Arbitration Act, 1995 renders its role in advancing arbitration as a friend or foe?

Perhaps then to hazard this situation further, recent Kenyan decisions have taken the view that by making P.Os or even filing grounds of opposition to the effect of denying a court's jurisdiction and urging it to dismiss the proceedings so as to enable arbitration, the applicant has taken a step in the proceeding contrary to section 6 of the Arbitration Act.<sup>46</sup>

This seems at odds with the very nature of a P.O or grounds for opposition to the effect that they seek to oust the jurisdiction of the court and not submit to

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<sup>44</sup> [2013] eKLR HCCC No. 645 of 2012 (per J.B. Havelock).

<sup>45</sup> *TM AM Construction Group (Africa) v Attorney General* High Court [2001] eKLR.

<sup>46</sup> See for this *Marge Enterprises Ltd v Kenya Alliance Insurance Company Ltd* (2006) eKLR, *Zaid Iqbal Dean v Samuel Gakiria Kingori & Another* [2014] eKLR; HCCC (Nairobi) No. 116 of 2013. Consider also the dicta of Kihara Kariuki J. in *Peter Mwema Kahoro & Another v Benson Maina Githethuki* [2006] eKLR, Nairobi HCCC No.208 of 2014.

it.<sup>47</sup> How then can it be deemed that by filing a P.O or moving the court to consider grounds for opposition the applicant has acquiesced to the court's jurisdiction and thus taken a step in the proceeding?

There has also been an instance where an application for stay was made contemporaneously on the same day of appearance and defence was filed. In such a case, the High Court of Kenya in *Africa Spirits Limited v PrevaB Enterprises Limited*<sup>48</sup> held that the contemporaneous filing of the memorandum of appearance, the defence and the application for stay did not preclude the court from referring the matter to arbitration.

### **5.0 Application of Stay Pending Arbitration in the UK**

As noted earlier, UK is a Model arbitration country and thus just like Kenya, the English Arbitration Act, 1996 is modeled on the MAL. However, unlike Kenya, the stay clause appearing under section 9 of the English Arbitration Act, 1996 is similar in interpretation and application to Article 8 of the MAL. Section 9 of the English Arbitration Act, 1996 provides:

“

- (1) *A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) respect of a matter which under the agreement is to be referred to an arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*
- (2) *An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.*
- (3) *An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.*

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<sup>47</sup>Preliminary Objection and grounds of opposition are objections that should be raised at the earliest opportunity not when a matter has been substantially dealt with. See for *dictum* on this, *Mukisa Biscuit Company v Westend Distributors Limited* (1969) EA 696.

<sup>48</sup> [2014] eKLR.

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- (4) *On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*
- (5) *If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal; proceedings in respect of any matter is of no effect in relation to those proceedings."*

As is evident from this section, the UK like Kenya has made entering appearance a condition precedent before filing an application for stay. However, unlike Kenya under the UK law, there is no requirement that the application must be filed at the same time the applicant is entering appearance. Thus, in this respect the UK has kept with the MAL timeline on when a party intending to enforce an arbitration agreement may move the court that is before taking any step in the court proceedings to answer the substantive claim. In this sense, even though the UK is also a signatory to the New York Convention, it has departed from Article II (3) of that convention by enjoining its courts not to grant a stay if the court has been properly seized with the matter in question because where the court has been seized of the matter without prior objections or by the applicant taking a substantive step in the proceedings, the applicant is deemed to have effectively waived his right to go to arbitration.

It is also evident that this provision enjoins English courts to mandatorily promote arbitration and enforce the arbitration agreements unless satisfied that the arbitration agreement is null void, inoperative, or incapable of being performed.<sup>49</sup> With regard to what amounts to a step in the judicial proceedings, English courts have moved to define the same ensuring there is no lacuna in interpretation.

### **5.1 When is the Rubicon Crossed?**

In the UK, the applicant must have already taken '*the appropriate procedural step (if any) to acknowledge the legal proceedings before him*'.<sup>50</sup> But the applicant must not

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<sup>49</sup>Neil Andrews, "Arbitration and Contract Law: Common Law Perspectives," Springer Publishing Switzerland (2016), at 69.

<sup>50</sup> Section 9 (3) English Arbitration Act 1996.

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have taken 'any step in those [court] proceedings to answer the substantive claim' (crossing the Rubicon).<sup>51</sup> Here the test is whether the defendant has taken a step in the proceedings which indicates clearly that he has elected to abandon arbitration and instead he has decided to respond on the merits to the court proceedings. In the following three cases, English courts held that the defendant had not taken any such fateful step in court proceedings so as to have precluded resort to or insistence on use of arbitration by obtaining a stay.

The Court of Appeal in *Patel v Patel*<sup>52</sup> held that a defendant had not abandoned arbitration when he applied to have a default judgement set aside and then made the 'otiose' statements in his summons to the court that: 'the default judgement dated 23<sup>rd</sup> March 1998 be set aside unconditionally and the defendant be given leave to defend this action'. The Court of Appeal was convinced that in reading said otiose phrase in context, the defendant had in no way intended to abandon the stipulated arbitration route.<sup>53</sup>

In *Capital Trust Investments Ltd v Radio Design TJ AB*,<sup>54</sup> the Court of Appeal held that the defendant in court proceedings had not crossed the Rubicon for the purpose of section 9 (3) because its responses to the claim had not created any suspicion that the defendant was abandoning the stipulated route of arbitration. Here the defendant had (i) applied for a stay and (ii) also applied for summary judgement against the claimant on the express basis that this application would be necessary only if the application under (i) were refused.

Similarly, Sales J. held in *Bilta (UK) Ltd v Nazir*<sup>55</sup> that a defendant had not 'crossed the Rubicon' by applying to the court for an extension of time within

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<sup>51</sup>Mustill & Boyd, "Commercial Arbitration" Butterworths Law: 3<sup>rd</sup> Edition (2010), at 270-271; see also *Roussel-Uclaf v Searle* [1978] 1 Lloyd's Rep 225, at 231-232, Graham J: defendant resisting application for interim injunction; this did not involve 'some positive act by way of offence on the part of the defendant,' who was instead parrying a blow').

<sup>52</sup>[2000] QB 551, CA.

<sup>53</sup>*Ibid.*

<sup>54</sup>[2002] EWCA Civ 135; [2002] 2 All ER 159; [2002] 1 All ER (Comm) 514; [2002] CLC 787, at 60-64.

<sup>55</sup>[2010] EWHC 1086 (Ch); [2010] Bus LR 1634; [2010] 2 Lloyd's Rep 29.

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which to serve a defence. It was clear to the opponent that the defendant's motive in doing so was to create more time within which to determine whether the relevant dispute was covered by the relevant arbitration agreement.

Since the *Patel* decision in 1978 judges in the UK have been reluctant to impugn a 'step' taken by the applicants. Further examples of 'taking a step' in this era are detailing your response to the claim in the defence as was held in *Russell Bros. & Co. Limited. v Lawrence Breen t/a L & E Properties*<sup>56</sup> and indicating that you await the full details of the claim.

Where the parties have taken a 'step' impugned by section 9 (3) of the 1996 Act, the UK Courts have been helpful. The UK Courts have encouraged parties who intend to make an application for stay to indicate that early enough. For instance, when filing a defence the defendant may indicate that '...at the opportune time the defendant shall make an application for stay'.<sup>57</sup>

In this respect, the precedent emanating from the UK courts are more progressive to the extent that even by filing a defence, one is not seen to have waived his right to arbitration if he makes it clear either expressly in the defence that he reserves his right to make any application under section 9 (3) to have the dispute referred to arbitration and by not serving the filed defence to the plaintiff.

The 1996 Arbitration Act reinforces the principle of party autonomy by providing that the parties shall be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest.<sup>58</sup> These "safeguards" are provided by the mandatory provisions of Part I of the English Arbitration Act, which apply regardless of any agreement by the parties to the contrary. The effect is that section 9 of the 1996 United Kingdom Act has managed to expand party autonomy in arbitration while checking to ensure that it does not fall prey to abuse by limiting instances of court intervention to a basic

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<sup>56</sup>(Pringle J., unreported, March 14, 1997).

<sup>57</sup>*Capital Trust Investments Ltd v Radio Design TJ AB* (n 56).

<sup>58</sup>UK Arbitration Act, 1996, section 1 (b).

minimum and more importantly ensuring that where there exists a valid agreement, parties adhere to it.<sup>59</sup>

## **6.0 Conclusion**

If anything, the foregoing review has shown the difference between the two Acts which were both in response to legal reform efforts aimed at achieving a universal goal: to reduce court interference in arbitration and expand party autonomy while rendering arbitration more expeditious and, as such, more just. The English Act succeeded where the Kenyan Act failed.

Kenya is a member of the international community and as a trade partner of many states regionally and internationally, must therefore have a reasonable stay of proceedings clause in its arbitration law. It is therefore necessary to harmonize the Kenyan Act to best worldwide practice on the law as regards stay of proceedings application even if it means she will borrow from section 9 of the English Arbitration Act and the interpretation of English courts.

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<sup>59</sup>Kitagawa, "Contractual Autonomy, in *International Commercial Arbitration: Liber Amicorum For Martin Domke* 133, 138 (Pieter Sanders ed., 1967), at 136. Merkin R., "Arbitration Act 1996," 2nd edn. LLP, London (2000).



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## **Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems<sup>1</sup>**

*By: Kariuki Muigua\**

### **List of Acronyms**

ADR	Alternative Dispute Resolution
APSEA	Association of Professional Societies in East Africa
CADR	Centre for Alternative Dispute Resolution
CIArb	Chartered Institute of Arbitrators (Kenya Branch)
CIC	Commission for Implementation of the Constitution
CUCs	Court User Committees
FIDA	Federation of Women Lawyers
ICJ	International Commission of Jurists
KEPSA	Kenya Private Sector Alliance
KLA	Kenya Land Alliance
KLRC	Kenya Law Reform Commission
KNHCR	Kenya National Commission on Human Rights
LSK	Law Society of Kenya
NCIA	Nairobi Centre for International Arbitration
NCMG	Negotiation & Conflict Management Group
NLC	National Land Commission
SDRC	Strathmore Dispute Resolution Centre
TDR	Traditional Dispute Resolution
TDRMs	Traditional Dispute Resolution Mechanisms
TDRs	Traditional Dispute Resolution systems
TJS	Traditional Justice Systems
UNDP	United Nations Development Programme

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\*PhD in Law (Nrb), FCIArb (Chartered Arbitrator), LL.B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); MKIM; Accredited Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/Implementer; Advocate of the High Court of Kenya; Senior Lecturer at University of Nairobi School of Law and the Centre for Advanced Studies in Environmental Law & Policy (CASELAP), University of Nairobi .

<sup>1</sup> This paper was informed by consultancy work done by the author for the now defunct Commission for the Implementation of the Constitution (CIC), an independent constitutional commission established under Section 5(6) of the Sixth Schedule to the Constitution of Kenya 2010 and by the Commission for the Implementation of the Constitution Act, No. 9 of 2010, with a mandate to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution.

## **1.0 Introduction**

This paper contains the findings and analysis of the outcomes of the research and field study undertaken for TDRs and other community justice systems in Kenya. This includes: an analysis of the status of TDRs, ADR and other community justice systems; a status analysis of the existing policies, legislation and administrative procedures designed to facilitate the promotion and support of TDRs and other informal community justice systems; the gaps that require immediate intervention; recommendations for policy formulation towards the implementation of Article 159(2) and (3) of the Constitution of Kenya 2010; and legislative proposals to address gaps in legislation and regulations to implement Article 159(2) (c) and (3) of the Constitution. In addition, the paper contains the presentations made during the stakeholder forums and workshops as well as the study tools used for data collection.

The Constitution of Kenya, 2010 recognizes application of TDRs and ADR mechanisms in dispute resolution for efficient dispensation of justice.<sup>2</sup> The Constitution establishes a strong elaborate human rights framework embodying the fundamental rights and freedoms entitled to the citizens. To achieve this, the Constitution dedicates an entire Chapter on human rights, that is, Chapter Four which embodies the Bill of Rights. However, the fundamental rights and freedoms cannot be enjoyed in the absence of an enabling framework for their enforcement.<sup>3</sup> To this end, the Constitution provides for the right of access to justice under Article 48 and enjoins the state to ensure access to justice for all persons and stipulates that if any fee is required, the same shall be reasonable and not impede access to justice. The Constitution contemplates 'justice in many rooms' and promotes access to justice through informal systems such as TDRs and ADR mechanisms in addition to the court process.<sup>4</sup> Indeed, a high percentage of disputes in Kenya are resolved outside courts or before they reach courts by use of TDRs or ADR mechanisms.<sup>5</sup> TDRs and other community justice

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<sup>2</sup> See Article 159 (2) (c) of the Constitution of Kenya 2010.

<sup>3</sup> See generally, Eide, A., "Making Human Rights Universal: Achievements and Prospects," *Human Rights in Development: Yearbook 2000* (1999).

<sup>4</sup> See generally, Galanter, M., "Justice in many rooms: Courts, private ordering, and indigenous law," *The Journal of Legal Pluralism and Unofficial Law*, Vol.13, No. 19 (1981), pp. 1-47.

<sup>5</sup> See generally, Wily, L. & Mbaya, S., "Land, People, and Forests in Eastern and Southern Africa at the Beginning of the 21st Century: The Impact of Land Relations on the Role of Communities in Forest Future," *Community involvement in forest management in Eastern and Southern Africa: Issue 7 of Forest and social perspectives in conservation*, (IUCN, 2001).

mechanisms are widely used by communities to resolve conflicts owing to their legitimacy and accessibility.

Access to justice is critical in the enforcement of human rights. Undoubtedly, traditional dispute resolution mechanisms guarantee access to justice at the community level especially for those who feel alienated from the formal processes in terms of the cost for justice and technical procedures. Certainly, a robust legal system based on a hybrid of formal and informal justice systems strengthens the capacity of citizens to access justice. This is because the two justice systems complement each other and citizens are at liberty to choose the most appropriate and affordable system for themselves. The hybrid system should be coherent and articulate specifying the nature of each system, the advantages and disadvantages and setting out a clear interface between formal and informal systems.

In order to guarantee access to justice for Kenyans, the Constitution embraces dynamism in justice systems by encouraging the utilization of formal and informal justice systems. In this regard, Article 159 recognizes the use of TDRs and ADR mechanisms in addition to the court process. Article 159 (2) envisages the underlying principles for the exercise of judicial authority in Kenya. It stipulates that in exercising judicial authority, the courts and tribunals shall be guided by the following principles; (a) justice shall be done to all, irrespective of status, (b) justice shall not be delayed and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause 3. Clause 3 thereof provides that TDRs 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 and morality, or (c) is inconsistent with the Constitution or any written law.

The role of TDRs in implementing access to justice cannot be gainsaid. In Kenya as well as many other African countries, it is trite that TDRs constitute the most basic and fundamental dispute resolution process. From time immemorial, even before the transplantation of the English legal system in Kenya, communities used to resolve a myriad of disputes through traditional justice systems.<sup>6</sup> In

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<sup>6</sup>Mkangi K, "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa," available at [www.payson.tulane.edu](http://www.payson.tulane.edu). [Accessed on 20/04/2017]; See also Joireman, S.F., "Inherited legal systems and effective rule of law: Africa and the colonial legacy," *The Journal of*

most African communities, TDRs derive their validity from the customs and traditions and are deemed to be the primary pillar of the justice system in an African context.<sup>7</sup>

### **1.1 Background**

Article 159(2) (c) of the Constitution of Kenya 2010 recognizes the use of other justice mechanisms in dispute resolution other than the court process. This Article envisages that judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. Further, courts and tribunals are enjoined, in exercising judicial authority, to be guided by principles that: (a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; and (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause(3). Drawing from 159 2(c) Clause 3 provides that traditional dispute resolution 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.

The Constitution envisages the overriding objective of the justice system in Article 48 on the right of access to justice and Article 159 that sets out the guiding principles. Thus, the goal of Article 159 is to ensure that every Kenyan can access justice without any impediment. Indeed, Article 159 as read together with Article 27 embodies the principle of rule of law which guarantees every citizen equal treatment, protection and benefits of the law. By strengthening access to justice, citizens are empowered to readily and affordably access the justice system to seek redress for violation of rights.<sup>8</sup>

Moreover, the constitutional guarantees on access to justice are designed to protect the rights of the economically disadvantaged as well as the vulnerable

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*Modern African Studies* Vol.39, No. 04, 2001, pp. 571-596; See also Fullerton J.S., "The evolution of the common law: Legal development in Kenya and India," *Commonwealth & Comparative Politics* Vol.44, No. 2 (2006), pp. 190-210.

<sup>7</sup> Ibid.

<sup>8</sup>United Nations Development programme, "Access to Justice: Practical Note," 9/3/2004, p.3. Available at [http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice\\_PN\\_En.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf).

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and marginalized groups.<sup>9</sup> Undoubtedly, TDR and other community based mechanisms are critical in promoting access to justice among many communities in Kenya.<sup>10</sup> Indeed, a great percentage of disputes in Kenya are resolved at the community level through the use of community elders and other persons mandated to keep peace and order.<sup>11</sup>

Despite formal recognition coupled with a constitutional mandate for their promotion in appropriate dispute resolution strategies, TDRs and other community justice systems have to date attracted inadequate attention in the ongoing judicial reforms. Recent studies carried out by civil society organisations indicate that TDRs and informal justice systems play a critical role in guaranteeing social order in many communities. They take the form of community council of elders, chieftains, peace committees and other indigenous community-based dispute resolution mechanisms. However, there has not been adequate attempt to give meaningful recognition, promotion and support for these invaluable strategies. There exists no policy or legislative framework to guide the promotion and use of these mechanisms despite their constitutional recognition and limitations prescribed in Article 159(2) and (3). Consequently,

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<sup>9</sup> See generally, United Nations General Assembly, 'Report of the Special Rapporteur on Extreme Poverty and Human Rights,' Sixty-seventh session, Item 70 (C) Of the Provisional Agenda (A/67/150), *Promotion and Protection of Human Rights: Human Rights Situations and Reports of Special Rapporteurs and Representatives*, A/67/278, 9 August 2012; See also generally, Inter-American Commission on Human Rights, "Access To Justice As A Guarantee Of Economic, Social, And Cultural Rights: A Review of the Standards Adopted By the Inter-American System of Human Rights," OEA/Ser.L/V/II.129 Doc. 4, 7 September 2007. Available at <http://www.cidh.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf>

<sup>10</sup> See generally, Wojkowska, E., *Doing Justice: How Informal Justice Systems Can Contribute*, (United Nations Development Programme - Oslo Governance Centre, December 2006). Available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>

<sup>11</sup> See Muigua, K., "Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms," Paper Presented at the *CI Arb Africa Region Centenary Conference 2015*, held on 15-17, July 2015. Available at [https://profiles.uonbi.ac.ke/kariuki\\_muigua/files/empowering\\_the\\_kenyan\\_people\\_through\\_alternative\\_dispute\\_resolution\\_mechanisms\\_-\\_21st\\_docx.pdf](https://profiles.uonbi.ac.ke/kariuki_muigua/files/empowering_the_kenyan_people_through_alternative_dispute_resolution_mechanisms_-_21st_docx.pdf) ; See also generally, Kariuki, F., "Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology," available at <http://www.strathmore.edu/sdrc/uploads/documents/books-andarticles/Paper%20on%20Traditional%20justice%20terminology.pdf>

these systems remain untapped with a view to effectively support and complement the conventional justice system that presently spreads too thin over a wide geographical expanse despite the ever-pressing need for accessible and effective judicial services.

The constitutional guarantees in regard to access to justice call for appropriate policy, statutory and administrative interventions to ensure the efficacy of both conventional and alternative dispute resolution mechanisms (ADR) including traditional dispute resolution strategies and community-based justice systems. To this end, research was undertaken and its outcomes form the substance of this paper. The paper explores appropriate policy, statutory and administrative intervention designed to ensure that: (a) TDR strategies and other informal justice systems find their rightful place in the conventional judicial system; (b) the requirements of Article 159(2) and (3) of the 2010 Constitution are meaningfully implemented; and (c) all traditional and informal justice systems observe the minimum standards prescribed in Article 159(3) of the Constitution.

## **1.2 Methodology and Research Design**

The research adopted a hybrid approach comprising of desk research and a field study where the Meru and Luo communities were sampled for field interviews. The research was guided by the constitutional provisions on application of TDRs and ADR. This is mainly Article 159 (2) (c) and (3). Overall, the research adopted a social-legal approach by conducting a study on community justice systems and the analysis of the legal, policy and administrative structures that promote or impact on TDR processes in Kenya. Firstly, the desk research was undertaken on the status of TDRs and other community justice systems, the legal and policy framework impacting on TDRs and their adequacy while identifying gaps and barriers that need to be filled to strengthen application of TDRs. To this end, the research revealed that the legal and policy framework fall short of the constitutional threshold for TDRs and ADR. These gaps have been pointed out in this paper and recommendations suggested to align the legal and policy framework with the Constitution.

Secondly, a field study was conducted in a few selected communities on the status of the TDRs and other community justice systems. For background information, the researcher reviewed and analyzed reports of studies conducted by several civil society organisations as well as academic commentaries on the subject. Moreover, the writer undertook a survey of TDR practice in other jurisdictions in Africa and beyond. Drawing from lessons of best practices in other jurisdictions, the report makes recommendations for harnessing TDRs in



dispute resolution. The paper points out the key weaknesses of TDR systems and makes recommendations for addressing the same in order to mainstream the application of TDRs in line with Article 159 (2) (c) and (3) of the Constitution.

### **1.3 Stakeholder Consultative Forums**

The stakeholder consultations were conducted in form of field interviews in various communities where TDRs are used in dispute resolution. The study focused on the nature and structure of various TDR mechanisms, their jurisdiction and the extent to which they satisfy the requirements of Article 159(2) and (3) of the Constitution. Six local communities where TDR mechanisms have been used to manage conflicts and resolve civil disputes were identified. These included the Digo, Meru, Kikuyu, Somali, Luhya and the Luo communities; where council of elders (*Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community*) are community gate keepers. In addition, Court User Committees (CUCs) and Local Administrators (Chiefs) were identified as respondents. Due to logistical reasons, actual interviews were conducted in two communities: Luo and Meru. The findings point to the use of TDR mechanisms in managing conflicts and resolve civil disputes and will contribute to the development of policy on Article 159(2) and (3) of the Constitution

### **1.4 Limitations**

The researcher was able to undertake research on the legal, policy and institutional framework relating to TDRs and other community justice systems. In the analysis, it was established that there is no distinct legal, policy or institutional framework for TDRs but there are various laws that promote the use of TDRs and other community justice systems in dispute resolution.

The writer undertook a comparative analysis of TDRs and other community justice systems in Africa and beyond and identified key best practices that Kenya can emulate. Moreover, it was established that most TDRs in Africa and beyond face almost identical challenges for instance failure to meet constitutional human right threshold, poor documentation, undefined jurisdiction and subjection to formal laws.

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The main challenge that the author faced was in respect of the field interview. Out of the targeted 342 respondents drawn from six local communities (Digo, Meru, Kikuyu, Somali, Luhya and Luo), Court User Committees and Local Administrators (Chiefs) only 81 respondents from two communities (the Luo community (Kisumu, Siaya and Homabay counties) and the Meru community of Tharaka Nithi County), the Local Administration and Court User Committee members were involved in the study. The study outcome is based on information from respondents drawn from six local communities and does not fully represent the diversity of the Kenyan community.

### **1.5 Recommendations**

The overall objective of the project was to undertake a status analysis of Traditional Dispute Resolution Mechanisms and informal community justice systems and to make recommendations and provide guidelines for formulation of policies and legislation to support TDR strategies. The recommendations are contained in section 5 of this paper.

## *PART II*

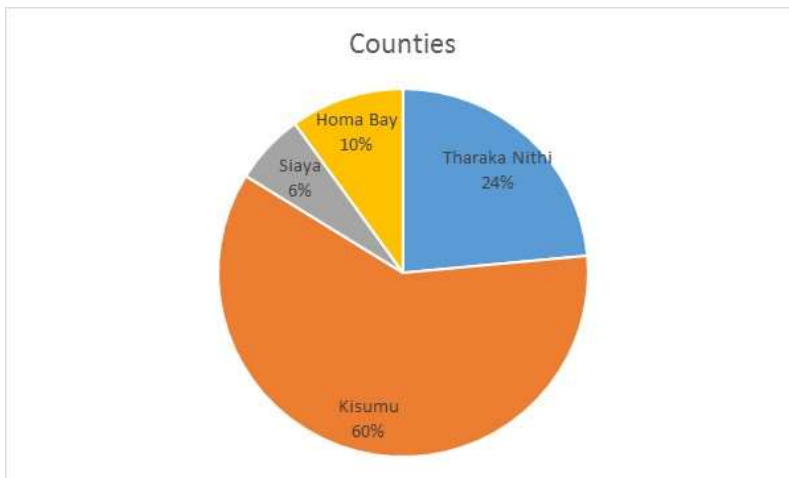
### **2.0 Status of TDRs and ADR in Kenya**

This section presents the findings of the research and field study conducted on the status of TDRs, ADR and other community based justice systems in Kenya. The research and field study focused on the nature and structure of various TDR mechanisms, their jurisdiction and the extent to which they satisfy the requirements of Article 159(2) and (3) of the Constitution. Further, the research examined the advantages and disadvantages of TDRs and the challenges in their application. In addition, the research explored the historical basis of TDRs in Kenya vis-a-vis the formal court process and how the two have been applied by Kenyan courts. A comparative survey of TDRs in other jurisdictions in Africa and beyond was undertaken. The findings of the field study were used to verify the research outcomes and finalize the report.

For the field study, six local communities where TDR mechanisms have been used to manage conflicts and resolve civil disputes were identified. These included the Digo, Meru, Kikuyu, Somali, Luhya and the Luo communities; where council of elders (*Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community*) are community gate keepers. In addition, Court User Committees (CUCs) and Local Administrators (Chiefs) were

identified as respondents. Due to logistical reasons, actual interviews were conducted in two communities: Luo and Meru.

Overall, the field study attracted a total of 81 respondents, 80% male and 20% female who were interviewed from four (4) counties: Kisumu, Siaya and Homabay for the Luo community and the Tharaka Nithi County for the Meru Community (Fig. 1). The respondents comprised of members of the Council of Elders (Luo and Meru) forming 26% of the respondents, local administration (22% of the respondents) and the Court User Committee members (49% of respondents).



**Figure 1: Respondents by County**

## 2.1 Overview of TDRs and ADR in Kenya

The recognition of ADR and TDRs under Article 159 of the Constitution is a restatement of the customary jurisprudence of Kenya.<sup>12</sup> This is because TDRs existed from time immemorial and are therefore derived from the customs and traditions of the communities in which they operate.<sup>13</sup> In most African

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<sup>12</sup> See Muigua, K., "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010," p. 2. Available at <http://www.chuitech.com/kmco/attachments/article/111/Paper%20on%20Article%20159%20Traditional%20Dispute%20Resolution%20Mechanisms%20FINAL.pdf>; See also Oraegbunam, I. K. E. "The Principles and Practice of Justice in Traditional Igbo Jurisprudence," *OGIRISI: a New Journal of African Studies* 6, no. 1 (2009): 53-85, p.53.

<sup>13</sup> See Brock-Utne, B., "Indigenous conflict resolution in Africa," In *weekend seminar on indigenous solutions to conflicts*, 2001, pp. 23-24; see also Ntuli, P.P., "Indigenous

communities, TDRs existed even before the other alternative dispute resolution mechanisms were invented. The key guiding principles for successful application of TDRs among traditional African communities was that the tribunal (chiefs, councils of elders, priests or kings) should be properly constituted. The disputants ought to have confidence in them and submit to their jurisdiction.<sup>14</sup>

The main aspects of TDRs and other ADR mechanisms which make them unique and community oriented is that they focus on the interests and needs of the parties to the conflict as opposed to positions, which is emphasized by formal common law and statutory regimes.<sup>15</sup> The main objective of TDRs in African societies is to resolve emerging disputes and foster harmony and cohesion among the people.<sup>16</sup> TDRs derive their validity from customs and traditions of the community in which they operate. The diversities notwithstanding, the overall objective of all TDRs is to foster peace, cohesion and resolve disputes in the community. The practice of TDRs is not recorded in any form of documentation or record keeping but the rules are handed down from one generation to the next.<sup>17</sup>

Historically, the use of TDRs and other ADR mechanisms in dispute resolution existed even before the introduction of a formal legal system. Conflict resolution

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knowledge systems and the African renaissance." *Indigenous knowledge and the integration of knowledge systems: Towards a philosophy of articulation* (2002): 53-66.

<sup>14</sup> Anjayi, A.T., "Methods of Conflict Resolution in African Traditional Society," *An International Multidisciplinary Journal*, Ethiopia, Vol. (8) Serial No.33, April, 2014, p.142.

<sup>15</sup> See Muigua, K., 'Effective Justice for Kenyans: Is ADR Really Alternative?' pp. 12-13. Available at

<http://www.kmco.co.ke/attachments/article/125/Alternative%20Dispute%20Resolution%20or%20Appropriate%20Dispute%20Resolution.pdf>; see also Shamir, Y. and Kutner, R., *Alternative dispute resolution approaches and their application*, Unesco, 2003. Available at

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.468.2176&rep=rep1&type=pdf> [Accessed on 20/04/2017]

<sup>16</sup> Hwedie, K.O. and Rankopo, M.J., Chapter 3: Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana, p. 33, University of Botswana. Available at [http://ir.lib.hiroshima-](http://ir.lib.hiroshima-u.ac.jp/files/public/33654/20141016194149348069/ipshu_en_29_33.pdf)

[u.ac.jp/files/public/33654/20141016194149348069/ipshu\\_en\\_29\\_33.pdf](http://ir.lib.hiroshima-u.ac.jp/files/public/33654/20141016194149348069/ipshu_en_29_33.pdf) [Accessed on 20/04/2017]

<sup>17</sup> See generally, Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *Journal of the Historical Society of Nigeria* Vol.1, No. 1, 1956, pp.43-47.

among the traditional African societies was anchored on the ability of the people to negotiate. However, with the introduction of colonial legal systems, western notions of justice such as the principles of the common law of England were introduced in Kenya. The formal courts, being adversarial in nature, greatly eroded the traditional conflict resolution mechanisms.<sup>18</sup>

The use of TDRs in access to justice and conflict management in Africa is still relevant especially due to the fact that they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective.<sup>19</sup> For this reason, most communities in Africa still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.<sup>20</sup> The use of TDRs fosters societal harmony over individual interests and humanness expressed in terms such as *Ubuntu* in South Africa and *Utu* in East Africa.<sup>21</sup> Such values have contributed to social harmony in African societies and have been innovatively incorporated into formal justice systems in the resolution of conflicts. Unlike the court process which delivers retributive justice, TDRs encourage resolution of disputes through restorative justice remedies.<sup>22</sup>

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<sup>18</sup>See generally, Mac Ginty, R., "Indigenous peace-making versus the liberal peace." *Cooperation and conflict*, Vol.43, No. 2 (2008), pp.139-163.

<sup>19</sup> See generally, Singer, L. R., "Non-judicial Dispute Resolution Mechanisms-The Effects on Justice for the Poor." *Clearinghouse Review Dated* :( 1979), pp. 569-583; Osi, C., "Understanding Indigenous Dispute Resolution Processes and Western Alternative Dispute Resolution, Cultivating Culturally Appropriate Methods in Lieu of Litigation," *Cardozo J. Conflict Resol.*, Vol.10, 2008, p.163.

<sup>20</sup> See Justice, D., "How informal justice systems can contribute." *Oslo, United Nations* (2006); Bamikole, L., "An Indigenous Yoruba Socio-political Model of Conflict Resolution," *Philosophy Study* Vol.3, No. 2 (2013), p.144; Edossa, D.C., et al, "Indigenous systems of conflict resolution in Oromia, Ethiopia," *Community-Based Water Law and Water Resource Management Reform in Developing Countries* (2007), p.146; Murithi, T., "African approaches to building peace and social solidarity," *African Journal on Conflict Resolution* Vol.6, No. 2 (2006), pp. 9-33; Akinwale, A.A., "Integrating the traditional and the modern conflict management strategies in Nigeria," *African Journal on Conflict Resolution*, Vol.10, No. 3, 2010.

<sup>21</sup> Muigua, K. and Kariuki, F., "ADR, access to justice and development in Kenya," Paper presented, at the Strathmore Annual Law Conference 2014 held on 3rd and 4th July, 2014 at Strathmore University Law School, Nairobi. Available at <http://www.kmco.co.ke/index.php/publications/138-adr-access-to-justice-and-development-in-kenya-kariuki-muigua-kariuki-francis> [Accessed on 21/04/2017].

<sup>22</sup> Mkangi, K., "Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualised Paradigm for Examining Conflict in Africa," op cit.

### 2.1.1 *The Repugnancy Test*

The transplantation of the English legal system in Kenya overhauled the hitherto African traditional dispute resolution systems and subjected them to a foreign legal system. The various TDRs were deemed to be backward, uncouth and uncivilized. The exclusion of customary law posed a big challenge to the formal courts in determining disputes emanating from customs and traditions of Kenyan Africans. Evidently, most judgments resulted in great injustice since African disputes which could have been better resolved by application of customary law were determined on the basis of notions and jurisprudence of a foreign law. This led to resistance and contempt by Africans against the colonial courts which prompted the colonial administration to integrate customary laws within the formal legal system but they were subordinated to English laws. In this regard, customary law was deemed valid as long as it did not contradict the common law or any written law. This was the origin of the repugnancy clause encapsulated in section 3(2) of the Judicature Act<sup>23</sup>.

The policy behind subjection of customary law to the repugnancy test was founded on the contention that there are certain aspects of customary laws that do not augur well with human rights standards.<sup>24</sup> This has resulted in continued subjection of customary laws to the repugnancy clause by courts hence undermining the efficacy of traditional justice systems.

However, there is an ongoing debate in academia with scholars positing that there is need for customary laws to be recognized at the same pedestal with formal laws as their usefulness in certain social and cultural aspects is now settled bearing in mind international human rights standards.<sup>25</sup> Besides, it is argued that the repugnancy clause suffers from a grievous misconception of 'justice and morality' because it imposes the Western moral codes on African

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<sup>23</sup> Judicature Act, Cap 8, Laws of Kenya.

<sup>24</sup> See Merry, S.E., "Human rights law and the demonization of culture (and anthropology along the way)," *Polar: Political and Legal Anthropology Review* Vol.26, No. 1, 2003, pp.55-76.

<sup>25</sup> See generally, Donnelly, J., "Cultural relativism and universal human rights," *Human Rights Quarterly*, Vol. 6, No. 4, 1984, pp. 400-419; See also Cerna, C.M., "Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts," *Human rights quarterly*, Vol. 16, No. 4, 1994, pp.740-752; See also Cobbah, J.A.M, "African values and the human rights debate: an African perspective," *Human Rights Quarterly*, 1987, pp.309-331.

societies who have their own conceptions of justice and morality.<sup>26</sup> Redefining the repugnancy clause would call for a change of attitude by the courts and reforms on the formal legal systems to elevate the position of customary laws.<sup>27</sup>

### 2.1.2 Conflict Resolution versus Dispute Settlement

Conflict resolution mechanisms are those that address disputes with finality and produce mutually satisfying solutions. Resolution of conflicts prescribes an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to redefine their conflict and their relationship.<sup>28</sup> Since resolution is non-power based and non-coercive, it follows then that conflict resolution entails the mutual satisfaction of needs and does not rely on the power relationships between the parties.<sup>29</sup> The outcome of conflict resolution is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power based out-comes.<sup>30</sup> A resolution digs deeper in ascertaining the root causes of the conflict between the parties by aiming at a post-conflict relationship not founded on power.<sup>31</sup>

On the other hand, dispute settlement mechanisms only address the issues raised by disputants and aims at resolving the issues without venturing into the

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<sup>26</sup> See Donnelly, J., "Human rights and human dignity: An analytic critique of non-Western conceptions of human rights," *American Political Science Review*, Vol. 76, No. 02, 1982, pp.303-316; See also generally, Heard, A., "Human rights: Chimeras in sheep's clothing." *Simon Fraser University* (1997). Available at <https://www.sfu.ca/~aheard/intro.html> [Accessed on 20/04/2017]; See also Donnelly, J., "The relative universality of human rights," *Human rights quarterly*, Vol. 29, No. 2, 2007, pp. 281-306; See also Cerna, C.M., "Universality of human rights and cultural diversity: implementation of human rights in different socio-cultural contexts," *Human rights quarterly*, Vol. 16, No. 4, 1994, pp.740-752; Harris, B., "Indigenous Law in South Africa-Lessons for Australia," *James Cook UL Rev.* Vol.5,1998, p.70.

<sup>27</sup> See Juma, L., "Reconciling African Customary Law and Human Rights in Kenya: Making a Case for Institutional Reformation and Revitalization of Customary Adjudication Processes," *Thomas L. Rev.*, Vol.14, 2001, p.459.

<sup>28</sup> Bloomfield, D., "Complementarity in Conflict Management Theory: Resolution and Settlement Approaches7," In *Peacemaking Strategies in Northern Ireland*, pp. 67-95. Palgrave Macmillan UK, 1997.

<sup>29</sup> Cloke, K., "The Culture of Mediation: Settlement versus Resolution," *The Conflict Resolution Information Source*, Version IV, December 2005.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid; Bloomfield, D., "Towards complementarity in conflict management: Resolution and settlement in Northern Ireland," *Journal of Peace Research*, Vol.32, No.2, 1995, pp.151-164.

root causes of the dispute.<sup>32</sup> Examples of dispute settlement mechanisms are arbitration and adjudication.

Traditional justice systems are dispute resolution mechanisms. This is because TDRs utilize resolution mechanisms such as negotiation, mediation and conciliation to ensure that the root causes of the dispute are addressed and assist the parties to explore mutually satisfying and durable solutions. Where these mechanisms have been employed they have been effective in managing conflicts and their declarations and resolutions have been recognized by the formal institutions.<sup>33</sup> For instance, in passing the Modogashe Declaration the people of Garissa, Mandera and Wajir districts agreed to resolve the problems of banditry, trafficking of arms, livestock movements, socio-economic problems, identifying role of peace committees among others.<sup>34</sup> It also outlined decisions made by the community around the issues affecting the community especially unauthorized grazing, cattle rustling, trafficking of arms, control of livestock diseases and trade, highway banditry, identity cards by non-Kenyans and others.<sup>35</sup>

## **2.2 Findings and Analysis**

The research conducted on TDRs and other community justice systems indicate that they are distinct from other justice processes and are the most preferred mode of conflict resolution by communities. The main characteristics of TDRs are: they do not adhere to a prescribed or written set of rules; they draw from customs and traditions of the community in which they operate; easily accessible to all people and use local language which is widely understood by people; proceedings are oral and usually there is no record keeping; Veracity of customs and values/rules depends on the memory of the mediators; mostly fail to adhere to the Bill of Rights; remedies are couched on restorative justice; wide and undefined jurisdiction; TDRs practitioners need no formal education and training.

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<sup>32</sup> Ibid; See also Mwangi, M., *The Water's Edge: Mediation of Violent Electoral Conflict in Kenya*, (Institute of Diplomacy and International Studies, July 2008), pp. 36-38.

<sup>33</sup> See generally, Ertel, D., "How to design a conflict management procedure that fits your dispute." *MIT Sloan Management Review*, Vol. 32, No. 4, 1991, p.29.

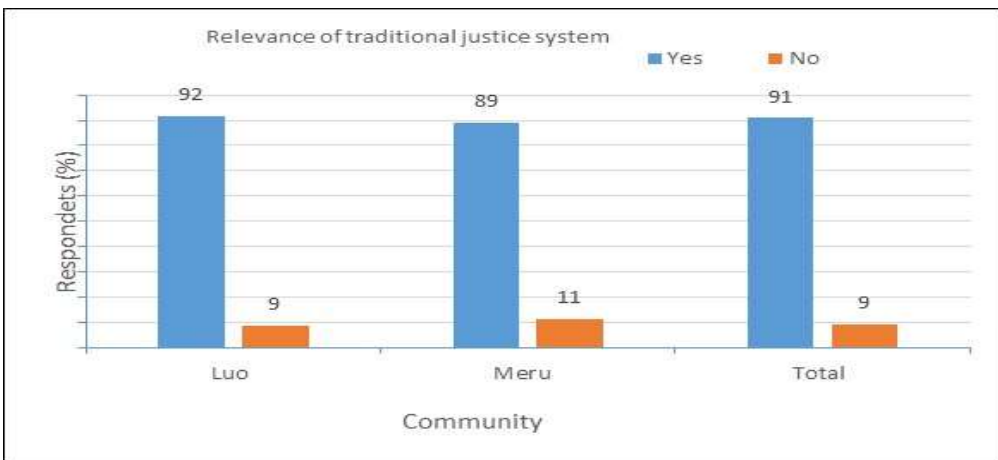
<sup>34</sup> See generally, Biko, A.S., *The role of informal peace agreements in conflict management: modogashe declaration and its implementation in North Eastern, Kenya* (Doctoral dissertation, University of Nairobi, 2011).

<sup>35</sup> See National Cohesion and Integration Commission, "Review of Modogashe Declaration," available at <http://www.cohesion.or.ke/index.php/programmes/review-of-modogashe-declaration> [Accessed on 20/04/2017]



### 2.2.1 Advantages of TDRs and other Community Based Justice Systems

The study assessed the advantages of TDRs and other community based justice systems and found out that; traditional values are part of the heritage of the people hence people subscribe to its principles; promotes social cohesion, peace and harmony; proximity to the people/ accessibility and use of language that the people understand; the mechanisms are affordable; TDRs are resolution mechanisms; are cost effective since parties can easily represent themselves in such forums; proceedings undertaken are confidential; TDRs and ADR mechanisms are flexible since they do not adhere to strict rules of procedure or evidence and they yield durable solutions. The majority of the respondents (91%) interviewed do consider community justice systems as valuable. (See Fig. 2 below)



**Figure 2: Relevance of Traditional Justice Systems**

Further, the respondents were of the view that TDR mechanisms are valuable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases and the people hence allow for handling matters discreetly for quick resolution, they are less costly and easy accessible to the poor, resolve disputes at grass-root level and enhance access to justice, they also provide local solutions which are more acceptable to people and they are agents of change and promote economic

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development, foster love, cohesion, integrity and promote respect for each other. (See table 1 below on the perceptions on relevance of TDRs)

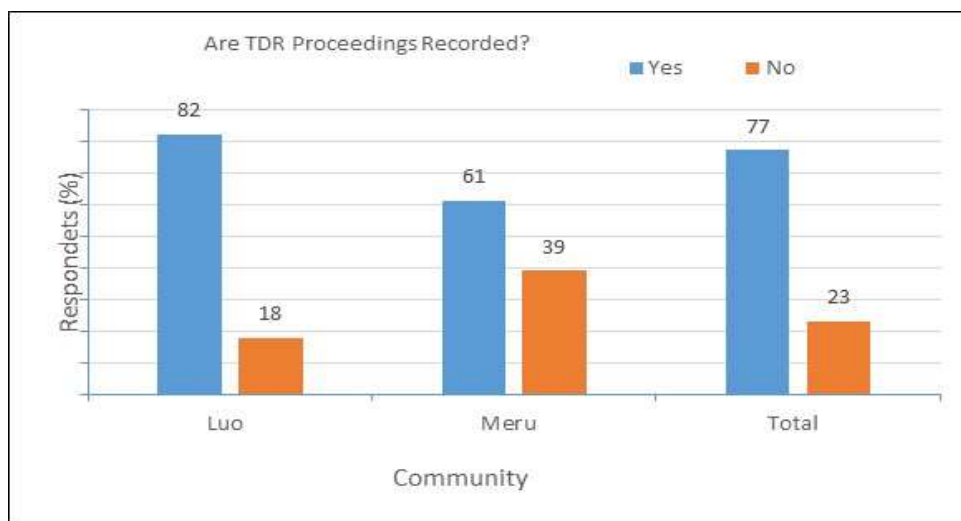
Reasons	Number of respondents	
	Yes	No
Decongest courts and prison	18	0
Respect traditions of communities	17	0
Promotes peace, harmony and coexistence among communities and security	16	0
Expeditious and most cases are resolved- Allow for handling matters discretely to allow resolution	16	0
Less costly and Easy access by poor	17	0
Resolve disputes at grass-root level and enhances access to justice	10	0
Local solution/more acceptable to people	8	0
Elders understand history of the case and people and have experience	6	0
Agent of change and promotes economic development	9	0
Foster love, cohesion and integrity and promotes respect for each other	7	0
mediate political issues and advise leadership on how to conduct themselves	2	0
Inclusiveness and non-discriminatory	2	0
Lack of framework and policies to enforce and not legally binding	0	2
little involvement of women and there is need for inclusion	0	2
Ignorance of legal knowledge	0	2
Lack of resources and limited financial ability	0	1
Communities have evolved and integrated a lot and sets of common laws do not exist	0	1
Disrespect of resolutions of TDR by many	0	1
Favoritism /biasness at times	0	1

**Table 1: Perception on relevance of TDR in community**

*2.2.2 Disadvantages of TDRs and other Community Based Systems*

However, TDRs were found to have various disadvantages such as: disregard for basic human rights (For example where women as discriminated against or where corporal punishment is meted out); application of abstract rules and procedure/lack of a legal framework; lack of documentation/record-keeping; limited resources and financial inability of the systems; evolution of communities and mixing up of different cultures thereby eroding traditions; negative attitudes towards the systems and bias at times; the jurisdiction is vague/undefined and wide; and lack of consistency in the decisions made.

Further, the study conducted indicates that there was some form of documentation of TDRs although it is poorly done. Documentation of cases and outcomes creates a historical data for reference. In the traditional setting, documentation was majorly by memorization. The research established that 77% of the respondents said their proceedings are recorded. The recordings are recorded to provide future references in case of need, during appeals and for forwarding the cases to the next level, whether in the same line of the TDR or to the courts of law. (See Fig. 3 below).



**Figure 3: Recording of TDR proceedings in writing**

The main challenges reported from the field study include: inadequate resources to finance the meetings and facilitation of the elders to participate actively in the meetings in form of transport. The services are usually voluntary and as such are dependent on the income level of the elders. Some of the meetings fail to take off, as indicated elsewhere in this paper, due to lack of quorums or non-availability of the elders mainly because of lack of transport. Other challenges include lack of recognition and empowerment of elders both legally and by the government, inadequate security and protection and negative attitudes towards elders by the community, illiteracy and lack of modern technology, gender imbalance in the composition of the committees and lack of awareness by the public on the TDRs and general rights, among others. (See Table 2 below)

Challenge	Number of respondents		
	Luo	Meru	Total
Limited resources and lack of funds and lack of transport facilities	33	6	39
Inadequate recognition and empowerment of elders - through protection and security, identification, negative attitudes towards elders	24	2	26
Not recognized by law and lack of enforcement mechanism	13	4	17
Non-compliance to rules	9	2	11
Illiteracy and lack of modern technology- illiterate clerks leading to inaccurate records, no records of how resolutions are arrived at	5	6	11
Gender imbalance and lack of representation and bias	10	0	10
Lack of exposure and capacity building	9	0	8
Vested interests in subject matter and lack on honesty with some elders looking at task as gainful employment and not service	5	0	5

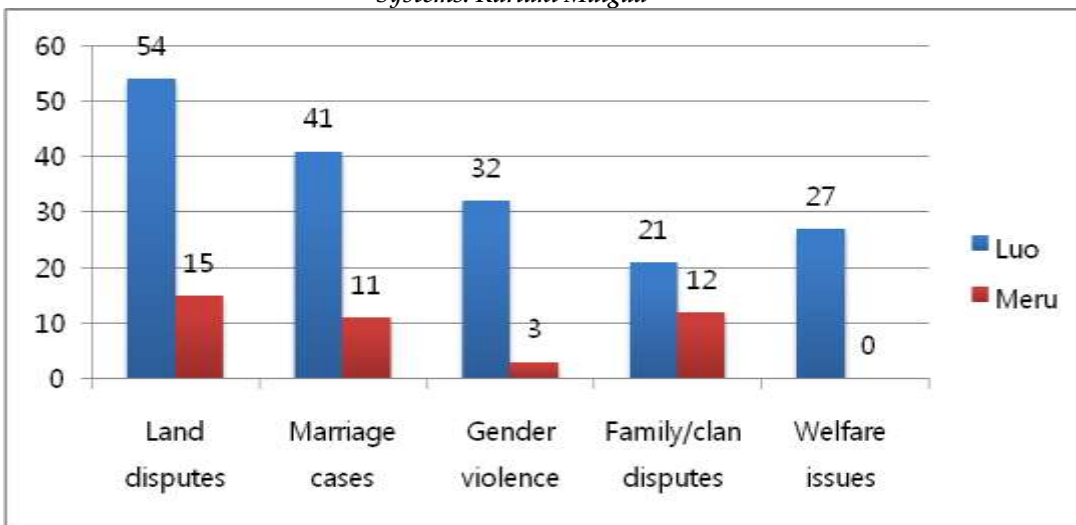
Challenge	Number of respondents		
	Luo	Meru	Total
No laid down standards/ framework for filing complaints and resolving disputes, how to behave as an elder	2	2	4
Lack of infrastructure and stationery-office space and furniture, buildings for holding courts	0	3	3
Political interference	2	0	2
Lack of quorum and reducing number of elders	2	0	2
Lack of awareness on rights and freedoms of public	4	1	5
Multiplicity of hearings and apathy	2	0	2

**Table 2: Challenges facing traditional dispute resolution processes in the community**

### *2.2.3 Disputes Resolved by use of TDRs*

These are anti-communal acts that require resolution through the traditional dispute resolution mechanisms without being referred to courts. The disputes could range from the criminal to the anti-social behavior such as violent acts, disputes over resources, and social misconduct such as murder, theft, sexual misbehavior, etc. The five main disputes, according to the study, requiring resolution under the TDR mechanisms in the communities include land disputes, marriage, gender violence, family cases including inheritance, clan disputes, and welfare issues such as nuisance, child welfare and neglect of elderly in that order.

(See figure 4 below).



**Figure 4: Five main disputes requiring resolution under the TDR mechanisms in the two communities**

The Respondents reported that other disputes which required resolution using TDR mechanisms include cattle rustling, debt recovery, crop damages, overall community conflicts and resolution of political disputes in the community. (See table 3 below).

Nature of Dispute	Number of respondents		
	Luo	Meru	Total
Inheritance cases	23	2	25
Theft including cattle rustling	20	4	24
Resource scarcity	11	4	15
Debt recovery	12	3	15
Crop damage	10	0	10
Witchcraft cases	0	2	2
Political dispute	3	0	3
Assault	6	3	9

**Table 3: Disputes requiring resolution under TDR**

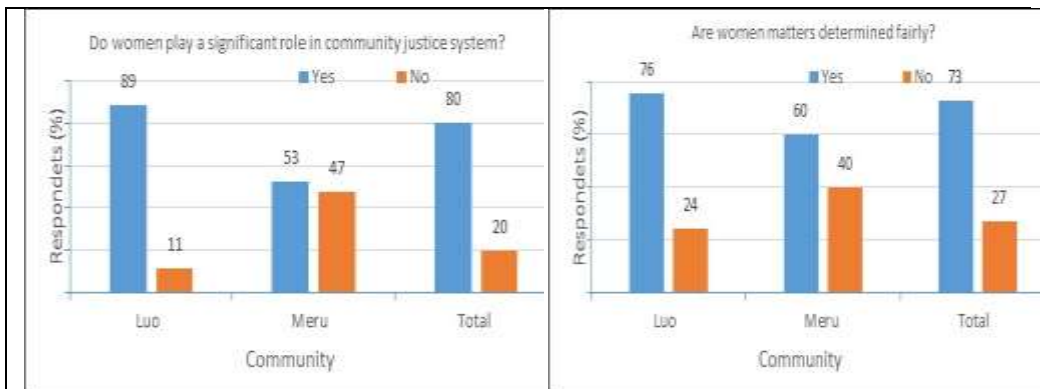
Basically majority of respondents indicated that many cases are resolvable through TDRs except for serious criminal offences that require the intervention

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of the courts. The offences suitable for trial in the court of law in addition to compensation under the traditional dispute resolution mechanism were reported as murder, manslaughter, sexual offences, grievous harm and stock theft.

*2.2.4 Role of Women in the Community Justice System*

Most TDRs are dominated by men. Women do not hold any substantive stake in TDR proceedings. The literature available on TDRs indicates that they mostly discriminate against women on matters where their rights are involved. This is because TDRs are based on customary law which discriminates against women. However, the study undertaken indicates that women play a significant role in the community justice system. Similarly, there is overall perceived fairness in the determination of women matters (73%). However, the perceived significance of women's role in the TDR mechanisms and fairness in the determination of matters affecting them varied between the communities with more respondents (89%) reporting significant roles in the Luo community compared to 53% in the Meru community. (See figures 5 and 6 below).



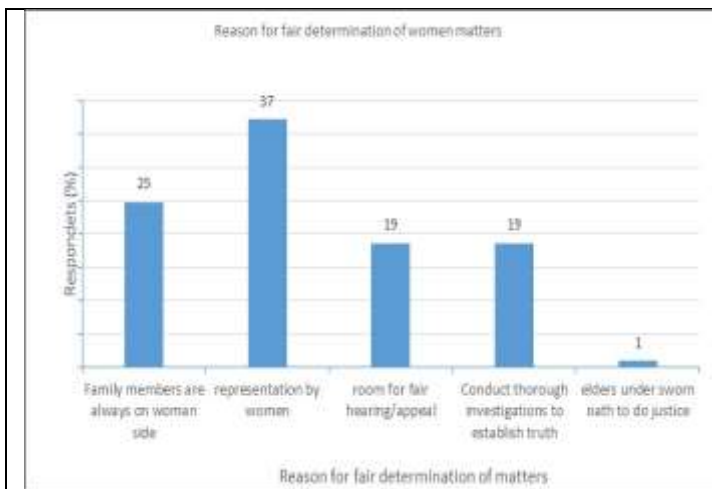
**Figure 5: Significance of role of women in TDR**

**Figure 6: Determination of women matters in TDR**

Some of the reasons offered to show that there is fair determination of disputes include the fact that elders are always concerned with the lives of the women and the children and are more keen on promoting their (women and children) welfare (25%), women are represented in most of the tribunals (38%), and that

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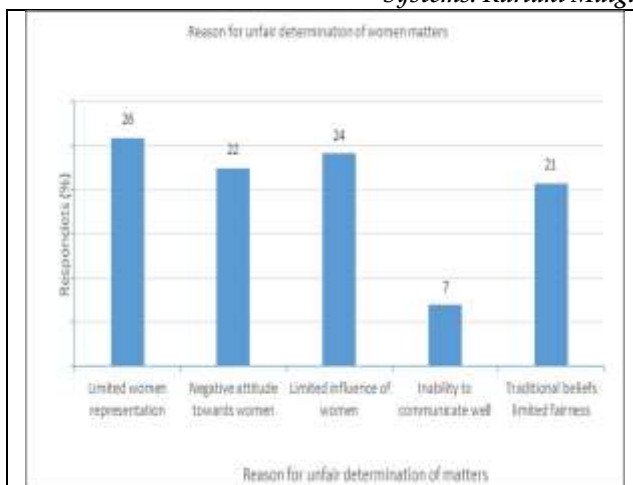
there is always room for fair hearing and appeals. Other reasons given were that women have the opportunity to appeal where not satisfied (19%) and tribunals are meticulous in conducting investigations to establish the truth (19%) before any determination. In addition, it was reported that most members of the tribunals have a good understanding of the community and yield fair and just determinations. Finally, councils of elders operate under an oath to do justice and they observe this responsibility without fear or favor. (See figure 7 below).



**Figure 7: Reason for fair determination of women matters in TDR**

However, some respondents felt that women matters are not (always) determined fairly. The reasons given include limited representation in terms of numbers, negative attitudes towards women by members, limited influence of tribunal outcomes by the women members, inability of women to communicate well and unfair and biased cultural practices and traditions. (See figure 8 below).



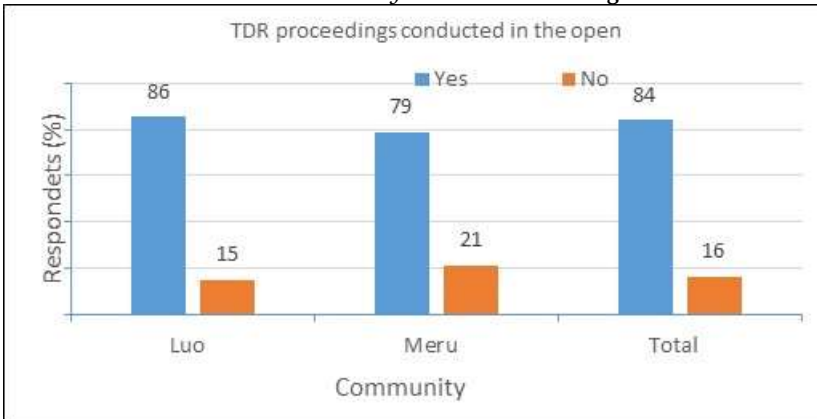


**Figure 8: Reason for unfair determination of women matters**

### *2.2.5 TDR Tribunal Proceedings*

At the community level, dispute resolution through TDRs involves an informal hearing before a council of elders, local administration such as chiefs and assistant chiefs or highly respected and knowledgeable village elders. TDRs differ from the formal system in that whereas the formal system is a codification of written laws and common law, TDRs draw from communal customary law which is drawn from a community's culture and traditions. The formal system is characterised by retribution, hierarchy, defined jurisdiction and is highly adversarial. On the other hand, TDRs are inconsistent, uncoordinated, scattered and the jurisdiction is abstract. Whereas the formal legal system is individual-oriented, the TDRs are communal-based. Further, the focus of formal law is allocation of rights hence retributive and punitive in nature while the primary goal of TDRs is reconciliation, restoration and peaceful co-existence in the community.

Traditional dispute resolution proceedings are conducted in the open according to majority of the respondents (84%). The open sessions allow for free and open participation and contribute to fairness in the determination of disputes. (See figure 9 below).



**Figure 9: TDR proceedings conducted openly for members of the community to attend**

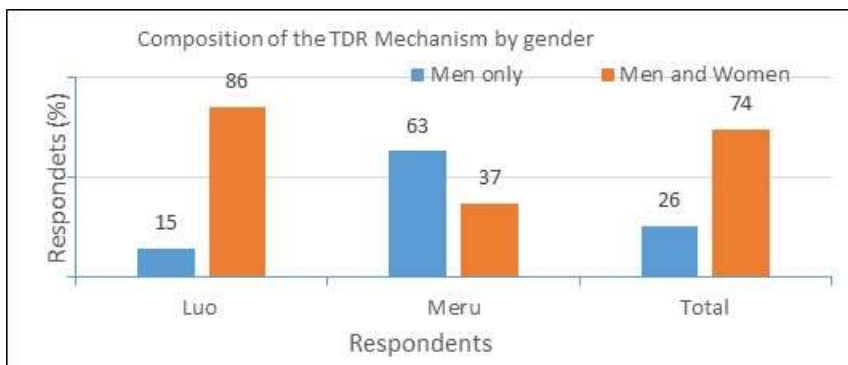
In terms of compensation of council of elders or members of the alternative dispute resolution committees for their work, it was found that the council of elders in the Meru community is usually compensated. For the Luo community payment is mainly made to the committees or tribunals by the local administration including clan elders, village elders, and assistant chiefs. But no payment is made to the committee of the council of elders.

Where payments are made to the committees, the rates were reported to be largely fair, reasonable and affordable to majority of the people (79%). Such payments are usually agreed on between the disputants and can take any of two forms, in kind (in terms of animals or farm produce) or cash. Each of the disputants has to pay similar amounts to avoid any feeling of perceived biasness. The negotiated rates take into consideration the income levels of the disputants and are often made as a token. Sometimes the compensation takes the traditional form of slaughtering animals (goats) for the elders.

#### **2.2.5.1 Composition of TDR Tribunals**

The common traditional dispute resolution (tribunals/council of elders) committees mentioned are the Council of elders (Council of elders for the Luo and the Njuri Ncheke for the Meru community), the Local administration (Nyumba Kumi initiative, clan/village elders, Assistant chiefs and Chiefs'

barazas), church elders and the children's departments. The councils of elders are mainly composed of men while in the local administration TDR mechanisms include women in the committees. Where both men and women are involved, the majority are men (the average being at 74%) with women forming only 26% of the membership. However the composition is slightly higher in the Luo community with 74% compared to the Ameru's 67% proportion of men to women. (See figure 10 below).



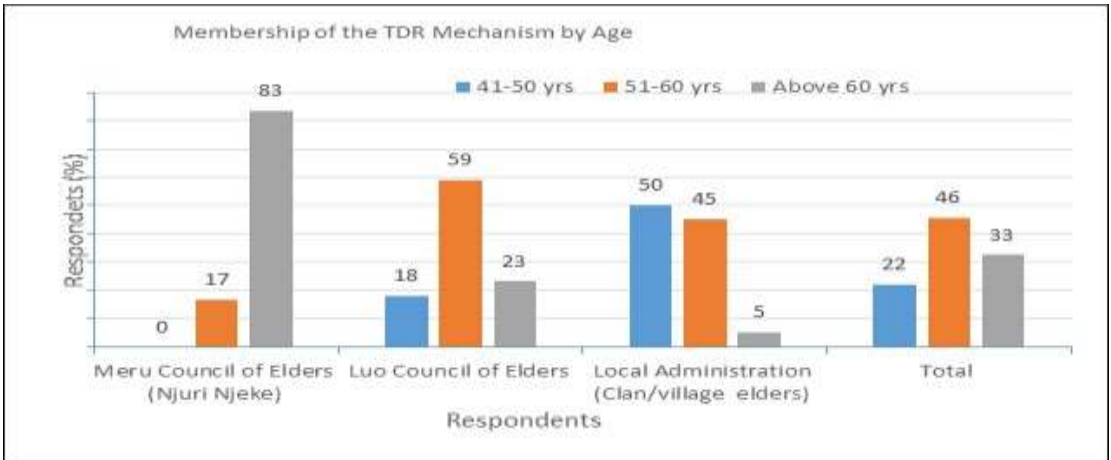
**Figure 10: Composition of panels in TDR Mechanisms by Gender**

In the Meru community, the membership of the council of elders is predominantly men with women being common mostly in the committees constituted to resolve certain specific issues under the local administration (mostly under the Chief and Assistant Chief's offices). The Luo community has women in both local administration and the council of elders. However participation of women in the Luo council of elders and to some extent in the committees is rather low due to the fact that elders engage in volunteer and free jobs which are not compensated and as such do not attract more women. It was also reported that women are mostly busy in household chores and therefore have limited time to engage in traditional committees.

It was established that a person's age is an important determinant factor in a person's membership to TDR tribunals/committees and especially with respect to membership in the council of elders. Most Councils of elders are constituted by persons who are above 50 years according to majority (79%) of the

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respondents, with the younger elders (51-50 years) being mostly clan/village elders under the local administration. In the Luo community, to be a member of the Council of Elders one has to be at-least 55 years for women and at least 65 years for men. The Meru have an age limit of over 50 years for one to be a member of the Njuri Ncheke. (See figure 11 below).



**Figure 11: Age of the Members in TDR Tribunals/Committees**

Other considerations for membership into these committees include gender, experience, knowledge and understanding of the traditions. Others are the overall status in the community including the social standing, integrity and commitment, maturity and family status such as marital status and success in raising a family. Special considerations among the communities include the residency status, clan representation, desire to volunteer, ability to keep matters confidential, foresightedness for the Luo and religious background among the Meru.

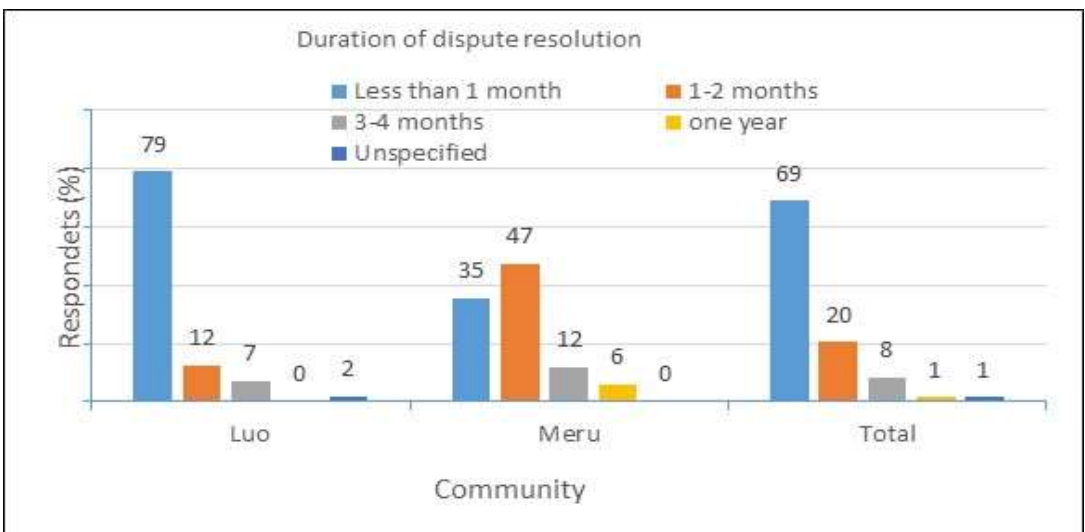
#### **2.2.5.2 Accessibility of Traditional Dispute Resolution Mechanisms**

Any dispute resolution mechanism should ensure access to justice for all persons and should be fair and affordable. The overall results from the field study indicate that majority of the respondents (84%) perceived TDR mechanisms as being accessible to all in the community. Among the Luo and Meru communities 85% and 83% of the respondents respectively, reported that TDR mechanisms are accessible. In cases where respondents felt some members

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of the community did not have equal opportunity to access traditional dispute resolution mechanisms, that was attributed to factors such as age, the status in the community, health/sanity, a person's character/behaviour with errant members of the community being dismissed, awareness of the TDRs with many people not being aware of the existence of the TDRs, lack of harmony between the TDRs and the statutes, conflict of interest, gender, high fees for some communities, knowledge of meeting venues and time, and proximity to the office.

The length of time taken to resolve most of the disputes in the two communities was found to be relatively short. According to 69% of respondents, disputes take less than 1 month to resolve, while 20% thought cases take 1-2 months. In the Meru community, majority of respondents (47%) said that cases take 1-2 months to resolve while 35% think cases take less than 1 month. In the Luo community, according to majority of respondents (79%), cases take less than 1 month to resolve, with only 12% expressing the view that cases take 1-2 months to resolve. (See figure 12 below).



**Figure 12: Duration of dispute resolution using the TDR mechanism**

The period taken to resolve a dispute is heavily dependent on a number of factors including; the nature of the dispute with complex disputes involving

land, communities and clans taking longer to resolve. Other determinants include the types of parties with the inter-clan and community disputes taking longer, the availability of the elders with cases being postponed severally due to lack of quorum or where the elders fail to turn up owing to lack of resources. The availability and number of witnesses and compliance of parties to the agreements is also crucial with longer periods taken where witnesses are many and do not comply with requirements. Accessibility of records and availability of adequate information about the issue under dispute is also important in determining the duration with longer durations taken to resolve cases which require time for further investigations and consolidation of background information. In some instances, the disputants appeal to the elders to take a longer period to resolve the dispute.

#### ***2.2.5.3 Outcomes of Traditional Dispute Resolutions***

Traditional dispute resolution processes often take various forms including arbitration, mediation or conciliation. The main forms in the communities include agreements facilitated by reconciliation (64%), mediated agreements (63%) and arbitral awards of the council of elders (35%). Other forms specific to the Luo community include peace building, cohesion and friendship (6%), advisory opinions and counseling (1%) and compensation of aggrieved parties (1%).

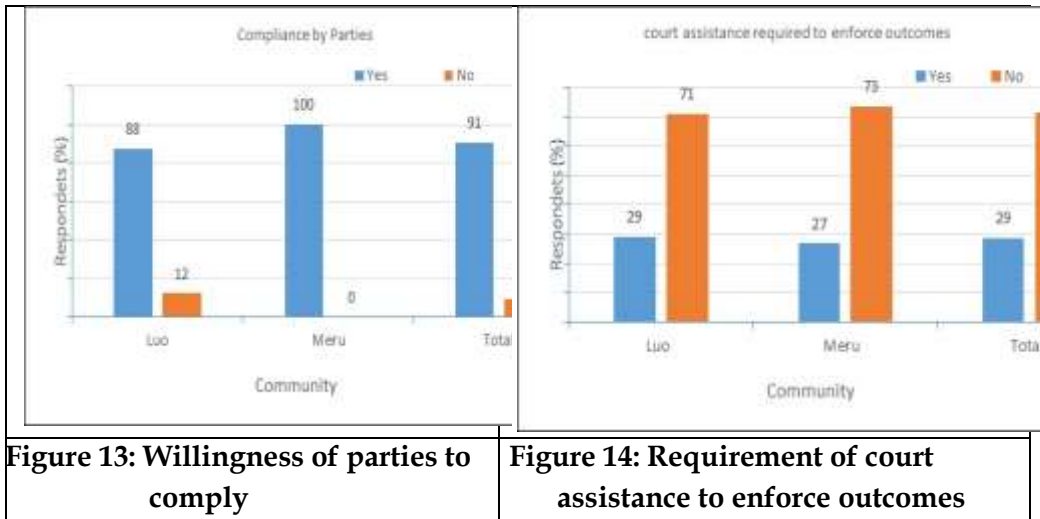
Usually the expected outcomes of traditional dispute resolution processes are transformation and overall behavior change, compensation of the complainant (restorative) and retribution or punishment of the offender for the offence. Other results common to the Luo community include reconciliation and maintenance of peace, security and harmony, enhanced development and self-sustenance, overall reduction of poverty, cohesion, integrity and avoidance of recurrence of the dispute.

#### ***2.2.5.4 Enforcement of Traditional Dispute Resolutions***

The success of a mechanism depends on the enforceability of its resolutions. The field study found that parties are always willing to comply with resolutions and that court assistance may not be necessary to enforce the outcomes. However,

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in some complex cases, TDR Tribunals will require enforcement by courts of law. (See figures 13 and 14 below).



Awards emanating from traditional dispute resolution mechanisms are enforced through the elders and the communities who make follow-ups and observations to take note of the compliance, behavioral changes and existence of peace. There is also self-enforcing or individual persuasion where individuals opt to comply with the agreements made for fear of curses from the elders and the community. Parties are also required to report back to the committees and community on the compliance status after specified periods.

Other enforcement mechanisms include symbolism and oath taking by parties, which increase compliance for fear of curses, award of penalties with double fines awarded in case of non-compliance. Parties are forced to make formal decrees of compliance through signed agreements and involvement of government officers including the chiefs, ministry of agriculture officials in case of crop damage, among others. (See table 4 below)

Enforcement	Number of Respondents		
	Luo	Meru	Total
By Elders and community- through follow-ups and observance of the changes in a person's behavior, compliance and existence of peace	26	4	30
Self-enforcing -Individual persuasion since parties agree and that people fear curses from elders	5	8	13
Parties report back at specified period	12	0	12
Symbolism and oath taking- people fear curses from elders	6	2	8
Penalties and fines-Offenders forced to give according to verdict and fine is doubled in case of failure	2	4	6
Signature of decree/formal decrees	5	1	6
Involvement of government officials (local administration)	4	0	4
Compensation and awards done in public	4	0	4
Unleashing of threats	3	0	3
Appeal system	1	0	1

**Table 4: Enforcement of the decisions/awards of the TDR mechanisms**

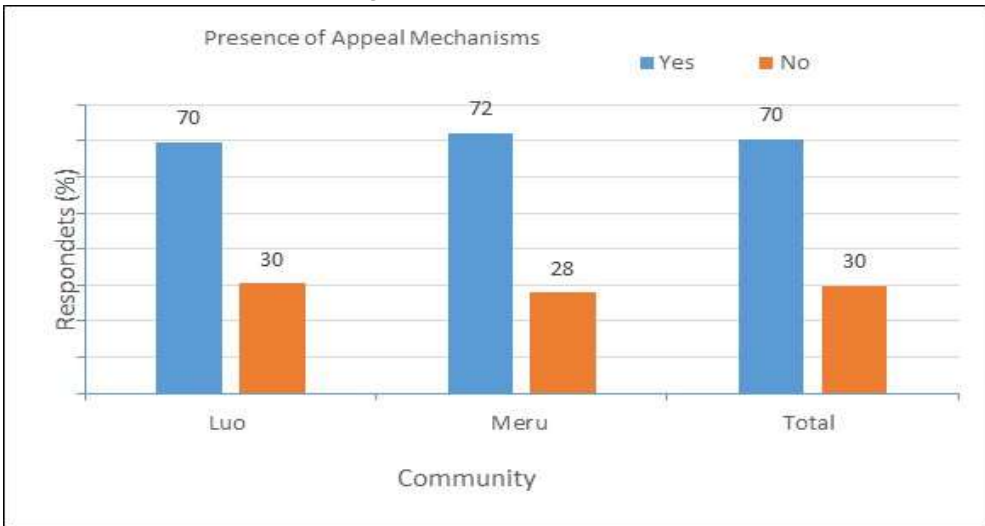
Non-compliance to resolutions/decisions of the TDR Tribunals has various consequences. The main consequences include review of the resolutions through an appeal mechanism to establish if they are reasonable, forwarding of cases to the courts or disputants advised to appeal to a higher level. There is also provision for forceful enforcement by authorities including the chiefs, police and the elders. This could be through forceful payment of awards and confiscation of properties to pay the awards. Other consequences include heavy punishments and penalties, performance of rituals and invocation of curses on the party, unleashing of threats of excommunication from the community or being outlawed and sanctioned by the community.

#### *2.2.5.5 Appeal Mechanisms in TDR*

The field study found the existence of appeal mechanisms in Traditional Dispute Resolution mechanisms among the Luo and Meru communities. Overall, 70% of respondents indicated that the community dispute resolution



process has appeal mechanisms through which unsatisfied disputants can lodge their complaints. The purpose of the existence of appeal mechanisms is to guarantee the disputants quality assurance in the decisions rendered by TDR Tribunals at all times. (See figure 15 below)



**Figure 15: Presence of Appeal Mechanisms**

The place to lodge an appeal is dependent on the nature and level of the dispute. Overall the disputants can either appeal at the same level in which case a new committee will be constituted to look into the case or at a higher level. Where disputes are handled by the local administration, the Nyumba Kumi groups are the first to consider the dispute. In the event a resolution is not reached, the dispute can then be referred to the Assistant Chief, then to the Chief. If the dispute is not resolved by the latter, it is referred to the Assistant County Commissioner and finally to the Deputy County Commissioner. Cases that cannot be resolved at that level are then referred to a court of law.

Where a dispute is heard by a Council of Elders, an unsatisfied disputant can appeal to the same committee of the council of elders, in which case a new committee chaired by a different council of elders will be formed to look into the case. The dispute can then proceed to the next level from village to location, to sub-county, to county, to president of the council of elders. Unsatisfied

disputants at this level are then advised to go to court. It is noteworthy that the Luo council of elders is organized into counties and sub-counties in line with the Constitution.

### **2.3 Other Field Studies**

The Federation of Women Lawyers conducted a study on Traditional Justice Systems among communities in the coast province of Kenya. The main objective of the field research was to study traditional justice systems in the selected communities and come up with recommendations for legal reform that would result in the mainstreaming of traditional justice institutions into the Kenyan justice system, with a view to promoting access to justice by vulnerable groups, particularly women.<sup>36</sup>

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<sup>36</sup> The study found that there is a hierarchy of Traditional Justice Systems (TJS) from village, locational, divisional and district levels. TJS members are predominantly elders drawn from the community, except for the Council of Imams and Preachers of Kenya (CIPK) in Mombasa which is composed of Imams and religious leaders. TJS members are mostly elected by community members, but in some cases they are appointed by the chiefs.

With regard to the composition of the Traditional Justice Systems in the communities, the study found that in most TJS, the members are men only, although there are a few TJS made up of both men and women with men comprising the majority. Two exceptional TJS exist among *Had Gasa* of the Orma community and the *Kijo* of the Pokomo community, whose TJS is made up of women only. TJS members are older, married, residents of the area, knowledgeable and respected in the community. Many male TJS members are religious leaders or knowledgeable in religious matters, for example Islam or Christianity.

The study found that Traditional Justice Systems are employed to resolve particular disputes at certain levels. At the village or locational level, TJS is used to resolve family and neighbourhood disputes while at the divisional and district levels they deal with issues such as security, livestock theft, grazing patterns, land disputes etc. Serious offences such as homicides and robberies are referred to the police. Women-only TJS deal with matters related to women's sexuality, for example rape or defilement, as well as social issues such as HIV/AIDS and FGM.

As regards the procedure during the proceedings, once a complaint is made the Respondent is summoned either orally or in writing and a date for the hearing of the dispute is set. On the date of the hearing each party presents their side of the case and call witnesses. Thereafter, the TJS members deliberate and either reach a decision on the same day or a decision is communicated at a later date.

If a disputant is dissatisfied with the decision made he/she may appeal to the next level of the TJS. Where a TJS decision is not complied with, the matter may be referred to the

The International Commission of Jurists also published a report on the interface between the formal and informal justice systems in Kenya. The report examines and analyses the different forms of TJS and ADR using the integrity 'lenses' and elucidates on them. The research makes a concise comparison between the formal and informal justice systems drawing key lessons which can be used to integrate an efficient and responsive justice system in the country. The research also explores the existing efforts to mainstream the use of IJS as an alternative to the court administered justice, the successes, challenges and way forward. It also assessed the adequacy of existing legal, legislative and policy framework on the same and suggests amendments.<sup>37</sup>

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chief. Enforcement of decisions by a TJS consists of social sanctions, for example shunning, ostracism and in some cases banishment from the community. Enforcement may also take a spiritual form such as cursing. In the women-only *Had Gasa* punishment may be meted out in the form of beating but the Chief has to be notified of such punishments.

The study found that men and women generally consider TJS accessible, affordable and fair. However, as far as outcomes are concerned many women perceive TJS, particularly men-only ones, to be biased against women due to the TJS negative perceptions of women. The invocation of traditional beliefs often operates to deny women's claims, for example to land. TJS are also vulnerable to vested interests of the community. Women's lower socio-economic position relative to men may sometimes result in detrimental outcomes, particularly for poor women or widows.

<sup>37</sup> The report finds that many Kenyans are frustrated and dissatisfied with the court process hence the tendency to trust alternative means of accessing justice. TJS are viewed as being accessible, impartial and affordable. It is also incorruptible, proceedings and language are familiar, accessible at all times, affordable, utilizes local resources, decisions are based on consensus, and seek to heal and unite disputing parties. This is unlike the formal system that is seen as breeding hatred.

The TJS hardly differentiates between criminal and civil cases. Land matters, family disputes, domestic violence, theft, marriage and divorce are some of the cases that are dealt with by TJS. Cases which cannot be resolved through the chiefs are often referred to the courts. There is a tendency to confuse 'referral' and 'appeal'. Since the formal justice system does not expressly recognize TJS the cases which are 'appealed' to the law courts have to start afresh.

The report finds that the TJS is trusted by communities because it is close to the people, it exhausts the issues between the parties, it is less expensive and is less time consuming due to the absence of elaborate procedures.

Traditional Justice Systems though widely accepted and used possess some negative traits which include their anarchical nature as a result of the laws and procedures being unwritten, inconsistency with the constitution and rule of law, infrequency and lack of structure, lack of defined jurisdictions, systemic biasness and lack of adequate mechanisms to enforce decisions.

The Chartered Institute of Arbitrators also organized a forum for ADR stakeholders in Kenya which was held on 22-23<sup>rd</sup> October 2014 at the Windsor Golf Hotel. The forum observed that Traditional Dispute Resolution is the oldest system of dispute resolution with clear foundations and acceptance by its users. It therefore does not require legitimization from the state.

The fact that communities have differing practices with regard to traditional dispute resolution, poses a significant challenge in the development of rules and standardization of practice for traditional dispute resolution.

#### **2.4 Alternative Dispute Resolution Mechanisms (ADR)**

Alternative Dispute Resolution (ADR) mechanisms refer to the set of mechanisms a society utilizes to resolve disputes without resort to costly adversarial litigation. All African communities had their own defined dispute resolution mechanisms. Similarly, each African community had/has a council of elders that oversees the affairs of the community, including ensuring that there is social order and justice in the community. These were known by various names in different communities and their membership had specific characteristics /qualifications. The most commonly used ADR mechanisms by traditional Kenyan communities include mediation, arbitration, negotiation, reconciliation and adjudication.

##### **a) Negotiation**

Negotiation is an informal process and one of the most fundamental methods of dispute resolution, offering parties maximum control over the process. It involves the parties meeting to identify and discuss the issues at hand to arrive at a mutually acceptable solution without the help of a third party. It has also been described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.<sup>38</sup> The focus of negotiations is the common interests of the parties rather than their relative power or position. The goal is to avoid the overemphasis of how the dispute arose but to create options that satisfy both mutual and individual interests. The aim in negotiations is to arrive at "win-win" solutions to the dispute at hand.

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<sup>38</sup> See generally, "Negotiations in Debt and Financial Management", *United Nations Institute of Training and Research*, (UNITAR), (December 1994).

The negotiation phase is the one during which the parties hammer out an agreement, or even agree to disagree and it is during this stage that the core issues of the conflict are negotiated or bargained.<sup>39</sup> The aim of negotiation is to harmonize the interests of the parties concerned amicably. This mechanism involves the parties themselves exploring options for resolution of the dispute without involving a third party. In this process, there is a lot of back and forth communication between the parties in which offers for settlement are made by either party. If agreed upon by the other party, the dispute is deemed to have been resolved amicably.

### **b) Mediation**

It has been said that negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.<sup>40</sup> In the TDR process through mediation, a third party called the mediator sits down with the two disputing sides and facilitates a discussion between them in order to reach a solution. The mediator usually endeavours that peace and harmony reign supreme in the society at whatever level of mediation. In mediation, there is no victor nor vanquished.<sup>41</sup>

Often the mediators are the respected elders of the communities of the disputants. Elders are trustworthy mediators owing to their accumulated experience and wisdom. The role of elders in a TDR hearing include, urging parties to consider available options for resolution of the dispute, making recommendations, making assessments, conveying suggestions on behalf of the parties, emphasizing relevant norms and rules and assisting the parties to reach an agreement.

### **c) Adjudication**

In adjudication, the elders, Kings or Councils of Elders would summon the disputing parties to appear before them and orders would be made for

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<sup>39</sup> Mwangiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), p. 115.

<sup>40</sup> Ibid.

<sup>41</sup> Stein, D., "Community mediation and social harmony in Nepal," (2013). Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.844.1074&rep=rep1&type=pdf>

settlement of the dispute.<sup>42</sup> These were in form of fines or other appropriate remedies. The end product of adjudication is reconciliation, where after the disputants have been persuaded to end the dispute, peace is restored.<sup>43</sup>

**d) Reconciliation**

Once a dispute was heard before the Council of Elders, the parties would be bound to undertake certain obligations towards settlement.<sup>44</sup> These were mainly through payment of fines by the party found to be on the wrong. Once this obligation is discharged, there was reconciliation which would result in restoration of harmony and mending relationships of the parties.<sup>45</sup>

**e) Problem-Solving Workshop**

The focus of this method is to create and maintain an environment where the parties can analyze their situations and create solutions for themselves. The workshop provides an opportunity for the parties to understand the root causes of the conflict and explore the available options for settlement.<sup>46</sup> For instance, in pastoral communities such as the Somali and Borana, the community leaders would arrange the problem solving meetings in which members drawn from each community come together to brainstorm on the most appropriate ways to resolve disputes over grazing lands and watering points.<sup>47</sup>

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<sup>42</sup>Ajayi, A.T and Buhari, L.O., "Methods of Conflict Resolution in African Traditional Society," op cit at p. 150.

<sup>43</sup>Ibid, p.150; See generally also, Simiyu, V.G., "The democratic myth in the African traditional societies," *Walter Oyugi et. al* (1988), pp. 49-70.

<sup>44</sup> See generally, Kenyatta, J., *Facing Mount Kenya, The Tribal Life of the Kikuyu*, (Vintage Books Edition, October 1965).

<sup>45</sup>Ibid.

<sup>46</sup>See generally, Organization for Security and Co-operation in Europe (OSCE), "Perspectives of the UN & Regional Organizations on Preventive and Quiet Diplomacy, Dialogue Facilitation and Mediation: Common Challenges and Good Practices," February 2011. Available at [http://peacemaker.un.org/sites/peacemaker.un.org/files/PerspectivesonPreventiveandQuietDiplomacy\\_OSCE2011\\_0.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/PerspectivesonPreventiveandQuietDiplomacy_OSCE2011_0.pdf)

<sup>47</sup> See generally, Walton, R.E., "A problem-solving workshop on border conflicts in Eastern Africa," *The Journal of Applied Behavioral Science* Vol.6, No. 4, 1970, pp. 453-489.

### **3.0 Analysis of the Legal, Policy and Administrative Framework for TDRs and other Community Based Justice Systems**

#### **3.1 Legal Framework**

Currently, there is no single statute on traditional dispute resolution in Kenya. In communities where traditional dispute resolution process is utilized in conflict management, the rules and procedure used is derived from customs and traditions of the community. The customs and traditions are handed down from one generation to the next. In addition, there is no sort of documentation for TDRs in most Kenyan communities. Consequently, there is a danger of distortion or neutralization of customs and traditions in the context of modern notions of Western civilization. To safeguard this, a few communities have introduced record keeping for agreements made at the conclusion of the TDR process. However, the problem persists due to illiteracy among traditional leaders and lack of formal training in record keeping.

##### *3.1.1 The Constitution, 2010*

An attempt to bring TDRs within the ambit of formal law has been achieved through the promulgation of the Constitution in 2010. In this regard, Article 159 (2) (c) and (3) envisages the substantive constitutional provisions for TDRs. Article 159 (1) provides that judicial authority is derived from the people and vests in and shall be exercised by courts and tribunals established by or under the Constitution. In exercise of judicial authority courts and tribunals shall be guided by principles, *inter alia*, 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);*
- (d) Justice shall be administered without undue regard to procedural technicalities; and*
- (e) The purpose and principles of this Constitution shall be protected and promoted.*

By stipulating that Justice shall be done to all, irrespective of status, Article 159 echoes the right of all persons to have access to justice as guaranteed by Article 48 of the Constitution. Undoubtedly, access to justice is the overall goal of traditional justice systems in most communities. Article 159 also mirrors the

spirit of Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.

Article 48 envisages the right of access to justice and provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. The rationale of the constitutional recognition of TDRs is to validate alternative forums and processes that provide justice to Kenyans. Technically, the Constitution contemplates “access to justice in many rooms” such that people can seek redress for violations of their rights in other forums of their choice rather than the formal courts.

### *3.1.2 Civil Procedure Act and Rules, Cap 21*

The Civil Procedure Act and rules embodies the procedural law and practice in civil courts in Kenya. These include the High Court and Subordinate Courts. An analysis of the Act and Rules shows that the Act and Rules envisage enabling provisions within which TDRs can be supported.

To start with, *Section 1A (1)* of the Civil Procedure Act encapsulates the overriding objective of the Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give effect to the overriding objective.<sup>48</sup> Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives. TDRs are definitely part of such options. The wording of Section 1A is as follows:

*(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*

*(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

*(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

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<sup>48</sup>Section 1A (2). The overriding objective has been viewed as the gate keeper to the just practice of litigation and the cornerstone upon which the Civil Procedure Rules are built.



Section 1B provides that the aims of ensuring a just, expeditious, proportionate and affordable resolution of civil disputes include the just determination of proceedings, efficient disposal of Court business, efficient use of judicial and administrative resources, timely disposal of proceedings, affordable costs and use of appropriate technology. In most civil matters emanating from customary law such as family disputes (marriage, divorce and matrimonial property), succession and inheritance often turn to customs and traditions of the communities of the parties. Thus, use of traditional processes in such cases facilitates achievement of the overriding objective.

Pursuant to the inherent powers of the court under *Section 3A* which empowers courts to make orders that may be necessary for the ends of justice; the court can promote the use of TDRs. In this regard, where a matter has been referred to TDRs, the Court ought to have powers to extend limitations set under the Limitation of Actions Act. Section 3A read together with Article 159 of the Constitution ought to be instrumental in extending time limitations on a case by case basis. Similarly, in reliance to the inherent powers, the courts can enforce any agreement, orders or fines imposed in TDR proceedings.

Mediation is one of the key dispute resolution mechanisms in traditional justice systems. *Section 59A* establishes the Mediation Accreditation Committee (MAC). The Committee's role is to determine the criteria for certification of mediators and propose rules for the certification of mediators. The Chief Justice has since appointed Members to the Committee and had them gazetted.<sup>49</sup> The *Mediation (Pilot Project) Rules, 2015* have also been gazetted.<sup>50</sup> These rules are to apply to all civil actions filed in the Commercial and Family Divisions of the High Court of Kenya at Milimani Law Courts, Nairobi, during the Pilot Project.<sup>51</sup> The *Mediation (Pilot Project) Rules, 2015* provide for:

- a) Training of mediators
- b) Accreditation of mediators

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<sup>49</sup> Kenya Gazette, Vol. CXVII-No. 17, Gazette Notice No. 1088, Nairobi, 20<sup>th</sup> February, 2015, p. 348.

<sup>50</sup> Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9<sup>th</sup> October, 2015, pp. 1283-1291 (Government Printer, Nairobi, 2015).

<sup>51</sup> Rule 2: "Pilot project" means the mediation program conducted by the court under these Rules. (R. 3).

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- c) Registration of mediators
- d) Conduct of mediators
- e) Confidentiality
- f) Evidence in mediation
- g) Immunity of mediators
- h) Code of Ethics for mediators
- i) Disciplinary action against mediators; and
- j) Court annexed mediation

The pilot project is ongoing on trial basis in Nairobi Milimani Court and its success rate will determine if and how the same will be rolled out to the rest of the stations in the country.

Further, the use of TDRs in resolution of civil disputes can be promoted under *Order 46 rule 20* of the Civil Procedure Rules which provides 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 and TDRs or any other appropriate mechanisms to facilitate the just, expeditious, proportionate and affordable resolution of all civil disputes governed by the Act. There is a need therefore to introduce court-annexed TDRMs and ADR as it will go a long way in tackling the problem relating to backlog of cases, enhance access to justice, encourage expeditious resolution of disputes and lower costs of accessing justice.

*Under Order 46 rule 20 (2)*, a court may adopt any ADR mechanism for the settlement of the dispute and may issue appropriate orders or directions to facilitate the use of that mechanism. Judges will thus need to be thoroughly trained on ADR mechanisms so as to be in a position to issue directions and orders in relation to the particular mechanism that will lead to the attainment of the overriding objectives under sections 1A and 1B of the Act. Nonetheless, Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159

of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases.

### *3.1.3 Evidence Act, Cap 80*

The application of TDRs in dispute resolution can be promoted under this Act by introducing amendments to relax the rules of evidence in informal hearings such as rules relating to character evidence, statements by persons who cannot be called as witnesses (Part I of the Act), competency of witnesses and rules as to examination of witnesses.

The strict rules of evidence have caused substantial injustice for many litigants. Even lawyers find difficulties in following these rules strictly. There is therefore a need to simplify these evidential rules to cover situations where informal systems of dispute resolution are being used. Indeed, Article 159 (2) (d) of the Constitution puts emphasizes on substantive justice rather than strict adherence to rules of procedure. In Kenya, adherence to the strict rules of evidence under the Act has resulted in substantial injustices to many litigants. Thus, the entire Act should be reviewed with a view of promoting substantive justice.

### *3.1.4 Judicature Act, 1967*

The Judicature Act makes provisions to govern the jurisdiction of the High Court, the Court of Appeal and subordinate courts and the judges and officers of courts. Section 3 of the Act provides for the sources of law in Kenya and stipulates that the jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with;

*(a) the Constitution;*

*(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;*

*(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.*

Notably, a proviso has been introduced into this section to enable courts consider circumstances of Kenya when applying English Law. The proviso reads that the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its

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inhabitants permit and subject to such qualifications as those circumstances may render necessary.

Section 3(2) encapsulates the repugnancy clause and states *that the High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.*

In effect, Section 3(2) of the Act ranks African customary law at the bottom of the hierarchy of laws that are to guide courts in civil cases. This Act should be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution. The rider in section 3 (2) of the Act on the application of customary law may thus not be applicable in view of Articles 11 on culture and 159 of the Constitution which recognize the use of traditional dispute resolution mechanisms in the interest of enhancing access to justice.

*3.1.5 Limitation of Actions Act, Cap 22*

This Act sets down the statutory period after the expiry of which a cause of action lapses. For instance, Section 4 of the Act provides that actions based on contract may not be brought after the end of six years from the date on which the cause of action arose and actions founded on tort may not be brought after the end of three years from the date on which the cause of action arose. An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action. Section 22 which provides for extension of the limitation period in cases of disability should be reviewed to provide other instances where a suit may be brought in the interest of justice notwithstanding the lapse of time.

To promote TDRs in dispute resolution, Parliament should amend this Act such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.

### *3.1.6 Kadhis' Courts Act, Cap 11*

The Kadhis' Courts Act provides for the law and procedure to be adhered to in matters before the Kadhi Courts. Section 5 of the Kadhis' Courts Act provides that a Kadhi's Court shall have and exercise jurisdiction in matters involving the determination of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion. Muslim/Islamic law is derived from the customs and traditions of persons who profess Islamic faith.

There are very few Kadhis' courts and Kadhis to meet the justice needs of the Kenyan Muslim population. Although the Kadhis' Courts Act requires the Chief Justice to make rules of practice and procedure for these courts, this has not been done to date. For these courts to fulfill their mandate, the Chief Justice needs to make these rules so that they can use the correct Islamic law procedures, practice and evidence. The Act needs further review to make provision for the appointment of women kadhis. Rules of procedure of Kadhi Courts should be developed and enacted to standardize the procedures and practices of these courts in line with the constitutional right to enhance access to justice for all.

### *3.1.7 Appellate Jurisdiction Act, Cap 9*

The Appellate Jurisdiction Act governs the procedure for appeals from the High Court to the Court of Appeal. Just like the Civil Procedure Act, Section 3A of the Appellate Jurisdiction Act embodies the overriding objective which is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act. Pursuant to the overriding objective, the Court of Appeal is enjoined to give effect to the overriding objective during the exercise of its powers under the Act or the interpretation of any of its provisions. In the same way, advocates in an appeal to the Court of Appeal are under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court. The application of TDRs in the appellate process can further the achievement of the overriding objective where the matter in dispute emanates from customary law.

Moreover, section 3B specifies the duty of the Court in furtherance of the overriding objective in appeals. To this end, courts are enjoined to handle all matters presented before them for the purpose of attaining the just determination of the proceedings, the efficient use of the available judicial and administrative resources, the timely disposal of the proceedings, and all other

proceedings in the court, at a cost affordable by the respective parties and through the use of suitable technology.

### *3.1.8 Land Act, 2012*

The Land Act is the substantive regime for matters pertaining to land in Kenya. It was enacted with a view to harmonize land regimes which were scattered in different pieces of legislation. The procedural law on land matters is embodied in the Land Registration Act 2012. Section 4 of the Land Act lays down the guiding values and principles of land management and administration. These include:

- a) equitable access to land;
- b) security of land rights;
- c) sustainable and productive management of land resources;
- d) transparent and cost effective administration of land;
- e) conservation and protection of ecologically sensitive areas;
- f) elimination of gender discrimination in law, customs and practices related to land and property in land;
- g) encouragement of communities to settle land disputes through recognized local community initiatives;
- h) participation, accountability and democratic decision making within communities, the public and the Government;
- i) technical and financial sustainability;
- j) affording equal opportunities to members of all ethnic groups;
- k) non-discrimination and protection of the marginalized;
- l) democracy, inclusiveness and participation of the people; and
- m) alternative dispute resolution mechanisms in land dispute handling and management.

This Section promotes the application of ADR mechanisms which in this case include traditional dispute resolution mechanisms. Thus, TDRMs can effectively be utilized within the framework of providing access to justice. In particular, disputes involving communal land can be better resolved through application of TDRMs.

### *3.1.9 Marriage Act, 2014*

The Marriage Act 2014 is the current marriage regime in Kenya. This Act repealed pre-existing legislation on various types of marriages.<sup>52</sup> Under section 3 of the Act, a marriage is defined as a voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act. Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage. All marriages registered under the Act have the same legal status. The Act recognizes the following marriages; Christian marriages, Civil marriages, customary marriages, Islamic marriages and Hindu marriages.

Part V deals with customary marriages and envisages rules to govern customary marriages. These include rules pertaining to notification of marriage, celebration of marriage and payment of dowry. Part X of the Act provides for resolution of matrimonial disputes and specifies the relevant laws to be applied depending on the type of marriage. Section 68 provides for mediation of disputes in customary marriages. It stipulates that parties to a customary marriage may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of marriage. The process of mediation or traditional dispute resolution should conform to the principles of the Constitution.

### *3.1.10 Matrimonial Property Act, 2013*

Section 11 of this Act stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives.

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<sup>52</sup> The Marriage Act, cap 150, the African Christian Marriage and Divorce Act. Cap 151, the Matrimonial Causes Act. Cap 152, the Subordinate Court (Separation and Maintenance) Act. Cap 153, the Man Marriage and Divorce Registration Act. Cap 155, the Mohammedan Marriage Divorce and Succession Act. Cap 156, the Hindu Marriage and Divorce Act. Cap 157

### 3.1.11 *Industrial Courts Act, 2011*

The Industrial Courts Act governs the procedure to be used in Industrial Courts (now known as the Employment and Labour Relations Court)<sup>53</sup> while adjudicating on labour and employment related disputes. Under section 15, the Act empowers the court to adopt alternative dispute resolution mechanisms in dispensation of justice. Section 15 reads:

*Nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion or at the request of the parties, any other appropriate means of dispute resolution, including internal methods, conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.*

To strengthen the utilization of ADR and TDR mechanisms in resolution of labour and employment disputes, this section mandates the court to avoid determining any dispute, other than an appeal or review before the Court, if the Court is satisfied that there has been no attempt to effect a settlement through ADR or TDRs.

Further, the Act empowers the courts to refer a dispute to conciliation at any stage of the proceedings if it becomes apparent that the dispute ought to have been referred for conciliation or mediation. In this case, the Court is required to stay the proceedings and refer the dispute for conciliation, mediation or arbitration.

The Industrial Courts Act also embodies the concept of access to justice as envisaged in section 29. This section states that the Court shall ensure reasonable, equitable and progressive access to the judicial services in all counties. Pursuant to the need for access to justice, the Chief Justice is empowered to designate a Judge in a county as a Judge to determine labour or employment disputes in the particular county. This may be done by notice in the *Gazette* pursuant to which the CJ appoints certain magistrates to preside over cases involving employment and labour relations for a particular area.

### 3.1.12 *Commission on Administrative Justice Act, 2011*

Section 3 establishes the Commission and confers it with the mandate under section 8 to perform various functions. Under section 8 (f), the Commission is mandated to work with various public institutions to promote alternative

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<sup>53</sup> Statute Law (Miscellaneous Amendments) Act No. 18 of 2014.



dispute resolution methods in the resolution of complaints relating to public administration. In the last five years, the Commission on Administrative Justice has received complaints with the numbers increasing annually since the promulgation of the Constitution in 2010.<sup>54</sup> The largest percentage of these complaints emanates from Police service, Judiciary land related issues, to mention but a few.<sup>55</sup> In this regard, the utilization of ADR and TDR mechanisms enables the Commission to explore the root causes of the disputes and the most appropriate options for resolution.<sup>56</sup>

### *3.1.13 The National Land Commission Act, 2012*

Under section 3, the object of the Act is to provide for the management and administration of land in accordance with the principles of national land policy and the Constitution of Kenya. It also provides for the operation, powers, responsibilities and additional functions of the Commission pursuant to Article 67(3) of the Constitution; a legal framework for the identification and appointment of the chairperson, members and the secretary of the Commission pursuant to Article 250(2) and (12) (a) of the Constitution; and for a linkage between the Commission, county governments and other institutions dealing with land and land related resources.

Under section 5 (f)<sup>57</sup> the Commission is mandated to encourage the application of traditional dispute resolution mechanisms in land conflicts. Further, under sub-section 2(f), the Commission is mandated to develop and encourage alternative dispute resolution mechanisms in land dispute handling and management. Section 6 provides for the powers of the Commission and subsection 3 thereof provides, *inter alia*, that in the exercise of its powers and the discharge of its functions the Commission is not bound by strict rules of evidence.

There is need to amend section 17 on consultations to the effect that the Commission can consult or seek assistance from community leaders on matters pertaining to land. Section 18 provides for the establishment of County Land

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<sup>54</sup>The Commission on Administrative Justice (The Office of The Ombudsman), *Annual Report 2015*, No. 29/2016, ISBN: 978-9966-1735-5-3, pp. 8-10.

<sup>55</sup>*Ibid*, p.10.

<sup>56</sup>See Amollo, O., "Constitutional and Statutory Regime of Alternative Dispute Resolution in Kenya," *Alternative Dispute Resolution*, Vol. 2, No.1, 2014, pp. 92-105 at pp.101-105.

<sup>57</sup>National Land Commission Act, No. 5 of 2012, Laws of Kenya.

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Management Boards tasked with managing public land. It is imperative that the section be amended in terms of the composition of the Boards so as to include community leaders.

*3.1.14 National Cohesion and Integration Act, 2008*

Section 49 provides for conciliation to be conducted by the National Cohesion and Integration Commission in appropriate cases. Under this section, if the Commission considers it reasonably possible that a complaint may be conciliated successfully, the Commission shall refer the complaint to the Secretary. Section 50 provides for the procedure to be used in cases where conciliation is inappropriate. In accordance to this section, if the Commission does not consider it reasonably possible that a complaint may be conciliated successfully, it shall notify the complainant and the respondent in writing. Within sixty days after receiving the Commission's notice under subsection (1), the complainant, by written notice, may require the Commission to set the complaint down for hearing and the Commission shall comply with such notice. Section 51 mandates the Commission to conduct conciliation. It provides that the Commission shall make all reasonable endeavours to conciliate a complaint referred to it under section 49 and may, by written notice, require any person to attend before the Commission for the purpose of discussing the subject matter of the complaint or produce any documents specified in the notice.

Section 52 provides for conciliation agreements where the parties to the complaint reach an agreement with respect to the subject matter of the complaint. The Secretary is required to record the agreement and the parties to be bound to comply with such agreement as if it were an order of the Commission.

*3.1.15 Supreme Court Act No.7 of 2011*

This Act provides for the jurisdiction of the Supreme Court of Kenya and provides the procedure to be followed by the court. Section 3 stipulates the objects of the Act which include:

- a) asserting the supremacy of the Constitution and the sovereignty of the people of Kenya;
- b) provide authoritative and impartial interpretation of the Constitution;
- c) *develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;*

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- d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;
- e) improve access to justice; and
- f) provide for the administration of the Supreme Court and related matters.

Rule 54 of the Supreme Court Rules 2012 provides for the attendance of Amicus curiae, experts or advocates assisting the court in determining technical matters. It states:

*The Court may;*

- (a) in any matter allow an amicus curiae;*
- (b) appoint a legal expert to assist the Court in legal submissions; or*
- (c) at the request of a party or on its own initiative, appoint an independent expert to assist the Court on any technical matter.*

This section should be accorded a wide interpretation and application to provide an opportunity for community leaders to assist the court in matters pertaining to customary law.

*3.1.16 Environment and Land Court Act, 2011*

Under section 3, the objective of the Act is stated as to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the Act and that the parties and their representatives shall assist the court in furthering the overriding objectives.

Section 4 establishes the Environment and Land court which is a superior court of record with the status of the High Court. Section 13 specifies the jurisdiction of the Court and states that:

*The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of the Act or any other written law relating to environment and land.*

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Pursuant to subsection 2, the court is empowered to hear and determine disputes relating to environment and land including disputes:

1. Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rent, valuations, mining, minerals and other natural resources;
2. Relating to compulsory acquisition of land;
3. Relating to land administration and management;
4. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
5. Any other dispute relating to environment and land.

Section 18 embodies the guiding principles to guide the court and they include the principle of sustainable development including the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law. Section 20 provides for the application of ADR and empowers the court to adopt and implement on its own motion with the agreement of or request of the parties any appropriate mechanism such as mediation, conciliation and TDR mechanisms in accordance with Article 159(2) (c) of the Constitution. Further, the Act provides that in cases where ADR is a condition precedent to any proceeding before the Court, the court stays proceedings until such condition is fulfilled.

Section 26 provides for the right of access to justice and provides that the court shall ensure reasonable and equitable access to justice to its services in all counties.

### *3.1.17 The Legal Aid Act, 2016*

The Legal Aid Act is meant to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes. The Act is relevant in the mainstreaming of TDR and ADR mechanisms as it defines "legal aid" to include:<sup>58</sup>

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<sup>58</sup> S.2., The Legal Aid Act, No. 6 of 2016, Laws of Kenya.

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- (a) legal advice;
- (b) legal representation;
- (c) assistance in –
  - (i) resolving disputes by alternative dispute resolution;
  - (ii) drafting of relevant documents and effecting service incidental to any legal proceedings; and
  - (iii) reaching or giving effect to any out-of-court settlement;
- (d) creating awareness through the provision of legal information and law-related education; and
- (e) recommending law reform and undertaking advocacy work on behalf of the community.

Section 3 thereof provides that the object of the Act is to establish a legal and institutional framework to promote access to justice by –

- a) providing affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya in accordance with the Constitution;
- b) providing a legal aid scheme to assist indigent persons to access legal aid;
- c) promoting legal awareness;
- d) supporting community legal services by funding justice advisory centers, education, and research; and
- e) promoting alternative dispute resolution methods that enhance access to justice in accordance with the Constitution.

Section 5 (1) establishes the National Legal Aid Service, whose one of the functions include to, inter alia: establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable; encourage and facilitate the settlement of disputes through alternative dispute resolution; undertake and promote research in the field of legal aid, and access to justice with special reference to the need for legal aid services among indigent persons and marginalized groups; promote the use of alternative dispute resolution methods; and take appropriate measures to promote legal literacy and legal awareness among the public and in particular, educate vulnerable

sections of the society on their rights and duties under the Constitution and other laws.<sup>59</sup>

### *3.1.18 Community Land Act, 2016*

The Community Land Act, 2016<sup>60</sup> encourages the use of TDR and ADR in management of community land disputes. Section 39(1) provides that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land. Section 40(1) provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation. Section 41(1) provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.

### *3.1.19 The High Court (Organization and Administration) Act, 2015*

The High Court (Organization and Administration) Act<sup>61</sup> was enacted to give effect to Article 165(1) (a) and (b) of the Constitution; to provide for the organization and administration of the High Court of Kenya and for connected purposes.

Section 3(1) provides that in exercise of its judicial authority, the Court shall –

- a) be guided by the national values and principles set out in Article 10 of the Constitution;
- b) be guided by the principles of judicial authority set out in Article 159 of the Constitution;
- c) be guided by the values and principles of public service set out in Article 232(1)(c), (e) and (f) of the Constitution;
- d) be independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice; and
- e) uphold the Constitution and administer the law without fear, favour or prejudice.

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<sup>59</sup> S.7 (1), The Legal Aid Act, No. 6 of 2016, Laws of Kenya.

<sup>60</sup> Community Land Act, 2016, No. 27 of 2016, Laws of Kenya.

<sup>61</sup> The High Court (Organization and Administration) Act, No. 27 of 2015, Laws of Kenya.

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Section 3(2) provides that the Court shall develop jurisprudence that respects the Constitution and responds to Kenya's social, economic and political needs. With regard to ADR, section 26(1) provides that 'in civil proceedings before the Court, the Court may promote reconciliation amongst the parties thereto and shall encourage and permit the amicable settlement of any dispute.'

Section 26(2) provides that 'the Court shall, in relation to alternative dispute resolution be guided by the Rules developed for that purpose.'

Section 26(3) provides that 'nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.'

Section 26 (4) provides that 'where an alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court shall by order, stay the proceedings until the condition is fulfilled.'

*3.1.20 The Court of Appeal (Organization and Administration) Act, 2015*

The Court of Appeal (Organization and Administration) Act, 2015<sup>62</sup> was enacted to give effect to Article 164 (1) (a) and (b) of the Constitution; to provide for the organization and administration of the Court of Appeal and for connected purposes. Section 3(1) provides that in exercise of its judicial authority, the Court shall –

- a) be guided by the national values and principles set out in Article 10 of the Constitution;
- b) be guided by the principles of judicial authority set out in Article 159 of the Constitution;
- c) be guided by the values and principles of public service set out in Article 232(1)(c), (e) and (f) of the Constitution;
- d) be independent and subject only to the Constitution and the law, which it shall apply impartially without fear, favour or prejudice;
- e) not be subject to any person or authority; and

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<sup>62</sup> The Court of Appeal (Organization and Administration) Act, No. 28 of 2015, Laws of Kenya.

- f) uphold the Constitution and administer the law without fear, favour or prejudice.

Section 3(2) provides that the Court shall develop jurisprudence that respects the Constitution and responds to Kenya's social, economic and political needs. Section 36(1) provides that the Court shall ensure reasonable access to its services in all parts of the Republic.

### **3.2 Policy Framework**

Currently there is no policy on TDRs and other community based justice systems in Kenya. Thus, dispute resolution through TDRs and other community justice systems is communal based. The rules governing the TDRs processes differ from one community to another depending on the customs and traditions of the communities. In this regard, there is a gap owing to the absence of a comprehensive policy to guide dispute resolution through TDRs. The lack of a TDRs policy is an unfortunate situation since TDRs are widely used to resolve both interpersonal and inter-communal conflicts hence restoring peace and harmony amongst communities. The aim of a TDRs policy framework should be to recognize and affirm the importance of TDRs in the administration of justice and establish a clear interface between TDRs and the formal processes. The policy should be targeted at promoting access to justice while preserving customs and traditions of the people of Kenya. The policy framework should be designed in a way that harmonizes traditional systems with the core principles of the Constitution and international law.

#### *3.2.1 Objectives of the policy framework*

1. To harmonize and align TDRMs with the Constitution.
2. To establish a basis for an overarching legislation to align TDRMs with the Constitution.
3. To strengthen TDRMs as alternative justice framework in Kenya.
4. To determine/define the jurisdiction of TDRMs.
5. To recognize, protect and perpetuate positive cultures and traditions of the people of Kenya.
6. To establish/provide for a clear interface between TDRMs and formal justice systems.

The traditional justice systems policy framework should promote and preserve the African values of justice, which are based on reconciliation and restorative



justice. The role of traditional justice systems in access to justice goes beyond dispute resolution. For instance, TDRs promote social cohesion, coexistence, peace and harmony besides the reactive role of dispute resolution.

The essence of the traditional justice system lies in the participation of communities in resolving their disputes. This differs from the formal judicial system where disputes are referred to the courts to be adjudicated by judicial officers who pass arbitrary judgments. The traditional methods of dispute resolution were not litigious in the courts as they are understood in the Western concept of justice. National policy on ADR and TDRs should affirm the traditional institutions or forums sitting as traditional courts at which councils of elders or community leaders exercise their role and functions relating to the administration of justice. The policy should be designed in a way that promotes coordination between courts and traditional dispute resolution institutions.

### *3.2.2 Policy Proposals*

#### **i. Provide Minimum Qualifications of TDRMs Practitioners**

Just like the Constitution provides for qualifications of judges for various courts, there is need to have a policy framework setting out the qualifications or designations of persons to preside over dispute resolution through TDRMs. For instance, the policy may require that the council of elders, traditional leaders or community leaders be knowledgeable and respected in the community, possess high integrity and impartiality.

#### **ii. Accountability of TDRMs Practitioners**

Mechanisms should be put in place to ensure that TDRMs practitioners exercise their role and functions in line with culture and traditions of the community. These safeguards should be designed to prevent deviation from the applicable rules of the community. There should be mechanisms to ensure adherence to due process by the community and observance of the principles of natural justice.

#### **iii. Continuous training of TDRMs Practitioners**

In order to link TDRMs to formal justice systems, there is a need to train TDRMs practitioners on the minimum requirements of formal law such as constitutional requirements as to the Bill of Rights and best practices regarding TDRMs. Such

curriculum should include themes such as human rights, restorative justice and social cohesion. Further, an enactment on TDRMs is necessary to provide for training programmes designed to promote efficient functioning of TDRMs.

#### **iv. Defining the Jurisdiction of TDRMs**

In most Kenyan communities, traditional dispute resolution systems have a wide and undefined jurisdiction comprising of both civil and criminal matters. There is no clear line as to which matters should be subjected to the TDR process and which matters should be taken to court. In defining jurisdiction, matters that emanate from customary law such as disputes involving land, marriage and inheritance, succession and property can be better resolved through TDRs. Similarly, some criminal matters such as petty thefts and trespass can be resolved through TDRs while felony offences like murder, robbery with violence, etc should be subjected to the court process.

#### **v. Defining Sanctions/Remedies to be imposed in TDRs**

The sanctions imposed in TDR processes should not contravene the Bill of Rights. For instance, the sanctions should not be discriminatory or of such a nature as to infringe on fundamental rights of the individuals. For instance, sanctions such as corporal punishment, banishment from the community and cursing are unconstitutional. It is highly recommended that remedies in TDRs be of a restorative nature.

The essence of restorative sanctions is expressed as follows: If a person realizes that he is wrong, or it is apparent to him that his fellow lineage members deem him so, he may impose a fine of a sheep, goat or even a beast on himself to indicate his contrition and to wash away his offence. It is an expression of an admission of guilt and an indication to the court of the sincerity of repentance. The sanctions may be individual sanctions or communal sanctions depending on the nature of the dispute.

#### **vi. Provision for Procedure in TDR processes**

The policy framework should outline minimum procedural requirements in TDR proceedings in order to entrench due process and rules of natural justice. These include requirements as to submitting a dispute, service of processes and whether or not there needs to be representation, the hearing, among others.

### **vii. Provisions for Review and Appeal**

The policy framework should clearly provide for recourse of any party who is aggrieved with a decision delivered in TDR processes. This is in line with the Constitution and due process for a fair hearing and access to justice. These mechanisms include review or appeal. The formal courts should be expressly conferred with jurisdiction to review decisions made in TDR proceedings.

### **viii. A clear Referral System**

There should be a clear interface between TDR processes and formal courts and tribunals. To this end, there is a need to formulate a clear referral system indicating how disputes from TDR proceedings can be referred to court and vice versa. The framework should be clear on the stage of the dispute process at which a referral may or may not be done.

### **ix. Provision for Record Keeping**

It is fundamentally prudent to keep records in a dispute resolution process whether formal or informal. The framework should provide for record keeping in TDR processes for instance through notes taking, videos, filming etc. To achieve this, there is need to embrace information technology in TDR processes. The government should provide resources to equip these processes with record keeping equipment and skills.

### **x. Entrenchment of the Bill of Rights**

The practice of TDRs should adhere to human rights standard. In this regard, the mechanisms used and the proceedings should be conducted in a way that does not violate fundamental rights and freedoms stipulated in the Bill of Rights. This can be achieved through sensitizing TDR practitioners about human rights such as gender equality and non-discrimination, fair hearing, public participation, access to justice, etc.

## **3.3 Administrative /Institutional Framework**

### *3.3.1 Courts and Tribunals*

Article 159 (2) (c) of the Constitutions requires courts and tribunals in the exercise of judicial authority promote the application of TDRs and ADR. In addition, the Civil Procedure Act under sections 1A provides that the overriding objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The judiciary is enjoined to exercise its powers and interpretation of the civil procedure to give

effect to the overriding objective.<sup>63</sup> Within this framework, the court has inherent power to explore dispute resolution options that further the overriding objectives.

### *3.3.2 Independent Commissions*

The Constitution 2010 created Independent Commissions to exercise oversight over other public bodies and mode of service delivery in various sectors. Some of the Commissions are involved in access to justice programmes for example human rights, land matters, public complaints and investigations, etc. Each Commission has an establishing Act which also provides for their constitution, mandate and powers. From the foregoing discussion on the legal framework for TDRs, it will be noted that some of the Acts establishing the Independent Commissions envisage provisions for promoting ADR and other appropriate dispute resolution mechanisms such as TDRs. These include the National Land Commission Act 2012, the National Integration and Cohesion Act 2008, Commission on Administrative Justice Act 2011 and the Kenya National Human Rights Act 2011.

### *3.3.3 Rules Committee of the Judiciary*

The Rules Committee is established under section 81 of the Civil Procedure Act and tasked with enacting rules of practice for efficient dispensation of justice by the civil courts. Section 81(2) enlists matters for which such rules may be enacted. Paragraph (ff) provides for enactment of rules for the selection of mediators and hearing of matters referred to mediation pursuant to court mandated mediation under the Act.

### *3.3.4 County Governments*

Kenya has 47 counties each with a county government formed under Chapter Eleven of the Constitution which Article 176 provides that there shall be a county government for each county consisting of a county assembly and a county executive. Although most government services have been devolved, the justice system is not devolved. However, there are courts of law in most counties in Kenya. Article 174 envisages the objects of devolution which include, inter alia, to foster national unity by recognizing diversity, promoting public participation in decision making and to recognize the rights of communities to manage their own affairs and further development. Notably, county

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<sup>63</sup>Section 1A (2)

governments are proximate to the communities and are best placed to promote dispute resolution by TDRs and ADR.

### *3.3.5 Civil Society Organizations*

Kenya has many civil society organizations which undertake advocacy and community programmes on areas of public interest such as human rights, land and environment. Most civil society organizations conduct peaceful campaigns and encourage communities to resolve dispute through mediation and reconciliation.

The leading civil society organizations in Kenya are religious based organizations such as National Council of Churches of Kenya and the Council of Imams and Preachers of Kenya (CIPK). Others include Maendeleo ya Wanawake, FIDA Kenya, Kenya Human Rights Commission, Muslims for Human Rights, Kituo Cha Sheria, etc.

### *3.8.6 Councils of Elders*

In most Kenyan Communities, the institution of Council of Elders remains a strong regulatory institution. Most disputes are submitted to the elders for resolution before parties consider the court process. The Councils of Elders exercise jurisdiction over both interpersonal disputes relating to land, marriage and inheritance and minor crimes such as assaults as well as inter-community disputes such as conflicts over pastures and water points. These include the *Kaya elders among the Digo community, the Njuri Ncheke of Meru, the Kiama of the Kikuyu community and Ker among the Luo community.*

### *3.3.7 Local Administration*

The local authority plays a fundamental role in the justice system. The local chiefs and headmen resolve minor personal and community based disputes. Chiefs have statutory powers to summon people within their jurisdiction and conduct hearings involving minor conflicts such as family feuds, inheritance/succession and breach of peace. The chief works closely with community leaders and elders to promote peace and harmony in the community.

## **4.0 A Survey of TDRMs from other Jurisdictions**

In traditional African societies, the emergence of conflict was inevitable as long as people interacted in various activities for instance in market places, cultural festivals, livestock grazing/watering, etc. In most communities, conflict

resolution was conducted by council of elders, king's courts, chiefs and other open place assemblies and through use of other intermediaries.<sup>64</sup> The disputes were diverse and would differ from community to community. Thus, there is no uniform definition of a dispute in an African perspective. Some of the disputes in traditional African societies manifested themselves in the form of disagreements, family and market brawls, skirmishes and wars.

Once a conflict emerged, each community had its own approaches towards the resolution of the same. The essence of dispute settlement and conflict resolution in traditional African societies include: to remove the root-causes of the conflict; reconcile the conflicting parties genuinely; to preserve and ensure harmony, make each disputant happy and be at peace with each other again which required getting at the truth; to set the right atmosphere for societal production and development; to promote good governance, law and order, to provide security of lives and property and to achieve collective well-being.<sup>65</sup>

In this section, the paper discusses the traditional dispute resolution in selected countries in Africa and beyond. These countries include Nigeria, South Africa, Rwanda, Botswana, Ghana, Malawi and Australia.

#### **4.1 Nigeria-Yoruba Community**

The Yoruba community derives their traditional justice rules from customs and traditions which have been practised over a long period of time.<sup>66</sup> The Yoruba traditions, like in most African communities were unwritten.<sup>67</sup> Memory and

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<sup>64</sup> See generally, Murithi, T., "African approaches to building peace and social solidarity," *African Journal on Conflict Resolution*, Vol. 6, No. 2, 2006, pp.9-33; See also Aredo, D. and Yigremew, A., "Indigenous institutions and good governance in Ethiopia: Case studies," *Good Governance and Civil Society Participation in Africa* (2008), p.141.

<sup>65</sup> See generally, Golwa, JHP, "Overview of Traditional Methods of Dispute Resolution (TMDR) In Nigeria," *Perspectives on Traditional African & Chines Methods of Conflict Resolution* (2013), pp. 14-43.

<sup>66</sup> Idowu, W., "Law, morality and the African cultural heritage: the jurisprudential significance of the Ogboni institution," *Nordic Journal of African Studies*, Vol.14, No. 2, 2005, pp.175-192; see also Ademowo, A.J. and Adekunle, A., "Law in Traditional Yoruba Philosophy: A Critical Appraisal," *Caribbean Journal of Philosophy*, Vol. 2, No. 1, 2013, pp.345-354.

<sup>67</sup> Asiwaju, A. I., "Political Motivation and Oral Historical Traditions in Africa: The Case of Yoruba Crowns, 1900-1960," *Africa: Journal of the International African Institute*, Vol. 46,

verbal art were paramount since the veracity of a tradition largely depended on the memory and knowledge of the forbearers who were regarded as wise men and women.<sup>68</sup> To maintain the traditions and safeguard them against distortion, the Yoruba people would arrange performances in which the traditions were dramatised and any inconsistency would be pointed out and rectified.<sup>69</sup> Whenever a dispute arose, the disputant would submit it to a council of elders who would sit under a tree and ventilate the dispute and explore the most appropriate option to address the matter.<sup>70</sup> The talks were conducted with absolute decorum and solemnity. The principle of truth reigned in the dispute resolution process especially because the elders invoked the spirits of their ancestors and would warn parties of the aftermath of failure to tell the truth.<sup>71</sup> Oaths were administered at the commencement of the conflict resolution talks to subject the parties to the jurisdiction of the elders and commit them to tell the truth.<sup>72</sup>

Among the Yoruba, conflict resolution process had a hierarchy. Dispute resolution would be done at the family level (*Idile*-nuclear family), extended family level (*Ebi*) and village or town level. These levels comprised the political organisation of the Yoruba.<sup>73</sup> Disputes resolved at the family level were mainly family disputes such as conflicts between co-wives and sibling disagreements. These disputes would be easily resolved by scolding and warning the guilty party and appeasing the victim.<sup>74</sup>

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No. 2, 1976, pp. 113-127; See also Law, R., "How Truly Traditional Is Our Traditional History? The Case of Samuel Johnson and the Recording of Yoruba Oral Tradition," *History in Africa*, Vol.11, 1984, pp.195-221.

<sup>68</sup> See generally, Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *op cit*.

<sup>69</sup> See Biobaku, S.O., "The problem of traditional history with special reference to Yoruba traditions," *Journal of the Historical Society of Nigeria* Vol.1, No. 1, 1956, pp.43-47 at p.44.

<sup>70</sup> See generally, Bamikole, L., "An Indigenous Yoruba Socio-political Model of Conflict Resolution," *Philosophy Study* 3, No. 2, 2013, p.144.

<sup>71</sup> *Ibid*, p.147.

<sup>72</sup> See generally, Golwa, JHP, "Overview of Traditional Methods of Dispute Resolution (TMDR) In Nigeria," *op cit*.

<sup>73</sup> *Ibid*, p.148; See also Ojigbo, A.O., "Conflict Resolution in the Traditional Yoruba Political System (La résolution des conflits dans le système politique traditionnel des Yoruba)," *Cahiers d'études africaines* (1973), pp. 275-292.

<sup>74</sup> Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society," *African research review*, Vol.8, No.2, 2014, pp.138-157, at pp.143-144.

During the hearings, women were supposed to be on their knees unless the Chief or King asked them to stand or sit. In criminal cases, the Chief-in -Council had jurisdiction to hear criminal cases and even pass a death sentence.<sup>75</sup>

In terms of remedies available to the innocent party, the Yoruba mediators rarely awarded damages in civil matters. To them, restoration of peace and harmony was of paramount importance than awarding damages.<sup>76</sup> This notwithstanding, the mediators would award damages in some cases as a way of deterring the re-occurrence of a particular anti-social behaviour.<sup>77</sup>

#### **4.2 South Africa**

In South Africa, there are traditional courts which operate parallel to the formal courts system.<sup>78</sup> The traditional courts have jurisdiction on matters emanating from the customary laws of the various communities.<sup>79</sup> In addition, some communities have their own internal dispute resolution structures. For instance, in the Pondo community, there were institutions of *Mat association* which presided over the distribution of foods at social gatherings.<sup>80</sup> Disputes would be heard at a higher level involving at least two *Mat associations*. The Mats applied mediation and reconciliation in dispute settlement. The court of headmen had powers to compel parties to comply with orders made for resolution of the dispute. Appeals from the lower courts (Mat associations) would go to the higher court, the chief's court.<sup>81</sup> The proceedings before the chief's court were formal and examined the decisions of the headman in light of the proven testimony and the sanctions imposed.<sup>82</sup>

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<sup>75</sup> Ibid, p.144.

<sup>76</sup> Ibid, p.148; See also generally, Oko E.O., et al, "Restoring justice (ubuntu): an African perspective," *International Criminal Justice Review*, Vol.20, No. 1, 2010, pp.73-85.

<sup>77</sup> Ibid, pp.144-145; See also generally, Gbenda, J.S., "Age-long land conflicts in Nigeria: a case for traditional peacemaking mechanisms," *Ubuntu: Journal of Conflict Transformation* Vol.1, No. 1\_2 (2012), pp. 156-176.

<sup>78</sup> Chirayath, L., et al, M., "Customary law and policy reform: Engaging with the plurality of justice systems," *Background paper for the WDR*, 2006, at pp.20-25. Available at

<http://documents.worldbank.org/curated/en/675681468178176738/pdf/336550Customary1Law01WDR060bkgd0paper1.pdf> [Accessed on 22/04/2017].

<sup>79</sup> Ibid, pp.20-25.

<sup>80</sup> Ajayi, A.T. and Buhari, L.O., "Methods of conflict resolution in African traditional society, op cit, at p.148.

<sup>81</sup> Ibid, p.149.

<sup>82</sup> Ibid, p.149.



### **4.3 Botswana**

Botswana is a country well known for preservation of its cultural heritage.<sup>83</sup> In Botswana, there is a well-organized system of traditional courts. The Botswanan justice system is dualistic comprising of formal courts and customary courts.<sup>84</sup> The customary courts are established by the Minister pursuant to the Customary Courts Act of 1974. The customary court structure comprises of the Customary Court Commissioner, Customary Court of Appeal and the Customary Courts.<sup>85</sup>

The dispute resolution process commences at the family level where the father as the head of the family presides over disputes between family members.<sup>86</sup> The next level is the family group level which comprises of a number of families which are closely related. After the family group level, there is the ward level which comprises of many family groups. The wards are headed by a headman in some tribes as well as headman and sub-chiefs in other tribes.<sup>87</sup>

The customary courts are headed by presidents appointed by a Minister.<sup>88</sup> Customary courts handle minor disputes mostly involving land matters,

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<sup>83</sup> See generally, Mnjama, N., "Preservation and Management of Audiovisual Archives in Botswana," *African Journal of Library, Archives & Information Science* Vol.20, No. 2 (2010); See also Denbow, J.R. and Thebe, P.C., *Culture and customs of Botswana* (Greenwood Publishing Group, 2006).

<sup>84</sup> Sharma, K.C., "Role of Traditional Structures in Local Governance for Local Development: The Case of Botswana," (Washington DC: World Bank, 2005); See also Sklar, R.L., *The significance of mixed government in Southern African Studies: A preliminary assessment*, (University of the Witwatersrand, 1994); See also generally, Sanders, A.J.G.M., "The Internal Conflict of Laws in Botswana," *Botswana Notes and Records*, Vol.17, 1985, pp.77-88.

<sup>85</sup> Fombad, C.M., "Customary courts and traditional justice in Botswana: present challenges and future perspectives," *Stellenbosch Law Review= Stellenbosch Regstydskrif*, Vol.15, No. 1, 2004, p-166.

<sup>86</sup> See generally, Moumakwa, P.C., *The Botswana Kgotla system: a mechanism for traditional conflict resolution in modern Botswana: case study of the Kanye Kgotla* (Master's thesis, Universities i Tromsø, 2011); See also Adamolekun, L. and Morgan, P., "Pragmatic institutional design in Botswana--Salient features and an assessment," *International Journal of Public Sector Management*, Vol. 12, No. 7, 1999, pp.584-603.

<sup>87</sup> See generally, Nyati-Ramahobo, L., *Minority tribes in Botswana: The politics of recognition*, (London, Minority Rights Group International, 2008); See also Proctor, J.H., "The House of Chiefs and the political development of Botswana," *The Journal of Modern African Studies*, Vol.6, No. 01, 1968, pp.59-79.

<sup>88</sup> S.41 (3), Customary Courts Act of 1974, Laws of Botswana.

marriage and property disputes.<sup>89</sup> Notably, there is no legal representation in customary courts and the rules of evidence are relaxed. Judges are tribal, appointed by a community or tribal leader.<sup>90</sup> The sentences passed by judges may be appealed in a formal court system. The jurisdiction of customary courts is stipulated under the Customary Courts Act in respect of the causes of action as well as the geographical limits. The Act also prescribes the constitution of the court, the order of precedence among its members and the powers and duties of any persons who may be appointed to act as assessors.

#### **4.4 Ghana**

The institution of chieftaincy is guaranteed by Article 270 of the Constitution of the Republic of Ghana, 1992.<sup>91</sup> The Chieftaincy Act of 1970 (Act 370) regulates chieftaincy in Ghana and sets up the traditional councils, as well as regional and national Houses of Chiefs.<sup>92</sup> The National House of Chiefs, the Regional Houses of Chiefs, and the traditional councils each have judicial committees with the authority to decide and resolve disputes affecting chieftaincy.<sup>93</sup> Despite the recognition of chieftaincy, traditional courts ceased to exist after independence.<sup>94</sup> The institution of chieftaincy does not have any legislative, administrative or judicial functions.<sup>95</sup> Nevertheless, chiefs still exert considerable authority, respect and influence at the local level, and fulfill quasi-judicial roles. Chiefs and their traditional councils have extended their jurisdiction beyond strictly chieftaincy-related matters to family and property

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<sup>89</sup> Ss 11, 12 & 13, Customary Courts Act of 1974, Laws of Botswana.

<sup>90</sup> U.S. Department of State, *Botswana Human Rights Practices*, 1995, Available at [http://dosfan.lib.uic.edu/ERC/democracy/1995\\_hrp\\_report/95hrp\\_report\\_africa/Botswana.html](http://dosfan.lib.uic.edu/ERC/democracy/1995_hrp_report/95hrp_report_africa/Botswana.html) [Accessed on 23/2017].

<sup>91</sup> See Constitution of the Republic of Ghana, Chapter Twenty-Two: Chieftaincy <http://www.ghanaweb.com/GhanaHomePage/republic/constitution.php?id=Gconst22.html> [Accessed on 21/04/2017].

<sup>92</sup> Ghana Legal, <http://laws.ghanalegal.com/acts/id/81/chieftaincy-act> [Accessed on 21/04/2017].

<sup>93</sup> S.1., *Chieftaincy Act of 1970 (Act 370)*, Laws of Ghana.

<sup>94</sup> See generally, Rathbone, R., "Native courts, local courts, chieftaincy and the CPP in Ghana in the 1950s," *Journal of African Cultural Studies* Vol.13, No. 1, 2000, pp. 125-139; See also Kumado, C. E. K., "Chieftaincy and the law in modern Ghana," *U. Ghana LJ* Vol.18,1990, p.194.

<sup>95</sup> See generally, Dzivenu, S., "The politics of inclusion and exclusion of traditional authorities in Africa: Chiefs and justice administration in Botswana and Ghana," *Political Perspectives*, Vol.2, No. 1, 2008, pp.1-30; See also Kumado, C. E. K., "Chieftaincy and the law in modern Ghana," *U. Ghana LJ* Vol.18, 1990, p.194.

matters, including divorce, child custody and land disputes.<sup>96</sup> The essentials of the traditional justice system are well articulated in the case law in Ghana, and customary law is also enforced in the district and other courts, depending on the nature of the dispute.<sup>97</sup>

Moreover, the use of TDR in conflict resolution was successfully applied in Ghana to resolve a long-standing conflict between the Alavanyo and Nkonya communities who occupy the Volta region of Ghana. These communities lived as neighbours in the 19<sup>th</sup> century but there was a perpetual conflict over the decades. In 2006, a peace initiative was commenced involving a mediation committee, consultative committee and community pacesetters from the two communities.<sup>98</sup>

#### **4.5 Australia**

Australia is the home of the famous indigenous Aboriginal community. In South Australia, the Aboriginal Courts were established as pilots in 1999 and conferred with jurisdiction over matters involving the Aboriginal community.<sup>99</sup> However, the Aboriginal people felt that as litigants they had limited input into the trial process and in sentencing.<sup>100</sup> In their view, the courts were culturally alienating, isolative, and unwelcoming to them and their families.<sup>101</sup> To address these concerns, reforms were introduced to address the fears raised by the

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<sup>96</sup> See generally, Ray, D.I., "Chiefs in their millennium sandals: traditional authority in Ghana—relevance, challenges and prospects," *Critical Perspectives in Political and Socioeconomic Development in Ghana. African Social Studies Series*, Vol. 6, 2003, pp. 241-271.

<sup>97</sup> See generally, Woodman, G., "Customary law, state courts, and the notion of institutionalization of norms in Ghana and Nigeria," *People's Law and the State* (1985), pp. 143-163; See also Sutton, I., "Law, Chieftaincy and Conflict in Colonial Ghana: The Ada Case." *African Affairs*, Vol.83, No. 330, 1984, pp. 41-62.

<sup>98</sup> Perpertia, F.M. and Imoro, R.J., "Assessing the Effectiveness of the Alternative Dispute Resolution Mechanism in the Alavanyo-Nkonya Conflict in the Volta region of Ghana" *Institute of Development Studies; Department of Sociology University of Cape Coast, Ghana*, 2011.

<sup>99</sup> See generally, Harris, M., "From Australian courts to aboriginal courts in Australia—bridging the gap," *Current Issues Crim. Just.* Vol.16, 2004, p.26; Freiberg, A., "Problem-oriented courts: Innovative solutions to intractable problems?" *Journal of judicial administration*, Vol.11, No. 1, 2001, pp.8-27.

<sup>100</sup> See generally, Burgess, S., "Aboriginals in the courtroom: recognising cultural differences," *Bulletin (Law Society of South Australia)* Vol. 32, No. 11, 2010, p.12; See also Marchetti, E. and Kathleen, D., "Indigenous sentencing courts: towards a theoretical and jurisprudential model," *Sydney Law Review, The*, Vol.29, No. 3, 2007, p. 415.

<sup>101</sup> *Ibid.*

Aboriginal community. These reforms include the magistrates sitting at the same level and in close proximity to each other to facilitate direct communication and inclusion of a member of the Aboriginal community to sit with magistrates to advise the court on issues involving the Aboriginal customs and traditions.<sup>102</sup>

#### **4.6 Rwanda**

There are other cultures around Africa where TDR based systems have worked relatively well. The establishment of the Gacaca courts was meant to transform Rwanda from the colonial ideology of power dominance and redefine relations between the state and the society.<sup>103</sup> They would also re-unite the Rwandan people by eradicating the disunity ideology and encouraging reconciliation.<sup>104</sup> Through the framework of the Gacaca courts, home-grown traditions derived from Rwandan society replaced the divisive foreign ideologies.<sup>105</sup> The Gacaca are meant to build a democratic culture and provide a policy of creating a true post-colonial state and restoring unity.<sup>106</sup>

The choice and installation of the Gacaca courts fit perfectly into this vision. They are a home-grown, almost pre-colonial resource. The courts are meant to fight genocide and eradicate the culture of impunity and have a mandate of reconciling Rwandans by re-enforcing unity.<sup>107</sup>

#### **4.7 Malawi**

The Malawian justice system has undergone remarkable reforms over the last decade and now has justice forums described as customary justice forums.<sup>108</sup>

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<sup>102</sup> Ibid.

<sup>103</sup> See generally, Meyerstein, A., "Between law and culture: Rwanda's Gacaca and postcolonial legality," *Law & social inquiry*, Vol.32, No. 2, 2007, pp.467-508.

<sup>104</sup> Raper, J., "The Gacaca Experiment: Rwanda's Restorative Dispute Resolution Response to the 1994 Genocide," *Pepperdine Dispute Resolution Law Journal*, Vol.5, No., 2012, p.1.

<sup>105</sup> Ibid, pp.5-7; Rettig, M., "Gacaca: truth, justice, and reconciliation in post conflict Rwanda?" *African Studies Review*, Vol.51, No. 03, 2008, pp.25-50.

<sup>106</sup>Ibid.

<sup>107</sup>International Institute for Democracy and Electoral Assistance, "the Gacaca Courts in Rwanda", 2008, extracted from *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences*, 32.

<sup>108</sup>See generally, Schärf, W., et al., "Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums." (2011). Available at

The forums operate under approximately 217 court centers presided over by magistrates.<sup>109</sup> They are estimated to handle about 90% of disputes in Malawi. They have jurisdiction over matters whose subject matter involves land, marriage, inheritance and property.<sup>110</sup>

## 5.0 Summary of Recommendations

### 5.1 General Recommendations

1. It is critical to identify the aspects of Traditional Dispute Resolution Mechanisms that contravene morality and are repugnant to the constitution and the law with a view to modifying them or have them eliminated.
2. There is a need to raise awareness on customary and religious laws and how they impact on women's rights. In particular, any customary practices that encourage or promote gender discrimination ought to be abandoned.
3. In order to eliminate the perception of bias and discrimination, Traditional Dispute Resolution Mechanisms ought to be restructured to ensure inclusiveness by involving women, youth and people with disabilities through policies and legislation.
4. More effort is needed in creating awareness to the public and the formal justice system on the existence, role and effectiveness of Traditional Dispute Resolution Mechanisms. This can be achieved through having clear provisions in law that promote the use of Traditional Dispute Resolution Mechanisms.
5. There is a need to train everyone involved in Traditional Dispute Resolution Mechanisms and especially the decision-makers in TDRMs on the constitutional provisions and the need to ensure that their

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<http://www.eldis.org/vfile/upload/1/document/1110/Access%20to%20justice%20for%20the%20poor%20of%20Malawi.pdf> [Accessed on 22/04/2017].

<sup>109</sup> See generally, Forsyth, M., "A typology of relationships between state and non-state justice systems," *The Journal of Legal Pluralism and Unofficial Law*, Vol. 39, No. 56, 2007, pp.67-112.

<sup>110</sup> See DeGabriele, J., and Jeff, H., "Justice for the people: strengthening primary justice in Malawi," *African Human Rights Law Journal*, Vol. 5, No. 1, 2005, pp.148-170.

decisions and the procedures they use to arrive at their decisions is in conformity with the constitution. Such training should especially ensure that the decision-makers are aware of the Bill of Rights.

6. Introduction of technology in TDRs practice would greatly help in documentation and record keeping in TDR processes.

## **5.2 Legal and Policy Framework Recommendations**

### *5.2.1 Policy Framework Recommendations*

1. There is need to formulate an enabling Policy framework for ADR and TDRs. The framework to be enacted ought to address the following issues:
  - i) Define and clarify the jurisdiction of TDRs and ADR. The matters that can be dealt with through TDRs and those which ought to be subjected to the formal court process need to be clearly prescribed;
  - ii) Provide a framework for development of programmes, plans and actions for creation of awareness and the establishment of institutional mechanisms for promotion of TDR practice in all the applicable sectors of society;
  - iii) The operationalization of Article 159 (2)(c) and (3)(a)-(c) of the Constitution and the development of a comprehensive regulatory and institutional framework to govern TDRMs;
  - iv) Regulation and training of the various players involved in TDRMs;
  - v) Restructuring of the TDRMs to ensure inclusiveness in the composition of TDRs;
  - vi) Documentation of TDR proceedings;
  - vii) Maintain informality in the TDR proceedings;

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- viii) Identification of the most suitable system to be employed with respect to TDRMs in the formal legal systems;
  - ix) Mapping of TDR and stakeholders Remuneration of TDRMs practitioners;
  - x) Enforcement of outcomes of TDR processes;
  - xi) Development of a multi-sectoral policy implementation forum comprising of key stakeholders drawn from the justice sector;
  - xii) Ethical framework for TDRM and ADR practitioners;
  - xiii) Setting ethical standards for TDR practice; and
  - xiv) Protection of TDRMs and ADR consumers from unconstitutional or unlawful outcomes.
2. In formulating the policy framework for TDRMs the following guidelines should be taken into account:
- i. TDRMs need to meet the constitutional threshold set out under Article 159 of the constitution;
  - ii. The composition of TDRs needs to be all inclusive;
  - iii. The outcomes of TDRMs and their enforcement need to be streamlined with constitutional requirements;
  - iv. TDRMs need to be kept as informal as possible;
  - v. Introduction of record-keeping and clear references for purposes of accountability and pursuit of justice through TDRs appeal mechanisms and the formal justice system;

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- vi. Remuneration of TDRMs practitioners and the necessary resources to run TDRs;
  - vii. Creation of awareness about TDRMs and their effectiveness in resolving disputes; and
  - viii. Uniformity of TDRs procedures throughout the country to ensure that the process of arriving at outcomes is fair.
3. A continuous monitoring and evaluation programme should be undertaken to appraise the implementation of the policy framework on TDRMs.

*5.2.2 Legal Framework Recommendations*

1. In order to foster an effective working relationship between the formal justice system and TDRMs, there is need to introduce court-annexed TDRMs and ADR. This would tackle the problem of backlog of cases, enhance access to justice, encourage expeditious disposal of disputes and lower costs of accessing justice;
2. In order to ensure a smooth interaction between TDRMs and the formal justice systems, laws providing for strict and convoluted procedures need to be reviewed with a view to simplifying the rules and procedures. In particular, the following laws need to be reviewed and amended in order to accommodate TDRMs in their application:
  - i. The Civil Procedure Act and Rules, Cap 21- Order 46 Rule 20 needs to be reviewed to put it into conformity with Article 159 of the Constitution which provides for the use of traditional dispute resolution mechanisms in appropriate cases;
  - ii. The Evidence Act, Cap 80 should be reviewed so as to simplify the evidential rules to cover situations where informal systems of dispute resolution are being used. Simplified procedures should be introduced to ensure that courts and tribunals focus on substantive



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rather than procedural justice as contemplated under Article 159(2) (d);

- iii. The Judicature Act, 1967 should be reviewed in view of the recognition that culture and traditional dispute resolution mechanisms are now recognized under the Constitution (Articles 11 and 44).
- iv. Parliament should amend the Limitation of Actions Act, Cap 22 such that matters that are the subject of traditional dispute resolution proceedings can still be taken to court if no agreement is reached at the conclusion of the TDR process.
- v. Kadhis' Courts Act, Cap 11 should be reviewed to make provision for the appointment of women Kadhis.
- vi. The Appellate Jurisdiction Act should be amended to provide for application of TDRs in the appellate process where the matter in dispute involves customary law.
- vii. Land Act, 2012, should be reviewed to ensure clear and substantive provisions that ensure: elimination of gender discrimination in law, customs and practices related to land and property in land especially in conflict management; encouragement of communities to settle land disputes through recognized local community initiatives; participation, accountability and democratic decision making within communities, the public and the Government; affording equal opportunities to members of all ethnic groups; non-discrimination and protection of the marginalized; democracy, inclusiveness and participation of the people; and the active utilisation of alternative dispute resolution mechanisms, especially TDRMs, in land dispute handling and management.
- viii. Marriage Act, 2014, should be reviewed to ensure that mediation of disputes in customary marriages and the customary dispute

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resolution mechanisms provided for in the Act conform to the principles of the Constitution.

- ix. Matrimonial Property Act, should be reviewed to ensure that Section 11 of the Act which stipulates that during the division of matrimonial property between and among spouses, the customary law of the communities in question shall, subject to the values and principles of the Constitution, be taken into account including (a) the customary law relating to divorce or dissolution of marriage; (b) the principle of protection of rights of future generations to community and ancestral land as provided for under Article 63 of the Constitution; and (c) the principles relating to access and utilization of ancestral land and the cultural home by a wife/wives is expanded to provide guidelines/rules that ensure that the same is smoothly implemented.
  - x. Section 17 of the National Land Commission Act should be amended with a view to incorporating a requirement on the part of the Commission to consult or seek assistance from community leaders on matters pertaining to land. Section 18 which provides for the establishment of County Land Management Boards needs to be amended in terms of the composition of the Boards so as to include community leaders.
  - xi. Rule 54 of the Supreme Court Rules 2012 which provides for the attendance of Amicus curiae, experts or advocates assisting the court in determining technical matters should be accorded a wide interpretation and application to provide an opportunity for community leaders to assist the court in matters pertaining to customary law.
3. There is need to formulate an enabling legal framework for ADR and TDRMs.

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4. It is proposed to have a law to be known as ADR and TDR Mechanisms Act enacted to provide for the operationalization of Article 159 (2)(c) and (3)(a)-(c) of the constitution and to provide for the regulatory and institutional framework to govern the practice of ADR and TDRMs. The formulation of the said legislation should be informed by the following guidelines:
  - a. The need to ensure that TDRMs meet the Constitutional threshold under Article 159(3) of the Constitution and the Bill of Rights;
  - b. The need to establish an efficient referral system for matters from courts of law to TDRs and vice versa depending on the nature of the dispute and steps taken by the disputants;
  - c. Provide for a clear review and appeal system in TDR and ADR;
  - d. Legal mechanisms for the formal recognition and enforcement of decisions made in TDR and ADR processes ought to be set up to make TDRMs more efficient;
  - e. The legislation should maintain informality of TDRMs;
  - f. Defining the jurisdiction of TDRMs;
  - g. Establishment of an efficient institutional framework for implementation and enforcement framework of TDRM Policies ;
  - h. Provide for enforcement mechanisms of TDRMs outcomes;
  - i. Abolish unconstitutional and/or unlawful TDRs and their outcomes; and
  - j. Establish collaboration between the National Government and the Devolved Governments to ensure that TDRMs are promoted and accessible to every person.
  - k. Collaboration between the National Government and the devolved units of governance to ensure that TDRMs are promoted in the counties and that every person has access to the mechanisms.
5. Kenya needs to adopt tested best practices in comparable jurisdictions with regard to TDRMs.

## **6.0 Conclusion**

The Constitution of Kenya 2010 specifies the fundamental rights and freedoms to which every Kenyan is entitled. It empowers courts to enforce human rights and interpret the law in a way that gives effect to a right of a fundamental freedom. To ensure full enjoyment of rights, the Constitution guarantees the right of access to justice under Article 48. Further, the Constitution widens the doors of access to justice by promoting the access through formal and informal processes. To this end, Article 159 (2) (c) and (3) brings on board other justice mechanisms such as ADR and TDR to ensure wide access to justice. For TDRs to be applicable, they must not be inconsistent with the Constitution, justice or morality or any other written law.

Although the Constitution guarantees the right of access to justice and goes further to recognize ADR and TDRs, there is no elaborate legal or policy framework for their effective application. This is the situation, despite the fact that a great percentage of disputes in Kenya are resolved through mediation, conciliation, negotiation and traditional processes. Currently, the legal framework does not provide for linkage of TDRs with the formal court process. In most instances, courts have undermined the awards reached through TDRs terming them as informal and not founded on any law. This has further frustrated the utilization of TDRs in Kenya.

From the findings of the research and study conducted, there is a need for enactment of a sound legal and policy framework for effective utilization of TDRMs and ADR to ensure full access to justice for Kenyans. The study revealed that TDRMs are widely used by communities to resolve a myriad of disputes and therefore cannot be wished away. Therefore, it is imperative that the TDRs be anchored in the legal and policy framework. The framework should harness the recommendations made in this paper for effective incorporation of TDRs and other community based process into the justice system. Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice Systems is an idea that calls for attention, and effective implementation.

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## **Reflections on the use of ADR to address Inter-governmental Disputes in Kenya**

*By: Kenneth Mutuma Wyne<sup>1</sup>, James Muruthi Kihara<sup>2</sup> & Ruth Onyancha Makanga<sup>3</sup>*

### **1.0 Introduction**

The Constitution of Kenya 2010 ushered in the era of devolution, transforming Kenya's previously centralised governance system to one based upon a devolved system of political, fiscal and administrative governance.<sup>4</sup> The intent is to create a cooperative system which combines autonomy and interdependence between the national and county governments in a manner in which the structures of devolved government function in a collaborative manner.<sup>5</sup> For this system of governance to be effective, there needs to be respect for the principles of devolution (such as the need for equality, harmony and collaboration in the development of policy, law and programs) which replace principles – such as subsidiarity - that were part of the old constitutional order.<sup>6</sup> There is also a need to respect the powers and functions of each level of government. Subsidiarity as a principle of devolution should be safeguarded

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<sup>1</sup>Ph.D (UCT), LL.M (UCT) LL.B (Liverpool), B Arch Studies (Nairobi), MCIArb, Certified Mediator (MTI), Lecturer (University of Nairobi), Advocate of the High Court of Kenya, Certified Public Secretary (Institute of Certified Public Secretaries, Kenya). Dr. Mutuma is a consultant with the State Corporations Advisory Committee

<sup>2</sup> LL.M (Corporate Governance), LL.B, B.Com, CPSK, FCIArb, Chartered Arbitrator, Accredited Mediator and Certified PPP Specialist. Mr. Kihara is the immediate former Chairman of the Chartered Institute of Arbitrators, Kenya Branch and also the Chairperson of the Public Private Partnerships Petition Committee. He was a member of the Intergovernmental Relations Dispute Resolution Steering Committee

<sup>3</sup>LL.B, Advocate of the High Court of Kenya and a consultant with the Ministry of Devolution.

<sup>4</sup>Cyprian Orina –Nyamwamu, From A Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics, Paper Presented at the FES Conference on State of Implementation of the Constitution since 2010, p4

<sup>5</sup> The Constitution of Kenya, 2010, Article 6(2); Article 189

<sup>6</sup>Ibid



zealously. This principal dictates that functions should be handled by a level of government closest to the issue, thus devolution. Failure to respect subsidiarity would lead to re-centralization and is a threat to devolution, also a cause of many disputes. Under the current constitution, powers and functions are supposed to be transferred based on developed capacity and this, sadly has been the reason for the reluctance to transfer some specific functions from the national government.

In the short time of its existence, devolution has improved access to recurrent and development funds, and increased local participation in the use of public funds. Notwithstanding these gains, disputes among the different tiers of government threaten the promise of devolution.<sup>7</sup> Evidence after four years of its existence has shown that the relations between different levels of government have not been cooperative. According to Micah Powon, Principal Secretary, Ministry of Devolution there has been an increase of disputes between the counties and the national government and county governments have spent up to Kshs.200 million to resolve these rows in courts.<sup>8</sup> These disputes have included matters touching on the division of revenue oversight<sup>9</sup> and relational conflicts between the Senate, National Assembly, County Executive and County Assemblies.<sup>10</sup> While conflict is inherent in a devolved system of government, it should be managed through respect for the objects and principles undergirding devolution provided in Articles 174 and 175 of the Constitution. These principles point to the need for the development of a robust dispute resolution mechanism system that can be employed effectively in the different types of governmental disputes.

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<sup>7</sup>Miguna Miguna, "Use Alternative Dispute Resolution Mechanisms to Implement Devolution", Star Newspaper (Nairobi March 22, 2014 )

<sup>8</sup> The Star Newspaper, 26<sup>th</sup> April 2017, "*Disputes between state and counties on the rise – PS.*"

<sup>9</sup>Speaker of the Senate & Another v Attorney – General & 4 Others [2013]eKLR.

<sup>10</sup>International Legal Consultancy Group v Senate and Clerk of the Senate [2014]eKLR.

## **2.0 The Legal Framework**

In light of the benefits offered by ADR, Kenya's efforts to develop ADR mechanisms are commendable. The concept is expressly anchored in the Constitution. Article 189(4) and 159(2) (c) encourage resort to ADR. In particular, Article 189 creates the obligation to make efforts to resolve disputes by ADR –even though it does not completely lock out litigation. Furthermore, as noted earlier, the Intergovernmental Relations Act (IGRA), 2012 provides a general framework for inter-governmental relations. In particular Sections 32, 33, 35 and 36 of the Act deals with the manner in which intergovernmental disputes are to be handled. Section 33 of the Act provides that 'before formally declaring the existence of a dispute, parties to a dispute shall, in good faith, make every reasonable effort to take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary.' It is only if this fails that a party to a dispute may formally declare a dispute by referring the matter to the Summit, the Council of Governors or any other intergovernmental structure established under the Act. In addition to this several statutes also provide for the utilisation of ADR mechanisms. These include the County Governments Act (CGA) 2012<sup>11</sup>, Arbitration Act,<sup>12</sup> the Civil Procedure Act<sup>13</sup> and the Civil Procedure Rules 2010<sup>14</sup> amongst others.

Despite this legal framework, the use of ADR to address inter-governmental disputes still faces the foremost challenge of a lack of specific enabling policies/legislation and institutional framework. The absence of a legal and institutional framework for ADR has resulted in over reliance on the courts. It is undesirable to continue using courts as the first forum for the intergovernmental disputes due to the aforementioned shortcomings of the courts. It is therefore necessary to reflect upon how the country can develop an effective legal and policy anchored in ADR mechanism that provide effective solutions to intra and inter-governmental conflicts. The starting point to such

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<sup>11</sup>County Governments Act No. 2 of 2012.

<sup>12</sup> Arbitration Act No.4 of 1995.

<sup>13</sup>Cap 21 Laws of Kenya.

<sup>14</sup>Legal notice 151 of 2010.

reflections is understanding the unique context in which inter-governmental disputes arise.

Experience from the past four years provides useful guidance that can inform the development of an appropriate dispute resolution framework. In particular this experience provides answers to two questions necessary for the development of such a framework. First, who are the disputants when it came to intergovernmental disputes? Second, what is the nature of the disputes that arise? In response to the first question, disputants include national and county governments, county to county governments, public entities among the county and national governments and interest groups that litigate on core functions of county governments.<sup>15</sup> Here it is important to note that disputes are not only limited to issues arising from the counties. Even at national government level, among the various ministries, disputes have arisen among state corporations and government agencies and committees.<sup>16</sup> The ADR mechanisms to be developed should have in mind these wide variety of disputants.

In terms of the second question, evidence suggests that the nature of the disputes has revolved around the following subject matter: intergovernmental fiscal relations,<sup>17</sup> sharing of government inventories,<sup>18</sup> boundary determination and access to environment/natural resources.<sup>19</sup> A few examples illustrate the cases that have come before the courts. Some cases have involved instances where the county and national government conflict over transfer of functions often causing an unhealthy competition for resources.<sup>20</sup> Other cases have been between the Senate and the National Assembly where disagreements have arisen over the functions to be exercised by national government /agencies and

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<sup>15</sup>Intergovernmental Relations Act, 2012, Section 30 (1), Section 8 (2)

<sup>16</sup>South African Intergovernmental Relations Framework Works Act, 2005, Section 2

<sup>17</sup>Council of County Governors v Attorney General & 4 Others [2015] eKLR para 97

<sup>18</sup>Republic v Transition Authority & Another Ex Parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 Others [2013] eKLR

<sup>19</sup>County Government of Isiolo & 10 Others v Cabinet Secretary, Ministry of Interior & Coordination of National Government & 3 Others [2017] eKLR para 20-22

<sup>20</sup>Ibid (n29)

county governments.<sup>21</sup> Once again, such disagreements have muddied the clarity required in relation to the scope of concurrent functions to be exercised by the national and county governments.<sup>22</sup> Finally, there exists few examples relating to boundary disputes between county governments.<sup>23</sup>

### **3.0 Saving Costs through ADR**

Both the Constitution and the IGRA contemplate that disputes between the two levels of government will be settled amicably and only in exceptional circumstances would such disputes be subject of judicial interventions. Sadly, despite the current legal framework intergovernmental relations, it has been noted that a preference exists for resolving intra and intergovernmental disputes through litigation. When the High Court, Constitutional & Human Rights Division, was faced with a dispute between the Council of Governors and the Ministry of Health,<sup>24</sup> the court dismissed the Petition as the parties had not exhausted the mechanisms of dispute resolution available under the IGRA. The Judge stated that she had not seen anything in the pleadings of the parties, which demonstrated that an attempt was made to resolve the dispute, if there was a dispute, in accordance with the provisions of the Inter-Governmental Relations Act. The court relied on an earlier decision in the Peter Ochara Anam case<sup>25</sup> where it was held that it was not right for a litigant to ignore with abandon a dispute resolution mechanism provided for in a statute and which would easily address his concerns and rush to the court under the guise of a constitutional petition for alleged breach of constitutional rights under the bill of rights.

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<sup>21</sup>Ibid (n5)

<sup>22</sup>Kenya Ferry Services Limited v Mombasa County Government & 2 Others [2016]eKLR

<sup>23</sup>Ibid (n31)

<sup>24</sup> International Legal Consultancy Group & another v Ministry of Health & 9 others [2016] eKLR

<sup>25</sup>Peter Ochara Anam & Others -V- Constituencies Development Fund CDF Board & Others, Kisii Petition No.3 Of 2010 (unreported) (2011) eKLR

However the Constitutional & Human Rights High Court in Nyeri<sup>26</sup> held a different view from the Peter Ochara Anam case and held that an allegation of violation of fundamental rights and freedoms is not an intergovernmental dispute simply because the County Government of Nyeri was the Petitioner and an entity of the National Government was the Respondent. It was further the courts view that an allegation of violation of fundamental rights is not a dispute which can be subjected to alternative dispute settlement even if the court were to find that it is a dispute within the meaning of the Act and the Constitution. It was held that Article 165 3(b) gives the High Court the exclusive jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied violated infringed or threatened. Accordingly, the court concluded that this is a jurisdiction which is not shared with any other organs of the state.

Taking matters to court has meant that intergovernmental disputes remain costly. The cost of litigation is not only monetary but includes opportunity costs such as delayed projects, negative public image, low investor confidence and strained relationships between different government levels and entities.<sup>27</sup>Reducing such costs could free up government resources for development. It is this context that presents a business case or justification for

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<sup>26</sup> County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & Another [2014] eKLR

<sup>27</sup>An example of high advocate fees charged in intergovernmental disputes involved the National Government and the County Government of Nairobi over land rates. Given that the subject matter valued at KShs. 29 billion, the lawyer representing the County Government demanded for Kshs. 2 billion as instruction fees! This was reduced to Kshs. 75 million based upon the Kshs. 724 million awarded to the court to the Nairobi County Government. The IGRTC commissioned a study to establish the indicative costs of litigation between the two levels of government and /or their agencies with the aim of understanding the nature, volume and indicative cost of litigation. The study captured the primary causes of disputes and the reasons why the two levels of government (and their agencies) resort to the court cases rather than to ADR mechanisms. The findings of the cost of litigation in intergovernmental disputes conducted over a six-month period at the request of Senate, IGRTC and MODP to inform the development of ADR solutions.

alternative dispute resolution (ADR) mechanisms in the area of intergovernmental disputes.

By ADR one means a multiplicity of distinct processes that parties can employ to resolve disputes such as negotiation, arbitration, mediation, conciliation, adjudication and expert determination. Negotiation involved parties coming together to agree on an amicable solution. In mediation an independent party steps to aid disputants reach a mutually agreed solution.<sup>28</sup> Arbitration involves the hearing of a dispute by an arbitrator in a manner that could be compared to private judicial proceedings.<sup>29</sup> Adjudication refers to instances where an adjudicator examines the conflict and comes up with a quick solution.<sup>30</sup> The distinct advantages of ADR over litigation has always been clear. Litigants remain dissatisfied with formal courts for various reasons such as the slow, costly and complex nature of court processes, and the fact that adversarial nature of the court system erodes the spirit of cooperation and goodwill that parties may enjoy.<sup>31</sup>

Thus, the courts may not be suited to resolving intergovernmental disputes. On the other hand, ADR processes could complement the judiciary in terms of facilitating easier access to the resolution of intergovernmental disputes. This is because ADR mechanisms differ from formal judicial systems in a number of ways. For one, ADR systems have more informal rules which make them less

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<sup>28</sup>It would bring parties to a binding process where there was an agreement. In conciliation a conciliator met with the parties separately and together and actively aids them to solve their differences.

<sup>30</sup>This type of ADR would not include government or county government entities but would require a neutral party. Expert determination involved an independent expert in the subject matter of the dispute and appointed by parties to resolve the matter. The decision was legally binding on the parties.

<sup>31</sup>ICJ, 'Strengthening Judicial Reform in Kenya: Public Perceptions and Proposals on the Judiciary in the new Constitution,' *Op. cit.*: D. Reiling, L. Hammergren & A. Di Giovanni, *Justice Sector Assessments: A Handbook*, World Bank, 2007.

complex than the judicial system.<sup>32</sup> Two, ADR is a mechanism of equity rather than the rule of law as such it cannot be expected to establish legal precedent or implement changes in legal or social norms. Three, under ADR there is more direct communication and participation between the parties because direct dialogue is encouraged with the aim of reaching reconciliation.<sup>33</sup> Finally, ADR systems have higher levels of confidentiality than the public judicial systems. Sensitive information is ideally regarded as confidential. However disputes that proceed to the courts and other state agencies are no longer confidential. The purpose of outlining these benefits is not to suggest the replacement of judicial systems with ADR mechanism. Indeed, while ADR can support developmental objectives and give access to social groups not adequately served by the judicial system, they can never be an absolute substitute for formal judicial systems. For this reason, ADR mechanisms make it clear that parties remain free to resort to courts if unsatisfied with ADR results.

#### **4.0 Best Practice**

In seeking appropriate approaches on how to address the question of inter-governmental disputes, it is helpful to analyze international experiences on the subject. Several countries (such as Pakistan, India, Ethiopia, New Zealand and South Africa) have demonstrated a preference for the resolution of disputes through political and administrative processes as opposed to judicial process. For example, in Pakistan, a Council of Common Interest chaired by the Prime Minister harmonizes labour relations.<sup>34</sup> Similarly in India, issues between states

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<sup>32</sup>Dutta A, "Origin Of Alternative Dispute Resolution System In India," available at [https://www.academia.edu/4371674/origin\\_of\\_alternative\\_dispute\\_resolution\\_system\\_in\\_india](https://www.academia.edu/4371674/origin_of_alternative_dispute_resolution_system_in_india), <accessed on 25<sup>th</sup> January 2018>

<sup>33</sup>M. Mwangi, 'The Water's Edge: Mediation of Violent Electoral Conflict in Kenya', (Institute of Diplomacy and International Studies) (2008) 36-38.

<sup>34</sup>Article 153 of Pakistan's Constitution invites for an establishment of a Council of Common Interest which is chaired by the Prime Minister with the members of the council to harmonize central and provisional labour relations. This is similar to the Summit in Kenya.

are resolved by an Intra-State Council chaired by the Prime Minister.<sup>35</sup> Although there is no explicit reference to intergovernmental consultation in Ethiopia, there are formal and informal forums (like the forum of speakers of both the parliaments) that promoted intergovernmental relations.<sup>36</sup> This is also the case in Malaysia where a National Council body chaired by the Deputy Prime Minister, coordinates policies and legislation affecting both national and local government.<sup>37</sup>

On its part, Kenya has established mechanisms for intergovernmental disputes. The Constitution and other legislation provide formal mechanisms to deal with horizontal and vertical issues that arise at national and county levels.<sup>38</sup> Article 189 of the Constitution states that “in any dispute between Governments, the Governments shall make every reasonable effort to settle the dispute including by means of procedures provided under national legislation. It states further that “National Legislation shall provide procedures for settling Intergovernmental disputes by alternative dispute resolution mechanisms, including negotiations, mediation and arbitration.”

Statutes such as the Inter-Governmental Relations Act (IGRA), 2012<sup>39</sup> establishes a framework for intergovernmental relations. In this regard, and with reference to the IGRA, Kenya appears to be unique having pioneered full-fledged statute dedicated to providing a framework for consultation and cooperation between the national and county governments through institutions such as the National and County Government Coordination Summit, Council

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<sup>35</sup>Article 263 of India’s Constitution calls for an Intra-State Council, a sub national platform/forum chaired by the Prime Minister of India and all the chiefs of states are members of the council. Intra state issues and common interests are discussed.

<sup>36</sup>Nigussie Afesha, ‘The Federal State Intergovernmental Relationship in Ethiopia: Institutional Framework and its Implication on State Anatomy’, (2015) 9(2), Mizan Law Review 354

<sup>37</sup>Daniel Halberstam, ‘ Mathias Reimann, Federalism and Legal Unification; A Comparative Empirical Investigation of Twenty Systems’,( 2013) 331

<sup>38</sup>The Constitution of Kenya, 2010, Article 189(3), (4)

<sup>39</sup>Act no.2 of 2012



of Governors, Intergovernmental Relations Technical Committee and the Intergovernmental Budget and Economic Council.<sup>40</sup> Similarly the South African Constitution has provided that an Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.<sup>41</sup>

### **5.0 Possible Approaches**

Our unique experience suggests a two-fold approach towards inter-governmental disputes. First, there is a need to invest in efforts that address the root cause of disputes in order to promote prevention based mechanisms. Second, and of relevance to when disputes demand a resolution, there is need to develop a comprehensive legal and institutional ADR mechanism to address such inter-governmental disputes. Regarding the former, evidence indicates the failure in understanding cooperative governance. Stakeholders in national and county governments should seek to address the root cause of this failure by devising ways of promoting consultation among different government levels and entities. These could include: providing a range of capacity development/technical assistances measures to national/county governments to further cooperation and promote a common understanding of intergovernmental relations; initiating a bill that makes it mandatory for all ministries to table their Bills to both houses of parliament; encouraging greater communication between the Senate and the County Governments e.g. by establishing Senate liaison offices within each County Government.

While preventative measures may reduce inter-governmental disputes, they will not eliminate them completely. There is an urgent need to develop the necessary policy, legal and institutional framework for effective ADR resolution of conflicts across all levels of government. Essentially such a framework should address two principle areas: how disputes are escalated through the various

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<sup>40</sup>Intergovernmental Relations Act, 2012, S7, S11, S19,

<sup>41</sup><https://www.gov.za/documents/constitution/chapter-3-co-operative-government> (accessed on 28th January 2018)

stages and who should be involved in this process. In line with the first point, the framework should clarify which platforms can be used to further regular interactions between government levels where parties directly consult and have structured negotiations before escalating a dispute to mediation/conciliation and arbitration/adjudication. Furthermore, timelines should be set for each of these unfolding processes and specifically there should be clear indications around reporting deadlines and actions are to be expected.

Equally important is the question of who should be involved in such processes, in other words, what kind of institutions should qualify as dispute resolvers given that such entities should not be a party to the disputes. Ideally, if mediators are required, what shape should this take? Similarly, what would we want an arbitration tribunal to be comprised of? The principles of ADR as well as best practice for inter-governmental relations suggest that resolving conflicts requires a neutral and independent party/chairperson to guide the discussion between the two parties at no cost to the tax payers.<sup>42</sup> It is debatable whether these attributes exist within the current set up of institutions established to address inter-governmental relations such as IGRTC, COG and Summit.<sup>43</sup> Currently, IGRTC is resolving issues arising and referred to it on the basis of trust and good faith in the absence of clear national norms and standards for ADR.<sup>44</sup> If such institutions are adopted as platforms to be used to employ ADR mechanism, it will be necessary for them to be strengthened for effective ADR resolution and corresponding processes for monitoring/evaluation put in place. In the alternatively, if existing public entities are found not be ideal as mediators or arbitrators, government should not shy away from drawing upon the experience that has been developed in the private sphere. This would mean tapping into the list of prequalified mediators and arbitrators who are members of professional bodies such as the Chartered Institute of Arbitrators.<sup>45</sup>

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<sup>43</sup>Ibid (n14)

<sup>44</sup>Ibid (n15)

<sup>45</sup>The Chartered Institute of Arbitrators is a leading professional membership organization representing the interests of ADR practitioners worldwide.< [www.ciarkbkenya.org](http://www.ciarkbkenya.org) > accessed on 25<sup>th</sup> January 2018

Finally, it is important to reflect upon a comprehensive legal and policy ADR framework can be established. One approach is to develop guidelines issued by the Cabinet Secretary for Devolution in consultation with the County Governments (with the approval of parliament) that would carry the force of law. Such guidelines would outline the ADR specific policy, inter-governmental consultative mechanisms, creation of tribunals and specific dispute referral mechanisms. Another approach would be to develop regulations for the Inter-Governmental Relations Act 2012 and County Government Act 2012 in consultation with all parties that would cover similar issues. Such regulations would be submitted to the Senate for debate and approval. The regulations would operationalize ADR aspects within the framework of these statutes and give effect to the Constitutional provisions which require intergovernmental disputes to, as far as possible, be resolved through ADR. A last approach would be to capture all the relevant issues in a fully-fledged ADR statute that governs inter-governmental relations disputes. It may be argued that the CGA and IGRA were not designed to resolve disputes hence there is a need for comprehensive statute that becomes the bedrock for ADR policy and law. Such a statute would also provide for the development of capacity among the key actors and be accompanied by rules that tackle impunity by state agents who deliberately ignore the laid-out processes. To start this process, the ministry of devolution should draft a Bill under the auspices of operationalizing Article 189(3) requirement for extending cooperative governance through ADR resolution.

## **6.0 Conclusion**

In conclusion, establishing an appropriate ADR legal framework is essential to optimize the benefits of intergovernmental relations. In the context of development, this framework will ensure access to justice for disadvantaged communities with limited resources and reduce conflict by leading to increased participation in dispute resolution mechanisms that are simple and efficient. Extensive consultations with stakeholders will be required to provide input into what the policy and legal framework would look like. That said, a legal framework in itself, will not act as a panacea to the multiple challenges that face the use of ADR systems towards addressing inter-governmental disputes in

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Kenya. Parallel interventions will be required to tackle the inadequate awareness of existence of ADR and its benefits. These interventions should deal with the cultural attitudes against ADR in a society that remains pro-litigation. Furthermore, such interventions should address the insufficient capacity among stakeholders within the different levels of governments. For example, counties could be assisted towards establishing fully fledged legal departments not only capable of handling litigation internally, but with sufficient number of professionals that understand the value of ADR mechanisms. At the same time, judicial officials (including judges and advocates) should be sensitized on the importance of ADR as part of their training. As the demographics of Kenya are still largely a rural, traditional disputes resolution mechanism should also be recognized and employed (subject to Article 159 of the Constitution).<sup>46</sup> This recognition would allow for implementation of the awards or orders of elders. In general, public awareness should be created both nationally and in the counties to educate the public on the benefits of ADR.

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<sup>46</sup>Article 159 (3) provides that traditional dispute resolution mechanisms are not to 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.

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## **The Irony of Security for Costs in Arbitration**

*By: Justus Otiso\**

The award of costs has varied applications depending on different jurisdictions, and in common law jurisdictions like Kenya it is the losing party that usually bears the costs of the successful party.<sup>1</sup> The rationale behind security for costs during arbitration is hinged on a claim being frivolous on its face and hence such guarantee could only be imposed on the claimant instead of placing a similar obligation on the defendant who was simply defending itself. The issue of security for costs involves an intricate balancing act between sieving out spurious claims and placing onerous responsibility on a claimant making it impossible for him/her to proceed with the claim.<sup>2</sup> In the case of *Re: Unisoft Group No.2*<sup>3</sup> the court was of the opinion that in determining whether to grant an order for security for costs and the quantum of such an order, a balance must be struck between protecting the ability of the defendant to recover its costs and the ability of the claimant proceeding with a meritorious claim.<sup>4</sup>

The UNCITRAL's view of such assurances has departed from the general notion of securing costs of arbitration to ordering a deposit for the enforcement of the award.<sup>5</sup> Under ICC Arbitration, an order for security for costs is considered as

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\* LLB, LLM, Advocate of The High Court Of Kenya, MCI Arb, Certified Mediator (MTI International) Certified Family & Divorce Mediator (MTI International), Lecturer, Kabarak University, Director, Kabarak University Adr Centre.

<sup>1</sup> Andrew Tweeddale, Keren Tweeddale (2007) *Arbitration of Commercial Disputes* (New York: Oxford) p.

<sup>2</sup> Wendy Miles, Duncan Speller, *Security for costs in international arbitration –emerging consensus or continuing difference?* <[http://www.wilmerhale.com/uploadedFiles/WilmerHale\\_Shared\\_Content/Files/Editorial/Publication/Security\\_costs\\_internationalarbitration.pdf](http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/Security_costs_internationalarbitration.pdf)> accessed on 8/11/14.p.2

<sup>3</sup> [1993] BCLC 532

<sup>4</sup> Miles p.2

<sup>5</sup> Peter Binder (2010). *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*. (London: Sweet & Maxwell) p.244 quoting ARTICLE 17(2) (c) UNCITRAL Model Law.

an interim or conservatory measure that may be so ordered. An ICC tribunal has however rejected to order for such costs on the basis of a claimant asserting that a prima facie case exists, unless the claimant convinces the tribunal that the money claim is of “existential importance” and that the respondent will escape the consequences by participating in insolvency proceedings.<sup>6</sup> Therefore, mere suspicions about the possibility of non-enforceability of a future award will not be entertained and regard is had to not issue an order for security that will unduly restrict a party’s access to justice and equal treatment of both parties.<sup>7</sup>

The Kenyan Arbitration Act of 1995 (as amended in 2009) read together with the Civil Procedure Rules<sup>8</sup> has also taken a similar stance by providing that a party may take interim measure of protection in the form of an appropriate security<sup>9</sup> and it may be ordered that any party do provide security in respect of any claim or any amount in dispute<sup>10</sup> or order a claimant to provide security for costs.<sup>11</sup> This power of the tribunal to order an advance on costs is not mandatory because the parties can agree otherwise not to seek security for costs.<sup>12</sup> In the exercise of such powers, the arbitral tribunal may seek the assistance of the High Court in determination but what is worrying is that despite the fact that such an order may be detrimental to a claimant, actuating the High Court proceedings *cannot* act as a stay of arbitral proceedings pending hearing of the matter.<sup>13</sup> Following the criticized decision of *Copê- Lavelin NV v Ken-Ren Chemicals and Fertilizers Ltd*,<sup>14</sup> it is now widely accepted that the ordering of security for costs

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<sup>6</sup>Michael Buhler, Thomas Webster (2008). Handbook of ICC Arbitration. (London: Sweet & Maxwell).p.338 quoting ICC case No. 13646, Procedural Order No.6 (2006), Unreported.

<sup>7</sup> Ibid p.344

<sup>8</sup>Order 26 Rule 1- provides for the taking of security for costs of the suit; Order 26 Rule 2- the other party will be required to furnish security to the satisfaction of the court. If you fail to furnish security to the satisfaction of court and the other party then your case will be dismissed.

<sup>9</sup> S.18 (1) (a) Cap 49.

<sup>10</sup> S.18 (1) (b) Cap 49.

<sup>11</sup> S.18 (1) (c) Cap 49.

<sup>12</sup> S.18 (1) Cap 49.

<sup>13</sup> s.18 (3) Cap 49.

<sup>14</sup> [1995] 1 AC 38.



is a preserve of only the arbitral tribunal and the courts should seldom intervene and this is mirrored in the Kenyan Arbitration law. The problem that presents itself is how much evidence a respondent has to table before a tribunal in order to prove that the claiming party will not be able to meet its obligations and therefore shifting the burden of proof to the claimant. A party does not have to be impecunious for the respondent to ask for security for costs, but it may be that the company or entity is incorporated in two different jurisdictions and therefore determination of an entities' financial standing is problematic.<sup>15</sup> In ICC case No 7074<sup>16</sup> the tribunal rejected the respondents' Yugoslavia's application for Security for costs against the claimant a shell company in Panama on the basis that the lack of assets by the claimant as well as the lack of a bilateral convention that would cover for security for costs between Panama and Yugoslavia were facts well known to the respondent before they entered into the arbitration agreement.<sup>17</sup>

### **1.0 Security for Costs inhibiting Access to Justice in Arbitration.**

Alternative dispute resolution mechanisms are supposed to contribute to the notion of access to justice for all especially the poor as well as advancing the rule of law.<sup>18</sup> Access to Justice has no conclusive definition and it may refer to situations where "people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution."<sup>19</sup> In the case of *Dry Associates Limited v Capital Markets Authority & anor*, the right to

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<sup>15</sup>Ouch! - Costs in Shipping and General Commercial Arbitration. Seminar 2 December 2013. <<http://www.lmaa.org.uk/uploads/documents/Costs%20talk.pdf>> accessed on 9/11/14. p. 3.

<sup>16</sup>ICC Case No. 7074, 28 February 1994

<sup>17</sup> Pessey p.23

<sup>18</sup> Kariuki Muigua, Francis Kariuki. *ADR, Access to Justice and Development in Kenya*. <<http://caselap.uonbi.ac.ke/sites/default/files/chss/law/law/ADR%20access%20to%20justice%20and%20development%20in%20Kenya%20-%20STRATHMORE%20CONFERENCE%20PRESENTATION.pdf>> accessed on 9/10/14 p.3

<sup>19</sup> Ibid p.6.

access to justice was defined in judicial processes by stating that ‘access to justice includes the enshrinement of rights in the law; awareness of and understanding of the law; access to information; equality in the protection of rights; access to justice systems particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay’.<sup>20</sup>

The right to access to justice is guaranteed under the Bill of rights of the Kenyan Constitution.<sup>21</sup> Article 159 of the Constitution also binds arbitral tribunals that in their exercise of judicial authority, they shall provide justice to all irrespective of status, without delay while promoting all forms of alternative dispute resolution mechanisms<sup>22</sup> such as arbitration. The right to Access to Justice is not expressly provided in international human rights instruments which Kenya has ratified<sup>23</sup> but nevertheless the requirement of ordering security for costs to an impecunious claimant is an antithesis to the relevant provisions of the constitution and may prevent access to justice leaving claimants with no choice but to abandon their claim. Article 50 of the Constitution also provides for rights to a fair hearing and this right is not only a reserve of the court process but also extends to tribunal as long as they are independent and impartial. Justice can be viewed either as distributive/economic justice which is concerned with fairness in sharing and procedural justice which is concerned with principles of fairness and fair play.<sup>24</sup> The interlink between right to access of justice and arbitration has been recognized as a problematic one because within the European system of Human rights protection,<sup>25</sup> everyone has the right to bring their civil claims

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<sup>20</sup>Nairobi Petition No. 358 of 2011.

<sup>21</sup>Article 48 Constitution of Kenya 2010.-“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

<sup>22</sup>Article 159(2)(a)(b)(c)

<sup>23</sup>Universal Declaration of Human Rights(UDHR) 1948 , International Covenant on Civil and Political Right(ICCPR)1966,African Charter on Human and Peoples Rights(ACHPR)1980

<sup>24</sup>Muigua, Kariuki. *ADR, Access to Justice and Development in Kenya*.6

<sup>25</sup> Article 6 ECHR

before court and this right shall not be impeded by financial obstacles. The problem that it poses is that arbitration is a form of private justice where parties willingly submit to the process and therefore if a party lacks financial resources they are more than likely unable to submit to it although they had earlier acceded to it.<sup>26</sup> This would seem to mean under the Kenyan dispensation that the ordering of Security for Costs under s. 18 of the Arbitration Act is at cross purposes with the Right under Article 48 of the Constitution. It suffices to say that the financial capability of a party to initiate arbitration proceedings is an important consideration to be made by judicial bodies.<sup>27</sup> Pessey states that forcing claimants to put up security for costs would significantly rob the business community off of their right to access to arbitral justice and small and maybe impecunious companies acting in good faith would not be able to use international commercial arbitration and eventually Arbitration may ironically remain an alternative dispute resolution mechanism only for the large corporations. It would be manifestly unjust to let a claimant suffer for actions that were actually caused by the respondent<sup>28</sup> just because the claimant lacks resources to pursue a legitimate claim that on the face of it is closely related to the parent dispute.

Persuasive jurisprudence emanating from the French courts exemplify the concept of access to justice in arbitration in the case of *Société Licencing Projects SL v Société Pirelli*,<sup>29</sup> where the Paris Court of Appeal was called upon to

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<sup>26</sup>Jaroslav Kudrna, Transnational Notes: Reflections on Transnational Litigation and Commercial Law. *Arbitration and Right of Access to Justice: Tips for a Successful Marriage*. 22/2/13

<<http://blogs.law.nyu.edu/transnational/2013/02/arbitration-and-right-of-access-to-justice-tips-for-a-successful-marriage/>> accessed on 10/11/14

<sup>27</sup> Kariuki Muigua. *Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending And After Arbitration in Kenya*. p.14

<sup>28</sup>Jean- Baptiste Pessey. *When to Grant Security for Costs in International Commercial Arbitration: The Complex Quest for a Uniform*

Test<<http://www.cpradr.org/Portals/0/Resources/Articles/When%20to%20Grant%20Security%20Costs%20by%20Jean->

Baptiste%20Pessey%20%28Writing%20Contest%20Winner%29.pdf> accessed on 8/11/14.p.15

<sup>29</sup>Paris Court of Appeal, November 17 2011, RG: 09/24158.

determine, interpret and uphold Article 6 of the ECHR<sup>30</sup> in relation to Arbitration and Arbitral tribunals. The court was called upon to answer the following question: “shall an arbitral award, in which arbitrators followed the ICC court’s decision to withdraw counterclaims of an impecunious defendant because of the non-payment of the advance on costs, be annulled for violation of right of access to justice?”<sup>31</sup>

The facts of the case were that Pirelli had entered into an agreement with L.P, licensing it to sell its shoes under Pirelli brands,<sup>32</sup> and later on a dispute arose between the parties regarding the Pzero brand, since LP had suspended the payment of royalties provided for under the agreement. Pirelli sent LP a termination letter. LP later went into insolvency, pursuant to the ruling of a Spanish court. Later a Barcelona court started liquidation proceedings against LP after declaring it insolvent.<sup>33</sup> LP had already come up with its own claims and counterclaims against Pirelli whom it claimed had granted it a license for one of its brands not under its possession and the termination of the agreement by Pirelli was unlawful.<sup>34</sup>

Following the liquidation proceedings, Pirelli pursuant to Article 30(2) of the ICC 1998 Rules,<sup>35</sup> requested the ICC to fix a separate order on advance of costs for the counterclaims because it was becoming evident that LP would not meet its financial obligations. Indeed, LP failed to pay the advance on costs and the ICC court informed the arbitral tribunal that the claims and counterclaims by LP were deemed to have been withdrawn.<sup>36</sup> The arbitral tribunal proceeded to render a final award that was in favor of Pirelli. A Barcelona creditor suing on

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<sup>30</sup> European Convention on Human Rights.

<sup>31</sup>Kudrna

<sup>32</sup> Ibid

<sup>33</sup>International Law Office. Arbitration and ADR- France:Award annulled due to withdrawn counterclaims introduced by insolvent defendant. 12/4/12

<<http://www.internationalawoffice.com/newsletters/Detail.aspx?g=e064b71e-c460-4046-8893-97537582c3dd>>

<sup>34</sup>Kudrna

<sup>35</sup> now Article 36(3) ,2012 ICC Rules

<sup>36</sup> Pursuant to Article 30(4) of the ICC 1998 rules now Article 36(6) of the 2012 rules

behalf of all LP's creditors proceeded to challenge the award on grounds of violation of Article 6(1) of the European Convention on Access to Justice because of failure to hear the counterclaim because security for costs had not been entered, violation of due process rights and the fact that such an award would be contrary to International Public policy.<sup>37</sup> The Paris court proceeded to annul the award by the arbitral tribunal deeming it, and the withdrawal of the counterclaims, an excessive measure that constituted violation of access to justice rights as well as the principle of equality between parties at judicial proceedings.<sup>38</sup>

The Kenyan Position on a claimant that fails to comply with the tribunals order to provide for security for costs remains the same as the one under the ICC Rules and the claimant may have its claim dismissed by the tribunal.<sup>39</sup> Nevertheless, conduct of the claimant should be an important factor to consider when deciding to order or not to order an advance on costs especially when a claimant after the conclusion of the arbitration agreement, organizes its own insolvency or impecunious condition by divesting itself off its assets in order to deprive the respondent of a chance to enforce later awards on costs by being an empty shell in case it loses the arbitration.<sup>40</sup>

In the case of *Nasser v United Bank of Kuwait*<sup>41</sup> the same approach was taken by the court after the United Bank of Kuwait sought £15000 from Nasser as security for costs. She had no assets within the jurisdiction and the Bank argued that it would be difficult to recover the costs of the claim if she was unsuccessful. Nasser relied on amongst other grounds Article 6 of the ECHR on the right to access to justice. In the U.K impecuniosity by itself is not a ground for ordering security for costs and conversely the fact that the individual is not from the particular jurisdiction is not a ground for such an order. The court ordered for a reduction in costs to £5000 because the claimant had not been heard in her

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<sup>37</sup>International Law Office

<sup>38</sup> Ibid

<sup>39</sup> S.26(f) Cap 49

<sup>40</sup> Pessey.p.25 quoting case of *A. S.p.A. v B AG* 25 September 1997, (2001) *ASA Bulletin* 745.

<sup>41</sup>[2002] 1 WLR 1868

original action and the order of security meant that she had not had any appeal against the decision to strike out her claims. The amount sought as an advance to costs would have definitely stifled her right to access to justice.<sup>42</sup> Rigidity in applying rules applicable to security for costs could actually lock out the revered notion of access to justice and remains incumbent upon judicial systems either at arbitration or in court to liberally look at the prevailing circumstances before making such an order.

The fact that the powers of a court to intervene are limited when ordering security of costs the potential of an injustice being occasioned is ever present.<sup>43</sup> This brings about the issue of stay of arbitral proceedings in case the impecunious party cannot meet the security for costs, and the likelihood of a unfavourable award are high despite having a legitimate claim that is closely related to the main claim at dispute. The right to access to justice, triumphs over party autonomy to submit to arbitration<sup>44</sup> but this right to access to justice can only be enforced in the High Court of Kenya and therefore begs the question, at what point can an arbitral tribunals proceedings be stayed based on its adverse order of security for costs pending hearing of a constitutional issue? s.7<sup>45</sup> as read together with s.14 of the Kenyan Arbitration Act permits parties to arbitration to challenge the procedure before court but what comes out clearly is that this challenge will not be able to stop arbitration proceedings which *may* continue if the parties so agree, but no award issued by the tribunal can take effect until the court case is heard.<sup>46</sup> Therefore, s.7 may give recourse to a party whose counterclaims have been withdrawn as a result of failure to advance costs and they may begin parallel proceedings in the High court via an application for interim protection on violation of their right to access to justice. Arbitral tribunals are not exempt from applying the right to access to justice as they are

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<sup>42</sup>Rosalind English. *Nasser*<[http://www.1cor.com/1315/?form\\_1155.replyids=636](http://www.1cor.com/1315/?form_1155.replyids=636)> accessed on 10/11/14

<sup>43</sup>Tweeddale.p.667

<sup>44</sup>Kudrna.

<sup>45</sup>It will *not* be incompatible with the arbitration agreement for a party to apply before a court for interim measures before or during arbitration proceedings and for the court to grant such interim reliefs.

<sup>46</sup> S.14 (8) Arbitration Act Cap 49.

also bound by the principles enunciated under Article 159, this may be to the detriment of the contractual nature of arbitration but serves to enforce the fundamental rights and freedoms of an individual. What is evident is that a court may enforce this rights but it will not delve into issues of merit of the counterclaims which may nevertheless be frivolous and time wasting gimmicks by a claimant.

The Kenyan Arbitration Act underscores the need for all parties in the arbitration process to receive equal treatment and to be given a reasonable opportunity to present their case.<sup>47</sup> Even though an arbitral tribunal need to take into consideration the twin issues of access to arbitral justice and party equity, these must be weighed against a respondents interest in avoiding costly arbitral proceedings. This was determined in the case of *Swiss Entity v Dutch Entity Award in Case No.415*<sup>48</sup> where access to justice and party equity were considered but the tribunal held that where one of the parties has gone through bankruptcy proceedings which were suspended due to lack of assets, then the respondents interest in security for costs actually trumped over the claimants interest in access to arbitral justice.<sup>49</sup> A liberal reading of Article 27 of the Kenyan Constitution would seem to promote equality for all and bar any form of discrimination based on any ground. Kariuki Muigua notes that s.3 of the Arbitration Act actually provides for mandatory arbitration because the term 'agreement' is not given a definition in the Act and therefore it becomes impossible to discern whether an arbitration agreement is supposed to be express or implied. In the case of an implied agreement in what Muigua calls 'contracts of adhesion', that may be obtained from employee handbooks or other unilaterally drafted documents; likelihood of power imbalance occurs where individuals are pitted against corporations and multinationals and have to go into arbitration<sup>50</sup> these individuals may lack the financial mettle to deposit

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<sup>47</sup>S.19 Cap 49.

<sup>48</sup>ASA Bulletin. Vol.20, No.3 (2002) 467-72.

<sup>49</sup>Tweeddale.p.302.

<sup>50</sup>Kariuki Muigua. *Emerging Jurisprudence on the Law of Arbitration: Challenges and Promises*. <<http://dosen.narotama.ac.id/wp-content/uploads/2014/10/Emerging->

security for costs in order to pursue their separate claim against conglomerates. On the other hand upholding access to justice over arbitration actually kills the concept of arbitration as a form of private justice paid for by the parties and may turn arbitration centers and institutions into “philanthropic institutions and arbitrators into workers driven by gratuity.”<sup>51</sup>

The impecunious nature of a claimant should be a factor only considered when there has been a considerable amount of change of their status since the conclusion of the agreement<sup>52</sup> and it would therefore suffice to say that a party that enters into a contractual agreement with another fully cognizant of their financial status has acceded to take the risk and it would only be justifiable to order for security for costs only if the risk has considerably and unpredictably increased between the conclusion of the contract and the commencement of the arbitral proceedings.<sup>53</sup> Pessey continues to add that deterioration alone of financial status has been held by some tribunals as normal commercial risk and does not justify an order for costs.<sup>54</sup>

## **2.0 Arbitration Finance: Enabling Access to Justice**

Burford, a London based corporate entity provides financing in arbitration processes and this can be one of the major ways in which impecunious claimants can proceed with a claim once an order for security for costs has been made. Little is known about litigation and arbitration finance, but the practice albeit complex has been around for a while and arbitration finance is simply specialty corporate finance that focuses on arbitration claims as assets.<sup>55</sup> Bogart states that

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Jurisprudence-in-the-Law-of-Arbitration-in-Kenya-Challenges-and-Promises.pdf>  
accessed on 10/11/14

<sup>51</sup>Kudrna

<sup>52</sup> Pessey p.24

<sup>53</sup>Decision of 29 May 2009, p. 71, para. 2.3,cited in Pessey.p.24 as cited in Bernhard Berger, *Arbitration*

*Practice: Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, 28 J. Int'l Arb 7, 11 (No. 1, 2010).

<sup>54</sup> Pessey .p.24

<sup>55</sup>Christopher Bogart, *Third Party Funding in International Arbitration*. 22/1/13  
<<http://www.burfordcapital.com/articles/third-party-funding-in-international-arbitration/>>



arbitration finance provides immense advantages to the realization of access to justice which is a fundamental characteristic of any meaningful legal system but which is sometimes impracticable due to bargaining imbalances which may skew a settlement. Arbitration finance is deemed to be an imperative in investor state arbitration where repeat litigants such as states have differing levels of risk tolerance than first time litigants who may be fronting a single and most crucial matter to them. Such financing ventures actually are desirable because they level an otherwise unlevelled playground where an order for security for costs may cripple a claimant and removes the risk of a world where only rich and powerful claimants are the only ones entitled to justice for illegal state action.<sup>56</sup> Insurances that are taken out to cover the after the event costs (costs of the winning party) and the policy can be used as security for costs incase such an adverse decision is rendered. Litigation funders usually require the plaintiffs in such cases to have such insurance policies taken out to cover for costs.<sup>57</sup> It has also been suggested that arbitration centers can provide aid by setting up funds within their institutions that will aid impecunious claimants deposit their security for costs while awaiting hearing and determination of their counterclaim. This fund can be achieved via setting up a premium payment system of subscribers to such institutions. This will definitely increase the costs of arbitration but will definitely help parties achieve their access to justice<sup>58</sup> The court has been called upon to determine whether an indigent party and a plaintiff in legal proceedings may be entitled to legal aid during the arbitration process.<sup>59</sup>

### **3.0 Capping of Costs: Enabling Access to Justice**

The application of security for costs can have adverse effects on the attractiveness of arbitration as an alternative form of dispute resolution. This is because whilst ADR methods are supposed to keep the costs of settling disputes lower and preferable to the costs of litigation, it is now apparent that request for security will bring about many other connected proceedings and submissions

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> Kudrna

<sup>59</sup>Edwin Journeys v Thyssen (GB) Ltd (1991) 57 Build LR 116

which actually hike the cost of arbitration.<sup>60</sup> This is a reasonable and achievable way of avoiding excessive costs, but it has achieved little headway in the field of arbitration and more often than not a party to arbitration will reject the notion of capping costs. When costs are capped, the resultant effect is not on the costs incurred but on the amount a successful party can recover on their expenses. Party consensus is important in order for this solution to take effect.<sup>61</sup> Capping costs can assist in doing away with unnecessary, repetitive and unjustifiable work by the successful party, tasks which escalate the costs of the claimant who lost and capping actually challenges the parties to carry out an efficient and cost effective arbitration. Prolivity is one of the reasons why costs should be capped as an opposing party applying for security for costs can bring unnecessary, voluminous application for the advance on costs, including rationales why security should be granted, legal articles amongst other references which are useless because the whole application could have been filed 3 or 4 pages long<sup>62</sup> and becomes clearly unfair to ask an impoverished claimant to pay for such extravagant litigation. When costs are capped, access to justice will be actually foreseeable and the costs *may* actually be affordable and gives the counter claim an equal footing with the main claim.

#### **4.0 Preempting Arbitration with Litigation: Enabling Access to Justice**

Access to justice can be achieved by granting the right to both the impecunious party and the respondents in arbitration and giving them both a chance to access the state courts in case the impecunious party introduces a counterclaim which may stall the arbitration process or end in a deadlock. An impecunious party will have a very heavy burden to prove to the state courts that their financial situation does not allow them to pursue arbitration.<sup>63</sup> This decision will be highly controversial and may need some law reform in order for it be actualized and provide for such an option. Often times critics have criticized courts intervention in arbitration but there is need to move from the particular mindset and adopt one of complementarity such that even in the middle of litigation,

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<sup>60</sup> Pessey.p.17

<sup>61</sup>"Ouch! - Costs in Shipping and General Commercial Arbitration.p.2

<sup>62</sup>"Ouch! - Costs in Shipping and General Commercial Arbitration. p. 7

<sup>63</sup> Kudrna

*The Irony of Security for Costs in Arbitration: Justus Otiso*

parties can opt for arbitration whose award will be adopted by the court; and also during arbitration parties can stop the process and proceed to court without having regard to rigid notions such as non-interference by the courts and party autonomy. An order for security for costs need to be one that emanates from the courts in order to provide checks and balances to the judicial system, and should not be the preserve of only the tribunal as seen at s.18 of the Arbitration Act.

## **Enforcement of Arbitral Awards in Kenya: Statutory and Institutional Bottlenecks**

*By: Wilfred A. Mutubwa\**

### **1.0 Introduction**

The arbitral award is perhaps the most significant feature of the entire arbitration process. It is a final determination of rights and obligations of parties who presented their disputes to the arbitral tribunal for determination.

The current Kenyan Arbitration Act 1995 (as amended in the year 2009) is modelled around the UNCITRAL model Arbitration Law, with some modifications.<sup>1</sup> Sections 32, 35, 36 and 37 of the Act make provisions that attend the substantive and formal requirements of an arbitral award, grounds and procedures for challenging/setting aside thereof and enforcement proceedings. Although the model law does not state this in no uncertain terms, its efforts in the limitation of grounds upon which arbitral award can be challenged is a significant feature that underlines the finality of the Arbitral award.<sup>2</sup> That awards of both domestic and international arbitral tribunals should be final in

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\*FCI Arb LLB (Hons) LL.M (Unisa) LL.D (candidate) (Unisa) Post Graduate Diploma in Law (Kenya School of Law), Post Graduate Diploma in Arbitration (CI Arb -UK), Advocate of the High Court of Kenya, CI Arb (U.K) and Kenya Judiciary Accredited Mediator, Member of the Task Force on ADR and Court Annexed Mediation in Kenya, Adjunct Lecturer Riara University School of Law, Arbitrator and Mediator at the Nairobi Centre for International Arbitration (NCIA) and London Court of International Arbitration/Mauritius International Centre for Arbitration (LCIA/MIAC), I Arb Africa top 100 recognized Arbitrators. Tutor at CI Arb Kenya, Commissioner for Oaths and Notary Public.

<sup>1</sup> Arbitration Act 1995 amended by Act No. 11 of 2009. Legal Notice Number 48/2010. The Act is available at [www.kenyalaw.org](http://www.kenyalaw.org) (Accessed on 18<sup>th</sup> January 2018).

<sup>2</sup> United Nations Commission on International Trade Law (UNCITRAL) Model law in International Arbitration 1985, found at [www.uncitral.org/pdf/english/text/arbitration](http://www.uncitral.org/pdf/english/text/arbitration). See Article 34 thereof: The amendments made in the year 2009 to the Arbitration Act of Kenya important modifications to the UNCITRAL model law principles and adds some provisions which are not in the original UNCITRAL model law text.

substance and on the merits of the disputes, except for procedural impropriety, misconduct and public policy considerations is perhaps one of the reasons for development of the model law, its promotion and the quest for its universal adoption and application, *mutatis mutandis*.<sup>3</sup>

Significantly therefore is section 32A of the Kenya Arbitration, which underscores the finality of Arbitral awards. However, the Act seems to give with one hand and take with the other. While arbitration is sold to its potential consumers as being speedy or expeditious, and although many arbitral tribunals make efforts to determine disputes within reasonable time, the time taken to enforce arbitral awards negates this most important quality of arbitration. The Kenyan Arbitration Act does not help matters by providing lengthy and laborious processes of enforcement of arbitral awards. Courts, as interveners in arbitral proceedings, prior, during and after the proceedings have also compounded the already bad situation presented by the Act. Enforcement proceedings of an award in Kenya may take up to 3 years to conclude.

This researcher attributes the difficulties in enforcement of arbitral awards in Kenya to both statutory and institutional bottlenecks. This paper therefore highlights some of the significant statutory and institutional problems that attend the enforcement of arbitral awards in Kenya. This paper draws conclusions and offers suggestions on amendments to the Kenyan Arbitration Act and institutional re-orientation to give effect to expeditious enforcement of arbitral awards.

## **2.0 The Statutory and Institutional Framework for Enforcement of Arbitral awards in Kenya.**

The principal legal instrument governing arbitration in Kenya is the Arbitration Act 1995 (as amended in 2009). Arbitration and indeed the entire edifice of Alternative Dispute Resolution (ADR) has now found recognition and place in the Kenyan legal system for administration of justice under article 159 of the

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<sup>3</sup>Ibid, explanatory note 3 states that the Model law aims at the harmonization and improvement of national laws on arbitration.

Constitution of Kenya.<sup>4</sup> This leads one to wonder whether with this mainstreaming of arbitration, mediation, reconciliation, conciliation, adjudication and Traditional Disputes Resolution mechanism (TDRMS), ADR should find a different description since they are obviously no longer alternative but complimentary to the court system.<sup>5</sup>

The Arbitration Rules<sup>6</sup> promulgated in 1997 though inadequately drafted, regulate the process of filing proceedings prior, during and after arbitral proceedings. Another significant legislation that is relevant to international arbitration in Kenya is the Nairobi Centre for International Arbitration Act, 2013.<sup>7</sup> This Act establishes the Nairobi Centre for International Arbitration and proceeds to provide for its working.<sup>8</sup> In a nutshell, the Act is an effort by the government of Kenya to attract international investors into Kenya and establish Nairobi, its capital, as a hub for dispute resolution within the east and central Africa region. The centre is meant to provide comfort to the transnational investor or trader that Kenya, and -the East African region, provides world class arbitration facilities, away from the state controlled courts, and assure them of expedient dispute resolution of the calibre found in western countries.

A discussion of Kenyan arbitration law with regard to the recognition and enforcement of Arbitral awards should therefore be of interest to any discerning international arbitration practitioner and transnational commercial person.

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<sup>4</sup> Article 159 (1)(c) reads: "In exercising judicial authority, the Courts and tribunals shall be guided by the following principles - ... (c) alternative disputes resolutions including reconciliation, mediation, arbitration and traditional dispute resolution mechanism..."

<sup>5</sup> See Muigua K "Resolving Disputes through Arbitration in Kenya" 2012 Glenwood publishers Nairobi, chapter ten p. 187.

<sup>6</sup> By legal Notice No. 58 of 1997 available at [www.kenyalaw.org](http://www.kenyalaw.org) visited on 18<sup>th</sup> January 2018.

<sup>7</sup> Available at [www.ncia.org](http://www.ncia.org). Accessed on 18<sup>th</sup> January 2018.

<sup>8</sup> For a critique of the NCIA Act, 2013 see Wilfred A. Mutubwa "The making of an International Arbitration Hub. A critical Appraisal of the NCIA Act 2013".

### **3.0 Enforcement of Arbitral Awards in Kenya**

The substantive and adjectival law on the enforcement of arbitral awards in Kenya is found in the Arbitration Act, 1995 and the Arbitration Rules, 1997. Awards made by the Nairobi Centre for International arbitration are enforced pursuant to provisions of the NCIA Act 2013.

Domestic arbitral awards, unless taken up and voluntarily complied with by the parties, must be filed in the High Court of Kenya for recognition and enforcement<sup>9</sup>. Any party to the arbitration proceedings can file the award in Court for enforcement.<sup>10</sup> However, such party must first file the original arbitration agreement or a certified copy together with the original arbitral agreement or a certified copy thereof.<sup>11</sup> Upon receipt of the award and arbitration agreement, the High Court registry gives a serial number to the cause, usually a miscellaneous cause.<sup>12</sup> If an application has previously been filed in court, such as for setting aside of the arbitral award, removal of an arbitrator or challenge on jurisdiction, then the enforcement proceedings should be filed within that causes.<sup>13</sup>

International arbitrations are governed by the New York convention and their recognition is specifically provided for under Section 36(2) of the Arbitration Act 1995.<sup>14</sup> Kenya is a state member and has ratified the said convention. Although the NCIA Act leaves the matter of enforcement of awards made by the Arbitration Court established thereunder to rules, the Arbitration Rules promulgated thereunder do not categorically state how the awards shall be recognised. One therefore assumes that the proceedings under the Arbitration

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<sup>9</sup> Section 36(1).

<sup>10</sup> Rule 6 4(1) of the Arbitration Rules, 1997.

<sup>11</sup> Section 36 (3) of the Arbitration Act 1995.

<sup>12</sup> Rule 5 of the Arbitration Rules, 1997.

<sup>13</sup> Ibid Rule 4(3).

<sup>14</sup> Section 36(2) reads:

“An International arbitration award shall be recognized as binding and enforced in accordance with the provisions of the New York convention or any other convention to which Kenya is signatory and relating to arbitral awards.”

Act 1995 (vide New York Convention recognition procedure) shall apply or that the NCIA awards are to be construed as self-executing.

#### **4.0 Statutory and Institutional Bottlenecks to enforcement of Arbitral Awards in Kenya**

It is perhaps most convenient to start by setting out that final arbitral awards, domestic and international, are deemed to be a final pronouncement on the disputes, rights and obligations of parties under the Kenyan Arbitration Act 1995.<sup>15</sup> This is of course subject to the provisions allowing for corrections and additional awards<sup>16</sup>, setting aside of arbitral awards<sup>17</sup>, and Appeals.<sup>18</sup> Within these processes lie the greatest challenges in giving effect to and timeous enforcement of Arbitral awards. A discourse of statutory and institutional hurdles, challenges and pitfalls that are encountered in the quest to convert an Arbitral award into an executable decree will now follow.

#### **4.1 Lengthy setting aside proceedings**

The Arbitration Act provides a window of 3 months from the date of publication of the award for any aggrieved party to mount an application in the High Court for the setting aside of an Arbitral award.<sup>19</sup> It is therefore plausible that within this period an application for enforcement of an award cannot be entertained or allowed. In effect, a successful party must second guess the losing party for 3 months and await an application for setting aside of the arbitral award. As a result, for the most part of the three months after publishing an award, arbitral proceedings are put on ice as the losing party weighs its options on whether or not to file an application for setting aside of the arbitral award. Often the application to set aside an arbitral award is filed on the very last days of the 3 months period. During this period an application for enforcement of the arbitral award cannot be allowed. Invariably, courts will stay the enforcement application until the setting aside application is determined. On the face of it,

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<sup>15</sup> Section 32A

<sup>16</sup> Section 34.

<sup>17</sup> Section 35.

<sup>18</sup> On points of law and subject to agreement of the parties- section 39.

<sup>19</sup> Section 35.



this seems to be an obviously reasonable thing to do. However, a frivolous setting aside application can hold up a successful party while the losing party strips or wastes away its assets with a view to defeating the realization of the award.

Rule 6 of the Arbitration Rules 1997 provides that the application for recognition and enforcement of the arbitral award is an *ex parte* application made by summons in chambers. The logic for staying the recognition and enforcement application until either the 3 months for setting aside expire, or the determination of the setting aside proceedings, is largely premised on the fact that one's adversary may not be aware of an *ex parte* application, Indeed no right of service of an ex-parte application by its very nature exists.

Yet another legal conundrum is exposed by a reading of Section 37 of the Act together with rule 6 of the Arbitration Rules, 1997. As indicated above, rule 6 of the Arbitration Rules, 1997 provides that enforcement proceedings will be moved *ex parte*. Yet on the other hand Section 37 of the Act, which provides for recognition and enforcement of an Arbitral award, allows the losing party an opportunity to oppose the recognition of the award on the basis of the very same grounds provided under the Section 35.<sup>20</sup> Can the enforcement proceedings therefore be *ex parte* as provided for by the rules, where the losing party would not be served by the enforcement chamber summons nor have a right of evidence in Court? This question was considered by Gikonyo J in his decision in the case of *Samura Engineering Limited v Don – woods Company*.<sup>21</sup> The relevant part of the decision is reproduced below:

*"I have heard many practitioners posit that there is a conflict between Section 35 and 37 of the Arbitration Act and that argument has bred two schools of thought*

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<sup>20</sup>Notice that the grounds under Section 37 and 35 are for all intents and purposes a photocopy of each other. For further critique of Sections 35 and 37 of the Act, read Wilfred A. Mutubwa "Consistency and Predictability of law versus Finality of the Arbitral Awards: A Juridical Juxtaposition of Section 32A, 35 and 37 of the Kenyan Arbitration Act" (2017) 5(1) *Alternative Dispute Resolution* at p.1.

<sup>21</sup>[2014] eKLR at p.5.

*on the matter. The proponents of one school of thought favour a strict application of Section 35 of the Arbitration Act and seem to assign legitimacy to an ex-parte application being made under Section 36(1) of the Arbitration Act without reference to the other party; while there are others who subscribe to the constitutional desire and principle of fair trial and right to be heard. The latter advert themselves to the argument that the right to a fair trial which includes the right to be heard in all substantive processes in a judicial proceedings is a constitutional right which cannot be circumvented and in arbitration the right extends to the process of recognition, adoption and enforcement of the award as the order of the court. ...I agree that there is justification and merit in the argument that an application for recognition and enforcement of the award under Section 36(1) of the Arbitration Act and Rule 9 of the Arbitration Rules should be served on the other party”.*

Despite Section 32A of the Arbitration Act being succinctly clear that an arbitral award is final and binding to the parties, the road to recognition of an arbitral award is long and windy – the delays having statutory justifications and blessings. Consider this, an appeal from a magistrate’s court to the High Court and from the High Court to the Court of Appeal must be commenced within 14 days of the delivery of the decision in the Court below. One wonders why a setting aside application in arbitration, which is supposed to be an expeditious method of dispute disposal, with simple setting aside, recognition and enforcement proceedings should take three months to file and an average of one year to determine. Amendments to sections 35, 37 of the Arbitration Act 1995 are long overdue in this respect. A setting aside period of 14 days should suffice.

#### **4.2 Pushing the limits of Section 35 and 37 of the Arbitration Act 1995.**

As argued elsewhere in this paper, the architecture of Section 35 and 37 of the Arbitration Act 1995 presents a legal conundrum to the practitioner of arbitration in Kenya.<sup>22</sup> Section 35 provides for grounds for setting aside of an arbitral award. However, Section 37 of the Arbitration Act gives the losing party a chance to oppose an application for recognition of an arbitral award on similar

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<sup>22</sup> *Supra*, note 2 above.

*Enforcement of Arbitral Awards in Kenya: Statutory and Institutional Bottlenecks:  
Wilfred A. Mutubwa*

grounds as Section 35. It is therefore possible that a party may fail to apply for the setting aside of an arbitral award within the 3 months stipulated under Section 35 of the Act will still have a chance to challenge the award at the enforcement stage. It is also possible that a party who unsuccessfully sought the setting aside of an arbitral award can still rehash the same grounds in opposition to an application for enforcement of an arbitral award.

In effect, by dint of the window offered by Section 37 of the Arbitration Act, three consequences can be discerned. Firstly, Section 37 makes nonsense of the 3 months statutory time bar or limitation of action for applying to set aside an arbitral award. Secondly, on an application under Section 37, the High Court may very well be invited to sit on an appeal of its own decision made under Section 35 in the setting aside proceedings; such preposition sounds foul and should be completely untenable in law. Thirdly, is the possibility of a party rehashing an application on grounds already previously dismissed by the court. This is most absurd in light of the fact that it is being done with the blessings of a statutory right to do so, all in contravention of the enduring common law bar of *res judicata*.

Yet another instance of statutory absurdity that undermines the principle of finality of the arbitral award is found in efforts by parties and Kenyan courts in expanding the scope of sections 35 and 37 of the Arbitration Act 1995. The grounds upon which an arbitral award can be set aside, or recognition refused are defined under Sections 35 and 37 of the Act to include incapacity of the applicant, invalidity of the arbitration agreement, improper appointment and composition of the arbitral tribunal, fraud, bribery under influence, corruption of the arbitration exceeding his jurisdiction and the award being against the public policy of Kenya. The origin of these provisions is in Articles 34 and 36 of the UNCITRAL Arbitration model law. The objective of which was to avoid appeals or challenges to the substantive findings of an Arbitrator and only to permit an audit or probe into the propriety of the Arbitral award on the basis of its procedural fairness, jurisdiction of the arbitration, misconduct and public policy considerations. Loose and permissive legislative draftsmanship has

however led to most setting aside applications taking the form of substantive appeals touching on the merits of the award. Increasingly, where parties or courts have found the grounds no direct grounds for impugning an arbitrator's decision, they have resorted to pushing the limits and boundaries of Section 35 and 37 of the Arbitration Act, 1995. This elasticity in the interpretation of the frontiers of the law with regard to setting aside and enforcement of arbitral awards is an antithesis to the doctrine of finality of the arbitral award which sought to be secured and underwritten by both the model law and the Arbitration Act by specifying the grounds for setting aside or refusal to recognise awards without any room for expansion.

An example will suffice to illustrate this point even more poignantly. In setting aside an Arbitral award Ogola J in his decision the case of *Evangelical Mission for Africa & Another v Kimani Gachuhi and another*<sup>23</sup> stated thus:

*"I agree with the Court of Appeal decisions that one of the principles underlying the Arbitration Act, the enforcement of awards and the principle of finality. I also believe that the Court of Appeal decisions did not mean that the finality of disputes through arbitration should be desired at any costs. Underlying this decisions of the Court of Appeal cases cited by the Respondents, is justice. After achieving justice, at least on the face of it, the arbitral decision should stand. While accepting the Court of Appeal objective on public policy, I am satisfied that public policy concept will keep on changing and as it does, we shall be guided by the Constitution and our laws, and also various policy documents emanating from various ministries in the county. Our Constitution at Article 10 therefore sets out national values which all decision makers in the country are obligated to observe while performing a public duty. These values, when it comes to judicial officers and arbitrators must necessarily import the duty to do Justice in deciding disputes."*

The net effect of the expanding scope of the grounds upon which an arbitral award may be set aside presents an amoebic and uncertain position for

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<sup>23</sup> (2015) eKLR at para 41.

practitioners of arbitration. It defeats the very essence for which the grounds for setting aside or refusal by Courts to recognise an award were specifically enumerated in the Arbitration Act, 1995. It becomes difficult to advise whether or not an award can be challenged and on what grounds.

Another potential problem can be summed up as follows; when the scope of challenge expands there is not knowing where it will stop. The net effect is that applications under Section 35 and 37 have invariably and most worryingly started assuming the character of appeals, all in an effort to defeat the finality of the arbitral award.

#### **4.3 Possibility of an Appeal and Review**

The Arbitration Act generally prohibits appeals from decision of the High Court on matters emanating from arbitral tribunals.<sup>24</sup> On challenges to the jurisdiction of the arbitrator, interim reliefs, and interpretation of points of law<sup>25</sup>, the Act is clear on the finality of the High Court's decision. However, a grey area seems to exist on whether an appeal to the Court of Appeal exists from decisions of the High Court in respect of an decision on setting aside of an arbitral award and/or enforcement proceedings under Section 35 and 37, respectively. No specific provision exists in the act stating that the High court's decision on an application for setting aside an arbitral award is final and incapable of Appeal.

The Court of Appeal of Kenya is established under Article 164 of the Constitution of Kenya 2010. The Court is clothed with jurisdiction to hear and determine appeals from the High Court and other Courts or tribunals as prescribed by an Act of Parliament. Importantly, the Jurisdiction of the Court of Appeal can only be invoked if the right of Appeal is specifically donated by an Act of Parliament.<sup>26</sup> This, the Court of Appeal has stated times without

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<sup>24</sup> Section 32A.

<sup>25</sup> Sections 17, 7(2) and 39(4).

<sup>26</sup> Article 164 of the Constitution, 2010 an Section 3 of the Appellate jurisdiction Act Cap 9 of the laws of Kenya. See for example the Court of Appeal decisions *Jabir Singh Rai & others v Tarlochan Singh Rai & 4 others* (2007) eKLR.

number.<sup>27</sup> With respect to Appeals from the High Court on matters touching on arbitration, the Court of appeal seems to have maintained a consistent voice on this point. A case in point is the Court's decision in the case of *Nyutu Agrovet Ltd v Airtel Networks Limited*<sup>28</sup> where the court authoritatively delivered itself on this point thus:

*"An arbitral award is final and binding on the parties, the intervention of the court as regards an award delivered by an arbitral tribunal is limited strictly to the grounds set out in Section 35 of the Arbitration Act and no more; the authority of the court in dealing with an application under Section 35 does not confer upon it an appellate jurisdiction meaning that the Court is not entitled to review the decision of the arbitrator for purposes of substituting its own view or conclusion with that of the arbitral tribunal. The Court will respect the fact that parties opted to go to an arbitral tribunal instead of going to Court and therefore except for the grounds set out in section 35, it will not interfere with an arbitral award even if the Court itself, on the facts proven, might have reached a different conclusion".*

Lady Justice Karanja in the *Nyutu* case even more unapologetic on the role of the court in arbitration and put it as follows:

*"Our courts must therefore endeavour to remain steadfast with the rest of the international community we trade with that have embraced the international trade practices espoused in the UNCITRAL Model. If we fail to do so, we may become what Nyamu J (as he then was) in Prof. Lawrence Gumbo v Hon. Mwai Kibaki & others ... referred to as "Pariah State" and could be isolated internationally"*

Another argument in support of wider court scrutiny of and appeals from decisions of arbitrators is founded in the constitutional right to access to justice.<sup>29</sup> Although arbitration is a constitutionally recognised mode of dispute

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<sup>27</sup> (2015) eKLR.

<sup>28</sup> *Ibid.*

<sup>29</sup> Article 48 of the Constitution of Kenya.

resolution, a bar to access to the Court of Appeal on second appeals from the High Court has also been said to amount to an infraction on the right to access to Justice. This was one of the arguments advanced by the applicant in the *Nyutu* case. To the contrary, the recognition of arbitration and indeed ADR under Article 159 of the Constitution of Kenya as a method of exercise of judicial authority in Kenya increases rather than shrinks the right to access to Justice.<sup>30</sup> In my considered view the argument that denying parties a right to appeal is an affront to the rights to access to justice, only a further attempt at scuttling the finality of arbitral proceedings and an attempt to elongate the arbitral process, obfuscate and ultimately revisit the merits of the arbitral decisions. This does not bode well with the practice of arbitration in Kenya.

Appeals are permitted by the Arbitration Act in limited circumstances. Firstly, on agreement of the parties before commencing the arbitration proceedings and only limited to points or questions of law.<sup>31</sup> Secondly, on principles of general importance as may be certified by the Court of Appeal.<sup>32</sup> It is the second part that presents a legal minefield and possible expansion of the scope of appeals.

Kenyan courts have not definitely stated what a point of general public importance would constitute. Furthermore, one wonders what point of general public importance can exist in a private process such as arbitration which seeks to resolve mostly commercial rights and obligations between parties. A private dispute resolution process does not portend public interest considerations. Scarcely do public rights attend arbitration which is mostly concern with contractual and commercial rights. It is also possible to argue that a point of general public importance may transcend a legal question to include factual matters. On this score a party can advance, quite persuasively, that a point of

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<sup>30</sup>For considered perspective of Arbitration and ADR as a means of access to Justice see Muigua K *Alternative Dispute Resolution and Access to Justice in Kenya* [2015] Glenwood publishers ltd Nairobi and Mbobu Kyalo "Efficacy of Court Annexed Alternative dispute Resolution; Accessing Justice though ADR "[2013] *Alternative Dispute Resolution* p. 105.

<sup>31</sup> Section 39 (3) (a).

<sup>32</sup> Section 39 (3) (b).

law of general importance cannot exist in isolation or vacuum but becomes only important or unclear if applied to a set of facts. As a result the entire arbitral award, both on points of law and merit, can be re-opened on appeals. The point is that the language employed in Section 39(3) of the Arbitration Act presents a potential for expanding the frontiers of the limitation appeals, from an arbitrator's award.

Another occasion is presented by Rule 11 of the Arbitration Rules 1997. This provision, almost fleetingly provides that the Civil Procedure Act and Rules shall be applied. The Arbitration Rules 1997 are made pursuant to section 40 of the Act and are promulgated to give effect to substantive provisions of the Act by supplying thereto a procedural framework for the Act's operation. The Arbitration Rules 1997 are rather sketchily drawn leaving very many important matters of procedure unattended. To fill in this void and lacunae, courts and practitioners of arbitration fall back to the more familiar territory of the civil Procedure Act and Rules. This, unfortunately, is aided by the said rule 11 of the Arbitration Rules 1997.

The Court of Appeal in Kenya has held that the Arbitration Act is a complete code of law and self-sufficient both in substantive and procedural law<sup>33</sup>. It is a fully furnished boutique dispute resolution package which does not require the importation of provisions of the Civil Procedure Act and/or Rules.<sup>34</sup> Yet the Civil Procedure Rules are specifically recognised by Rule 11 of the Arbitration Rules 1997- as being applicable to Arbitration matters. It may very well be argued that the Civil Procedure Act and Rules ameliorate or fill in the gaps that the thinly drawn Arbitration Rules, 1997 leave and that the same should only be invoked if they are neither inconsistent with nor contradicting the Arbitration Act and rules.

The above perspectives of thought on the application of Civil Procedure Rules to arbitration cases in the High court are persuasive depending on one's

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<sup>33</sup>See *Anne Mumbi Hinga v Victoria Njoki Gathara* (2009) eKLR at p.10.

<sup>34</sup>*Ibid.* Supra, note 29 (per Karanja , J).



inclination. The challenge is presented when one invokes the Civil Procedure Act and rules, with which come the right of Appeal and review of the decisions of the Arbitrator and High Court. To accept the propriety of employing the court Civil Procedure Act and Rules in arbitration is to open the door for appeals and review as provided for in the Civil Procedure Act and Rules.

To stay an Arbitral award pending multiple appeals or review goes against the universal spirit and principles of arbitration, particularly on finality of the arbitral award and expeditious disposal of commercial disputes.

### **5.0 Conclusion**

As I have argued elsewhere, judicial scrutiny of arbitral awards is not an entirely bad thing. It may very well give a stamp of approval to arbitral awards and processes. The integrity of the process is also assured by the knowledge that an award may be challenged or set aside. However, a delicate balance on how far judicial intrusiveness into the realm of arbitration should be permitted by statute is important to consider. Intervention by courts which may become obstructive rather than facilitative may end up undermining arbitration as a method of choice for resolution of commercial disputes in Kenya. Indeed, as the Court of Appeal observed in the *Nyutu* case, court intervention in arbitration should be facilitative and not obstructive. This would certainly not be appealing to the consumers of Arbitration as a principal method of attending commercial Justice. More so now that Kenya seeks to position itself as a regional hub for international commercial dispute resolution.

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## **The Evolution, Role and Effects of Dispute Boards in Construction Contracts**

*By: Hazron Maira\**

### *Abstract*

*This paper discusses the evolution, role and effects of Dispute Boards in construction contracts. In recent years, Dispute Boards have gradually developed to become the preferred Alternative Dispute Resolution mechanisms for avoiding and resolving disputes in large and complex as well as Multilateral Development Banks and International Financial Institutions funded construction projects across the globe. Avoiding disputes and resolving them as they occur enables the parties to a construction contract realise the benefits envisaged in the contract within projected time lines and costs. The paper reviews the various types of Dispute Boards and discusses Dispute Adjudication Board provisions in the 1999 edition of FIDIC Red Book Standard Contract Form, which is the indisputable type of Dispute Board commonly used internationally including in Kenya. Until recently, enforcement provisions of a Dispute Adjudication Board decision in the FIDIC Red Book that was not final and binding had “grey areas” and the paper examines a recent court case that resolved a protracted dispute concerning such a decision and establishes from the judgment that Board’s decisions are enforceable under the rubric of “pay now, argue later”.*

### **1.0 Introduction**

Standard contract forms have for many years been used in the construction industry for both buildings and engineering works. After the second world war, it was standard to provide in engineering projects contract forms that any dispute was to be referred to the Engineer in the first instance for resolution in a quasi-judicial manner, and referral for arbitration could only be done if one or both parties rejected the Engineer’s decision.<sup>1</sup> In 1970s, the contract provisions

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\* MSc in Construction Law & Dispute Resolution (King’s College, London), BA (Building Economics) Hons (UON), FCI Arb.

<sup>1</sup> See Institution of Civil Engineers (ICE) Conditions of Contract first published in 1945, 2nd Edition 1950, 3rd Edition 1951, 4th Edition 1955, 5th Edition 1973 and 6th Edition 1991; Association of Consulting Engineers, Overseas (Civil) Conditions of Contract (the ACE Form) published by ICE in 1956 that was based on its 4th Edition; and FIDIC’s First Edition of the Red Book that followed closely the fourth edition of the ICE Conditions

permitting an Architect or Engineer to act in a quasi-judicial role started losing support of the courts and the first setback occurred after the UK House of Lords ruled in *Sutcliffe v. Thackrah*<sup>2</sup> that Architects and Engineers could be sued in negligence. The decision overruled the earlier principle set out in *Chambers v. Goldthorpe*<sup>3</sup> that provided an Architect or Engineer was immune from suit in respect of certification of works on grounds of public policy that he or she was acting as a quasi-arbitrator.

The possibility of being liable in negligence heightened fears that awarding payments to contractors could rebound on the Architect or Engineer in liability. This possibility coupled with the then ongoing criticism of the quasi-judicial role of the Engineer in standard contract forms by various interest groups in the industry led by contractors brought into focus questions of the independence or the impartiality of the Engineer to assess and adjudicate claims and disputes especially because he or she was appointed and paid by the employer.<sup>4</sup> It was also not considered appropriate for the Engineer to decide disputes that may have concerned his or her own performance and judgment.<sup>5</sup> Employers too were critical of the practice and were accusing the engineers of favouring the contractors especially in awarding extensions of time, giving instructions and assessing claims.<sup>6</sup>

If the claim or dispute involved payment of money to the contractor, it was common for employers to withhold payments as they waited for resolution of disputes by arbitration or litigation. The delays in payments caused cash flow

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of contract and was referred to as "*Conditions of Contract (International) for Works of Civil Engineering Construction*" published in 1957, 2nd Edition 1969, 3rd Edition 1977 and 4th Edition 1987 that had the word "International" removed from the title to facilitate its use in domestic projects. (Cited in Nael G. Bunni, "The FIDIC Forms of Contract" (3rd Edition, 2005))

<sup>2</sup> [1974] A.C. 727

<sup>3</sup> [1901] 1 K.B. 624

<sup>4</sup> Christopher R. Seppälä, "The New FIDIC Provision for a Dispute Adjudication Board". IBLJ No. 8, 1997.

<sup>5</sup> Dr N. G. Bunni *et al.* (2001), Final Report on Construction Industry Arbitrations, ICC International Court of Arbitration Bulletin Vol. 12 No. 2

<sup>6</sup> Nael G. Bunni, "The FIDIC Forms of Contract" (3rd Edition, 2005), at p.182

difficulties to contractors,<sup>7</sup> and in accordance with the standard practice during those times, contractors partially insulated themselves from such eventualities by insisting on having "pay when paid" or "pay if paid" clauses in sub-contracts,<sup>8</sup> thus inflicting same difficulties to the supply chain. Moreover, arbitration or litigation were expensive and sometimes the process took place long after the disputes had crystallised when some people who were involved had moved on. This led to challenges in establishing some facts and parties had to occasionally rely on historical reconstructions of events. These factors contributed to the industry becoming very adversarial and during the sunset years of the twentieth century, calls for changes to among others, the dispute resolution provisions in standard contract forms were irresistible.

In the United States of America, the construction industry practices were different from those of its counterpart on the other side of the Atlantic, but the parties' attitudes towards one another were not much different. After the second world war, the "construction environment [had] been degraded from one of a positive relationship between all members of the project team to a contest consumed in fault finding and defensiveness which [resulted] in litigation. The industry [became] extremely adversarial" and it was necessary to re-examine the construction process particularly the relationships between contractors and subcontractors.<sup>9</sup> In 1970s, Dispute Review Boards (DRBs) were introduced and were to comprise of impartial professionals formed at the beginning of the

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<sup>7</sup>See *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 57, per Lord Justice Lawton: - "The Courts are aware of what happens in these building [and engineering] disputes; cases go either to arbitration or before an Official Referee; they drag on and on; the cash flow is held up... that sort of result is to be avoided if possible"

<sup>8</sup> See *Durabella Ltd v J. Jarvis & Sons Ltd* [2001] EWHC 454 (TCC), at para 19: - "There are two principal reasons for a "pay when paid" or "pay if paid" clause. First, all work has to be financed until payment is received. The clause extends the period for financing until payment is received and relieves the contractor of an obligation to do so until payment is received. Secondly, the risk of insolvency is shared proportionately."

<sup>9</sup>Newsletter from "The Dispute Avoidance and Resolution Task Force", (Dart), Washington D.C., February 1994 - Cited in Sir Michael Latham, *Constructing The Team*, Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry, Final Report (July 1994)

project to follow construction progress, encourage dispute avoidance, and assist in the resolution of disputes duration the construction of the project.<sup>10</sup>

Outside the United States, the reasons that led the adversarial nature of the industry and the interventions by the World Bank through recommendations for employers to adopt the US concept of DRB as the first step dispute resolution mechanism for projects it was funding led some regions to adopt the US format of DRB. Other regions incorporated some amendments and styled it to what is currently known as Dispute Adjudication Board (DAB). The term Dispute Board<sup>11</sup> is generic and refers to both DRB and DAB, both of which are perceived as appropriate for large and complex projects. The United Kingdom took a different approach and developed a procedure known as construction adjudication that was to encompass all construction projects irrespective of the size or complexity.<sup>12</sup> The procedure was later made statutory and the adjudication regime in the Construction Act applies to all contracts as defined by the Act, and parties can only incorporate the concept of DB in contracts that are not subject to the provisions of the Act,<sup>13</sup> or as a procedure for resolving the dispute before invoking the rights to adjudicate.<sup>14</sup>

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<sup>10</sup> See Dispute Resolution Board Foundation (DRBF) (2007), Introduction and Development of the DRB Concept. Available at: [https://www.drb.org/wp-content/uploads/2016/02/1.1\\_final\\_12-06.pdf](https://www.drb.org/wp-content/uploads/2016/02/1.1_final_12-06.pdf). [Accessed on 12 November 2017]; *Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd* [2013] EWHC 2001 (TCC), at para 16: – “One of the main ideas of having DRBs is that they can look at disputes as they emerge and make recommendations to the parties with a view to "nipping in the bud" such incipient disputes.”

<sup>11</sup> The term Dispute Board is used synonymously with the term “Dispute Resolution Board”. Other terms that have been used include Dispute Settlement Panel, Dispute Avoidance Panel and Dispute Conciliation Panel, (See Peter H.J. Chapman (2015), *The Use of Dispute Boards on Major Infrastructure Projects*, *The Turkish Commercial Law Review*, Volume 1 Issue 3)

<sup>12</sup> Sir Michael Latham, *Constructing The Team* (*supra* fn. 9).

<sup>13</sup> See for example *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC).

<sup>14</sup> *Secretary of State for Defence v Turner Estate Solutions Ltd* [2014] EWHC 244 (TCC), para 5.

The common objective of developing both Dispute Boards (DBs) and construction adjudication procedures was to provide a first step alternative dispute resolution mechanism that was fast and inexpensive and end the adversarial attitudes that had become inherent. To achieve the aim of this paper, it is not necessary to discuss construction adjudication further, and the discussion that follows is on DBs only. The paper traces the origin of DBs and their internationalisation, ascertains the mechanisms are used for both dispute avoidance and dispute resolution, and discusses the effects of DBs decisions.

## **2.0 What is a Dispute Board?**

Prof. Dr. Nael G. Bunni defines the term “Dispute Board” as follows;

“Dispute Board is a board composed of one or more (usually three) independent and impartial professionals, who are qualified, experienced and knowledgeable in the technical field of the project, appointed at the commencement of a project to track its progress and to be available at short notice to prevent disagreements from escalating into disputes; and to resolve disputes should they arise. In order to do so effectively, ideally the Board should be appointed at the commencement of the project so as to become very quickly familiar with its technical and contractual characteristics, and then continue to monitor its progress until completion”.<sup>15</sup>

## **3.0 History of Dispute Boards**

The concept of DBs originated in 1960s during the construction of a Boundary Dam in Washington, USA, where problems occurred during the course of the project and the contractor and employer agreed to appoint two professionals each to a four-member “Joint Consulting Board”, in order that the Board could provide non-binding suggestions.<sup>16</sup> Following successful conclusion of the

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<sup>15</sup> Nael G. Bunni, *op cit.*, at p.600.

<sup>16</sup> Nicholas Gould, Enforcing a Dispute Board’s decision: issues and considerations; Paper presented at the “*Introduction to International Adjudication Conference*” held at The Centre of Construction Law & Dispute Resolution, King’s College, London (June 29 and 30, 2011)

process, in 1972, the US National Committee on Tunnelling Technology sponsored a study to develop recommendations for improved contracting practices in the United States. The report entitled *Better Contracting for Underground Construction* was published in 1974 and it described the adverse effects of delays, claims, disputes and litigation on the construction process, and made recommendations aimed at mitigating this problem.<sup>17</sup>

In 1975, two years after completion of the first bore tunnel of the Eisenhower Tunnel in Colorado, a project that had a huge cost overrun and completion was two years late, in order to avoid a repeat of such a disastrous result, the first DRB was established for the construction of the second bore. That DRB heard four disputes and all were resolved before contract close-out and without litigation.<sup>18</sup> A follow up report of 1978 entitled *Better Management of Major Underground Construction Projects* recommended for among others, for an innovative methodology of resolving disputes contemporaneously with their occurrence and the implementation of DRBs.<sup>19</sup>

In 1980, the first DB outside United States was used in the construction of El Cajon Dam and Hydropower station in Honduras. The World Bank which was the financier instigated engagement of a US style DB to ensure on-time completion and within the budget.<sup>20</sup> The success of the DB at El Cajon, on which all disputes were resolved amicably by the time construction was complete, led the World Bank to suggest wider use of the technique for projects they financed.<sup>21</sup> Outside the Americas, the first known major project to use the concept of DB was the contract agreed in 1986 for the construction of the Channel Tunnel that connects the United Kingdom and The French Republic. In

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<sup>17</sup> Kathleen M. J. Harmon, "To Be or Not to Be - That is the Question: Is a DRB Right for Your project?" *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction*, Vol 3 No 1 (February 2011); DRBF (2007), (*supra* fn. 10)

<sup>18</sup> *Ibid*

<sup>19</sup> Kathleen M. J. Harmon (*supra* fn. 17)

<sup>20</sup> Peter H.J. Chapman (*supra* fn. 11)

<sup>21</sup> DRBF (2007), *Multinational Practice, History Revised*. Available at: [https://drb.org/wp-content/uploads/2016/02/4.2\\_final\\_12-06.pdf](https://drb.org/wp-content/uploads/2016/02/4.2_final_12-06.pdf). [Accessed on 25 October 2017]



that contract, the settlement of dispute clause provided that “if any dispute or difference shall arise between the employer and the contractor during the progress of the works ..., such dispute or difference shall at the instance of either the employer or the contractor in the first place be referred in writing to and be settled by a panel of three persons (acting as independent experts but not as arbitrators) ...”<sup>22</sup>

In 1995, the World Bank produced the first edition of its standard bidding documents for the procurement of works of civil Engineering construction, ‘SBDW’, and included as one of its mandatory provisions the use of a DRB for the resolution of disputes between the employer and the contractor.<sup>23</sup> In the same year, the International Federation of Consulting Engineers (FIDIC<sup>24</sup>) published a separate set of conditions for use on design-build turnkey contracts with major changes to the conditions of its Red Book<sup>25</sup>. In the new standard form, the type of Board chosen was Dispute Adjudication Board or Dispute Adjudication Expert.<sup>26</sup> Then in 1996, FIDIC published its Supplement to the Red Book by which it provided for the establishment of a Dispute Adjudication Board to replace the Engineer’s traditional role of a decision maker or quasi-arbitrator in the settlement of disputes. When it released its new suite of standard forms in 1999, FIDIC included DAB mechanism as the first step in the settlement of dispute procedure.<sup>27</sup>

In its new edition of the “Procurement of Works” published in 2000, the World Bank modified the Dispute Review Board procedure in its earlier edition and replaced it with FIDIC-style DAB.<sup>28</sup> In 2004, led by the World Bank and FIDIC, a group of Multilateral Development Banks and International Financial Institutions<sup>29</sup> embarked upon a process to harmonize and bring into alignment

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<sup>22</sup> *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334

<sup>23</sup> Nael G. Bunni, *op cit.*, at p.604

<sup>24</sup> French acronym for “Fédération Internationale Des Ingénieurs-Conseils”

<sup>25</sup> FIDIC classifies its suit of contract documents according to colour and collectively refers to them as "rainbow" of FIDIC contracts/agreements

<sup>26</sup> DRBF (2007), (*supra* fn. 21)

<sup>27</sup> Nael G. Bunni, *op cit.*, p. 604

<sup>28</sup> DRBF (2007), (*supra* fn. 21)

<sup>29</sup> The Participating Banks and Financial Institutions included; African Development Bank, Asian Development Bank, Black Sea Trade and Development Bank, Caribbean

the differing Dispute Review Board /Dispute Adjudication Board provisions, and in 2005, FIDIC published the Multilateral Development Bank Harmonised (MDBH) Edition of Conditions of Contract for Construction Works. The MDBH Edition was adopted for projects funded or partially funded by the Participating Development Banks and International Financial Institutions and its dispute resolution regime is a two-step process that requires the employer or the contractor in the first instance to refer any dispute to DAB.<sup>30</sup>

#### **4.0 Number of Dispute Board Members**

DBs may comprise of one or more members depending on the size and complexity of the project and the often-quoted membership of three is for guidance. For a large and complex project that involve a variety of disciplines, the number of DB members could be more than three; for example, in the construction of Hong Kong Airport, the contract provided for a Convenor (non-sitting) plus 6 members of various disciplines and selections of DB members were based on specialist knowledge and experience.<sup>31</sup> In the Channel Tunnel Rail Link project (the UK side high speed railway to London), the DB had two panels; a technical panel comprising of Engineers who gave decisions on construction related disputes and a finance panel who gave decisions on disputes concerning the financial provisions.<sup>32</sup>

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Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Islamic Development Bank and Nordic Development Fund (DRBF, (*supra* fn. 21))

<sup>30</sup> With reference to Kenya, see Paul Karekezi & Francis Kariuki, A Case for Statutory Adjudication in Kenya, (2017) 5(1) Alternative Dispute Resolution, at p. 20: - "For projects jointly funded by the government and multilateral development banks or other international finance institutions, the MDB Harmonised Edition .... [is] adopted in the majority of contracts."

<sup>31</sup> The Dispute Board Federation (2013), The Use of Dispute Boards in Public-Private Partnership Transactions. Available at: <https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Dispute%20Board%20Federation-%20Dispute%20Boards%20in%20Practice%20by%20Cyril%20Chern.pdf>.

[Accessed on 09 September 2017]

<sup>32</sup> Peter H.J. Chapman (*supra* fn. 11)

## 5.0 Types of Dispute Boards

The International Chamber of Commerce (ICC) Dispute Board Rules<sup>33</sup> identify three types of DBs.

### 5.1 Dispute Review Boards

DRB explores with the parties all open issues and urges the parties to resolve disputes that may otherwise eventually become formal claims. The DRB can also be asked to give non-binding, very informal advisory opinions on issues that have not become formal claims under the contract. DRB deals with arising issues in an informal hearing process and based on the parties' submissions, supporting documents and contract provisions, it issues non-binding findings and recommendations. The parties are free to accept the DRB's findings and recommendations, reject them, or keep negotiating based on their risk exposure, taking into account the DRB's analysis. The findings and recommendations (but not other records) of DRBs are usually admissible in subsequent proceedings.<sup>34</sup> The recommendation of DRB to tribunal or court would normally be expected to give some significant weight due to its experience and hands on approach.<sup>35</sup>

For a DRB appointed under ICC rules, it should issue a recommendation and the parties may voluntarily comply with it but are not required to do so. If a party is dissatisfied with the DRB recommendation, it should give a written notice to the other party and the DRB expressing its dissatisfaction within a stipulated time, and the dispute should finally be settled by arbitration or

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<sup>33</sup> International Chamber of Commerce (2015), Dispute Boards Rules. Available at: <https://cdn.iccwbo.org/content/uploads/sites/3/2015/09/ICC-dispute-board-rules-english-version.pdf>. [Accessed on 31 October 2017]

<sup>34</sup> Kurt Dettman and Christopher Miers, Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary. Paper presented at the "Introduction to International Adjudication Conference" held at The Centre of Construction Law & Dispute Resolution, King's College, London, (June 29 and 30, 2011); *Schulster Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corporation and City of San Diego* 111 Cal. App 4th 1328 (Sept. 12, 2003)

<sup>35</sup> John Wright, Dispute Boards and dispute avoidance, Paper presented at The CIARB East Anglia Branch Annual Summer Seminar (10 June 2011)

litigation. However, if neither party expresses dissatisfaction with the recommendation, it becomes final and binding after a prescribed time.<sup>36</sup>

## **5.2 Dispute Adjudication Boards**

DAB issues interim decisions that are binding on the parties as a term of the contract, and remain so until overturned by a formal dispute resolution procedure such as arbitration or litigation. Therefore, a party seeking to enforce a DAB decision has to do so either through arbitration or litigation or as agreed by the parties.<sup>37</sup>

DABs appointed under ICC rules may assist the parties in avoiding disputes and in resolving them through informal assistance. In the event of a formal referral, the DAB issues a decision that is binding on the parties and they must comply with it immediately. A party dissatisfied with the decision should give a written notice of dissatisfaction within a prescribed time limit, and the dispute should finally be settled by arbitration or litigation. If neither party gives a notice of dissatisfaction, the decision becomes final and binding after a prescribed time.<sup>38</sup>

## **5.3 Combined Dispute Boards**

This is a form of hybrid of both DRB and DAB. Combined Dispute Boards (CBDs) appointed under ICC rules may assist the parties in avoiding disputes and in resolving them through informal assistance. In the event of a formal referral, a CBD may render recommendations pursuant to provisions governing DRBs and may also render decisions pursuant to provisions governing DABs. If any party requests for a decision with respect to a given dispute and the other party does not object, the CBD issues a decision. If any party requests for a decision and the other party objects, the CBD makes a final decision on whether

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<sup>36</sup> *Ibid*, fn. 33

<sup>37</sup> Professor Doug Jones, Dispute Boards: Preventing and Resolving Disputes. Paper presented at “*The Growth of Dispute Boards Around the World*” DRBF Conference in Singapore (16 May 2014)

<sup>38</sup> *Ibid*, fn. 33

it would issue a recommendation or a decision depending on the circumstances of the case.<sup>39</sup>

## **6.0 Standing and *ad-hoc* Dispute Boards**

Standing and *ad-hoc* DBs are common in all the three types of DBs and the main difference between the two relates to the date of appointment. Both share similarities in that the date by when parties must make the appointment and the procedure to be followed would be included in the dispute resolution clause.

A standing DB is appointed at the commencement of the contract with its tenure lasting the whole construction period. In the Swiss Federal Tribunal (Swiss Supreme Court) case of *A.\_SA v. B.\_SA*,<sup>40</sup> the Tribunal outlined the rationale of appointing a “permanent” or “standing” DB and said the idea of having that variety of a Board is to facilitate speedy disposition of the disputes arising during the performance of the project without jeopardizing its continuation and having disputes decided by specialists appointed at the beginning of the contract and able to follow its implementation from the beginning to the end.

An *ad-hoc* DB is appointed as and when a dispute arises, and its mandate typically expires after it issues its decision or recommendations. This variety of DAB has the advantage of giving the parties an option of appointing an expert or experts with particular expertise in the area of the dispute or disputes which have arisen.<sup>41</sup>

## **7.0 Why are Dispute Boards commonly used and how Successful are they?**

Provisions governing operations of DBs including jurisdiction are included in the contract and in most cases, Dispute Boards are established at the commencement of the project. This enables the Dispute Board Members to have

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<sup>39</sup> *Ibid*, fn. 33

<sup>40</sup>4A\_124/2014: The translated and redacted copy is available at: <http://www.swissarbitrationdecisions.com/sites/default/files/7%20juillet%202014%204A%20124%202014.pdf>.

<sup>41</sup> C. R. Seppälä, “FIDIC’S New Standard Forms of Contract. Force Majeure, Claims, Disputes and other clauses.” Available at: [http://fidic.org/sites/default/files/18%20int\\_construction\\_law\\_feb04.pdf](http://fidic.org/sites/default/files/18%20int_construction_law_feb04.pdf) [Accessed on 15 December 2017]

an accumulated understanding of the project from inception and its personnel. With regular site visits, the members become part of the project and are able to deal with issues that could potentially escalate into fully crystallised disputes that can harm the business relationship between the parties and result in acrimonious arbitration or litigation. The availability of Dispute Board Members as and when required by the parties to deal with disagreements and disputes have proved to be effective in avoiding or early resolution of such disagreements and disputes thus giving certainty to parties in forecasting costs and reducing loss of productive times, both of which are considered to be the main ingredients for a successful implementation and conclusion of construction contracts.<sup>42</sup>

According to the data collected by the Dispute Resolution Board Foundation, as at April 2017, there were more than 2,700 projects from all over the globe with DBs that had been completed or were under construction with total cost exceeding USD 270 billion.<sup>43</sup> Further, project owner studies and analysis show 85-98% of recommendations/decisions have not been escalated to arbitration or litigation, thus delivering substantial cost and time savings.<sup>44</sup>

### **8.0 Dispute Adjudication Board in the Red Book of FIDIC Standard Contract Form, 1999 Edition.**<sup>45</sup>

In Kenya, DAB is the type of DB mechanism commonly used and this paper will focus on that process as provided in the Red Book of FIDIC Standard Contract Forms (the Red book), which is also the Standard Contract Form commonly

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<sup>42</sup> Nael G. Bunni, *op cit.*, at p. 601-602; DRBF (2007), Benefits, Available at: <https://www.drb.org/concept/manual/table-of-contents/>. [Accessed on 13 November 2017]; *Schulster Tunnels v. Traylor Brothers (supra* fn. 34)

<sup>43</sup> See DRBF (2007), DB Project Database. Available at: <https://drb.org/publications-data/drb-database/>. [Accessed on 13 November 2017]

<sup>44</sup> See DRBF (2007), FAQ. Available at: <https://drb.org/concept/faq/>. [Accessed on 13 November 2017]

<sup>45</sup> FIDIC launched new editions of some of its standard contracts forms on 05 December 2017, including the Red Book. When revised contract forms are launched, the standard practice in the industry is the revised editions are valid for new projects and not for projects already tendered or ongoing. The 1999 Edition of the Red Book is therefore expected to be in use until the projects governed by its provisions are closed out.

used internationally and some of its clauses have been subject of judicial interpretations in various jurisdictions. Further, the FIDIC-style DAB has been incorporated in the MDB Harmonised Edition of Conditions of Contract and therefore used in projects financed by the Participating Multilateral Development Banks and International Financial Institutions in Kenya.<sup>46</sup>

The Red book is described as the Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer. The Particular Conditions in the Red Book that were used by the World Bank in its Standard Bidding Documents before the introduction of the MDB Harmonised Edition in 2005 are incorporated in the MDB Construction Contract Edition.<sup>47</sup> The DABs provisions in both sets of documents are not considered to be significantly different.

The Red book provide for a “full term” or “standing” DAB. The book also gives parties an alternative option of allowing the Engineer to make pre-arbitral decisions if he *“is an independent professional consulting Engineer with the experience and resources required for the administration of all aspects of the contract”*. If this alternative is considered appropriate, the book gives guidance on suggested wording for the substituted clause as follows; *“The Engineer shall act as the DAB in accordance with this Sub-Clause 20.4, acting fairly, impartially and at the cost of the Employer”*. The author does not consider the second alternative to be relevant in fulfilling the objective of this paper and will not consider it any further.

The Red book standard form includes the following provisions on the DAB;

1. Under the sub-heading Claim, Disputes and Arbitration, sub-clauses 20.2 - 20.8 provides for the following on the DAB; appointment, failure to agree on appointment, obtaining a decision, amicable settlement, Arbitration, failure to comply with DAB’s decision and expiry of DAB’s appointment.

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<sup>46</sup> See fn. 30

<sup>47</sup> See FIDIC, Which FIDIC Contract should I use? Available at: <http://fidic.org/node/149>. [Accessed on 31 October 2017]

2. Appendix: General Conditions of Dispute Adjudication Agreement;
3. Annex: Procedural Rules
4. Dispute Adjudication Agreement (for a one-person DAB and for each member of a three-person DAB)

What is significant in the above outline is that the Red book is a self-contained Standard Contract Form with provisions that provide for both construction works and consultancy services. Accordingly, the discussions that follow are based on provisions from both construction and consultancy services.

## **8.1 The Role of Dispute Adjudication Board**

The role of DAB in the Red Book is two-fold;

### *8.1.1 Dispute avoidance*

By sub-clause 20.2 seventh paragraph, it is provided that if at any time the parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. The natural meaning of this sub-clause is perceived as performing the role of dispute avoidance during the performance of the contract and by seeking a DAB opinion, the parties would be hoping to determine their rights and obligations without subjecting themselves to the adversity of a dispute resolution procedure.

Under Article 5 of the Dispute Board Agreement, reference of a matter to DAB for an opinion is to an extent restricted by the requirement that prohibits the Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel from requesting advice from or consultation with the DAB member(s) on matters regarding the Contract, otherwise than in the normal course of the DAB's activities under the Contract and the Dispute Board Agreement.

### *8.1.2 Dispute Resolution.*

Before reviewing the express provisions in the contract, it is appropriate to note that not all disagreements or differences of opinions should be deemed to be disputes and therefore referable to DAB. In terms of what constitutes a "dispute



or difference" fit to be referred for determination in accordance with the disputes resolution procedure incorporated in a construction contract involving a contractor and an Engineer, with reference to a contract incorporating the Institution of Civil Engineers standard form, 4th edition, Lord Denning MR formulated a useful guidance in the following terms;

*"The first point is this: was there any dispute or difference arising between the contractors and the Engineer? It is accepted that in order that a dispute or difference can arise on this contract, there must in the first place be a claim by the contractor. Until that claim is rejected you cannot say that there is a dispute or difference. There must be both a claim and a rejection of it in order to constitute a dispute or difference."*<sup>48</sup>

With reference to the Red book, Bunni agrees the same principle applies and says it is only if and when the Engineer's determination of a claim is rejected by either party that a dispute comes into existence between the parties.<sup>49</sup> In other instances, where there is no express rejection of a claim and the Engineer does not give a response to the contractor's claim within the time limits in the contract, the Engineer is taken not to have admitted that claim and thus a dispute arises.<sup>50</sup> Likewise, if the contractor submits a claim and the Engineer gives responses that are non-committal or is seen as avoiding making any effective response, the prevarication gives rise to the inference the claim is not admitted and there is a dispute.<sup>51</sup>

By the first paragraph of sub-clause 20.4, the Red Book contract form provides that if a dispute (of any kind whatsoever) arises between the parties in connection with, or arising out of, the Contract or the execution of the Works,

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<sup>48</sup> *Monmouthshire County Council v Costelloe & Kemple Ltd* (1965) 5 BLR 83

<sup>49</sup> Nael G. Bunni, *op cit.*, at p. 627

<sup>50</sup> *Tradax International v Cerrahogullari* TAS [1981] 3 All ER 344, 350:

<sup>51</sup> *Ellerine Brothers (Pty) Ltd v Klinger* [1982] 1 WLR 175, at p. 381: Templeman LJ said; "But the fact that the [contractor] make[s] certain claims which, if disputed, would be referable [to the DB] and the fact that the [Engineer] then does nothing - he does not admit the claim, he merely continues a policy of masterful inactivity - does not mean that there is no dispute. There is a dispute until the [Engineer] admits that a sum is due and payable, as Kerr J said in the *Tradax* case."

including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either party may refer the dispute in writing to the DAB for its decision. For the purposes of making a decision on a dispute, the DAB shall be deemed to be not acting as arbitrator(s).<sup>52</sup>

A provision worth noting in the Dispute Adjudication Agreement is that unless it is otherwise agreed in writing by the Employer and the Contractor, the DAB members are not liable for any claims for anything done or omitted in the discharge or purported discharge of their functions, unless the act or omission is shown to have been in bad faith.<sup>53</sup>

## **8.2 Procedure for Resolving a Dispute**

Steps to be taken in resolving disputes referred to a DAB;

### *8.2.1 Engineer's Decision*

Sub-clause 20.1 entitles the contractor to give a notice of a claim to the Engineer followed by submission of the details including supporting particulars. The Engineer is then required to agree or make a determination within a prescribed time.

### *8.2.2 DAB Decision*

If either party is dissatisfied with the Engineer's decision, then a dispute is deemed to have crystallised and is then referred to DAB. By Sub-clause 20.4, DAB is to give a reasoned decision within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both parties. The decision shall be binding on both parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or

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<sup>52</sup> The main distinguishing feature is while an arbitrator is chosen to exercise a quasi-judicial function and to resolve a dispute based upon submissions by the parties, a Dispute Board is chosen for its expertise in a certain subject matter and often does its own investigation or appreciation of the issue, with or without submissions by the parties. (See; The Dispute Board Federation (*supra* fn. 31)

<sup>53</sup> A DAB process is an Expert Determination and following the decision of the House of Lords in *Sutcliffe v Thackrah* (*supra* fn. 2) and *Arenson v Arenson* [1977] A.C. 405, Experts are liable to an action in negligence and the limited immunity in the Red Book insulates DAB members against harassment for actions by disappointed parties.

an arbitral award as described below. A DAB decision may be submitted as evidence in a later arbitration.

### *8.2.3 Notice of Dissatisfaction*

By Sub-clause 20.4 paragraph 5, if either Party is dissatisfied with the DAB's decision, then either party may, within 28 days after receiving the decision, give a Notice of Dissatisfaction (NOD). If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving reference of a dispute, then either party may, within 28 days after this period has expired, give a NOD to the other Party. The effect of giving a NOD is that it renders the DAB decision binding but not final, while a failure to give it renders the DAB decision final and binding upon both parties.

### *8.2.4 Amicable Settlement*

Sub-clause 20.5 provides that where a Notice of Dissatisfaction has been given as above, both parties shall attempt to settle the dispute amicably. If they do not amicably resolve the issues within 56 days after the day on which NOD was given, arbitration may be commenced, unless both parties agree otherwise, even if no attempt at amicable settlement has been made.<sup>54</sup>

### *8.2.5 Arbitration*

By Sub-clause 20.6, any dispute between the parties arising out of or in connection with the Contract not settled amicably in accordance with Sub-Clause 20.5 and in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by arbitration. The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute.

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<sup>54</sup> This is perceived as helpful or necessary to enable certain bodies such as State owned to participate in settlement discussions at this stage as, in the absence of such a provision, such participation could be seen as an unacceptable sign of weakness or capitulation in the face of threatened arbitration - see Christopher R. Seppälä (*supra* fn. 4)

In the event a party fails to comply with any decision of DAB, whether binding or final and binding, sub-clause 20.7 provides that the other party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.6 for summary or other expedited relief, as may be appropriate. Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 shall not apply to this reference.

### **8.3 Procedural Rules**

The procedural rules annexed to the contract comprise of several provisions including;

- 1) If any dispute is referred to the DAB, it shall;
  - a. act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case,
  - b. adopt procedures suitable to the dispute, avoiding unnecessary delay or expense
- 2) The DAB may conduct a hearing on the dispute, in which event it will decide on the date and place for the hearing.
- 3) The DAB shall not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties. Thereafter, the DB shall make and give its decision in accordance with Sub-Clause 20.4, or as otherwise agreed by the employer and the contractor in writing.

A DAB member who breaches a procedural rule could lead to the termination of his or her services and courts will uphold such terminations. In *Los Angeles County Metropolitan Transportation Authority v Shea-Kiewit-Kenny*,<sup>55</sup> the case concerned termination of appointment of a DRB member and similar procedural rules as above governed the relationship between DRB members and the parties. In its decision, the California Court of Appeal upheld the lower

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<sup>55</sup> (1997) 59 Cal. App. 4th 676

court's decision on termination of appointment of the DRB member whom it found had breached prohibition against *ex parte* communications when he expressed his opinion on an issue in dispute to one of the parties before the hearing was completed. The Judge said that the members of the DRB are bound by contractually imposed duties, including a duty to act impartially and independently in the consideration of facts and circumstances surrounding any dispute; and a duty to refrain from giving any advice to either party on the conduct of the work or resolution of problems other than disputes formally referred to the DRB for which written recommendations are issued.

#### **8.4 The Singapore Case of PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation**

The case concerned a dispute between *PT Perusahaan Gas Negara (Persero) TBK (PGN) v CRW Joint Operation (CRW)*,<sup>56</sup> and the contract between the parties was governed by the standard provisions of the FIDIC Conditions of Contract for Construction (1st Edition, 1999) ("the 1999 Red Book"), with some modifications. A dispute arose between the parties and pursuant to sub-clause 20.4 of the Conditions of Contract, the parties referred it to DAB. The DAB heard the dispute, rendered a decision and ordered PGN to pay CRW the "Adjudicated Sum" of US\$17million, which PGN refused to pay despite the contract having a provision requiring the parties to comply with DAB decisions. In the saga that ensued, there were two arbitrations,<sup>57</sup> two high court decisions,<sup>58</sup> two court of appeal decisions,<sup>59</sup> and it took six years to resolve the dispute.

It suffices for the aim of this paper to state that in the second arbitration, the tribunal by majority issued an Interim Award and ordered PGN to pay CRW "the Adjudicated Sum" of US\$17million, and in the second high court case, CRW was granted leave to enforce the Interim Award against PGN in the same manner as a court judgment. The two questions in the second court of appeal case were whether the Interim Award ordering PGN to pay CRW a sum of

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<sup>56</sup> See fn. 58 & 59

<sup>57</sup> ICC International Court of Arbitration Case No. 16122/CYK (2009) cited severally in case [2010] SGHC 202 & 18272/CYK (2011) cited in case [2015] SGCA 30 at para 112.

<sup>58</sup> [2010] SGHC 202 & [2014] SGHC 146

<sup>59</sup> [2011] SGCA 33 & [2015] SGCA 30

US\$17 million should be set aside, and whether the order of court granting CRW leave to enforce the Interim Award against PGN in the same manner as a court judgment should be set aside. The court declined to set aside both the Interim Award and the high court order, and the judgment has useful guidance on the interpretation of sub-clauses 20.4 and 20.6 of the 1999 Red Book Conditions of Contract.

#### *8.4.1 Obligations and Rights of Parties Following A DAB Decision*

With reference to sub-clause 20.4, the court stated that the clause imposes one distinct contractual obligation on the parties and confers a conditional right on a party who wishes to challenge a DAB decision. First, as to the obligation, the sub-clause imposes an affirmative obligation on the parties to “*promptly give effect to [a DAB decision]*”. In particular, the paying party (i.e., the party that is required to make any payment under the DAB’s decision) has a contractual obligation to pay promptly, notwithstanding its views on the merits of the DAB’s decision.<sup>60</sup> The issuance of an NOD, initiated by a party with a view to having the DAB decision reviewed, does not and cannot displace the binding nature of a DAB decision or the parties’ concomitant obligation to promptly give effect to and implement it.<sup>61</sup> Secondly, a dissatisfied party (usually the paying party) who wishes to challenge a DAB decision must issue an NOD, and thereafter first attempt to amicably settle its disagreement with the DAB decision with the other party. It is only if no amicable settlement is reached or if no attempt at amicable settlement is made that the dissatisfied party has, after 56 days from the date of issuance of the NOD, the right to refer the merits of the DAB decision to arbitration.<sup>62</sup>

#### *8.4.2 The Effects of a DAB Decision*

One point that seemed to have attracted almost universal acceptance in the case was that clause 20.4 evinces a clear intention for parties to *promptly* comply with a DAB decision, irrespective of any disagreement or dissatisfaction with it. This,

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<sup>60</sup> *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30, at para 55

<sup>61</sup> *Ibid*, para 57(c)

<sup>62</sup> *Ibid*, para 58

the court said serves the vital objective of safeguarding cash flow in the building and construction industry, especially that of the contractor, who is usually the receiving party. It (the court) reasoned that the intention underlying sub-clause 20.4 would be completely undermined if the receiving party were restricted to treating the paying party's non-compliance as a breach of contract that sounds only in damages and must be pursued before the available domestic courts.<sup>63</sup>

In addition, the court cited two separate concerns as to why it may be vital that parties *promptly* comply with a DAB decision; first, the court referred to a paragraph in a published article by Prof Nael G Bunni entitled "The Gap in Sub-clause 20.7 of the 1999 FIDIC Contracts for Major Works" [2005] ICLR 272, at p. 278, where he suggested that if the "[DAB's decision] involves a large sum of money to be paid to the contractor who is experiencing financial difficulties, then the employer's failure to make such payment promptly might mean the difference between the contractor on the one hand being able to afford to continue in the arbitration; and on the other hand being under such economic pressure that he is forced to concede to the employer. ...", and second, the court referred to the second high court decision where the Judge observed that contractors performed their obligations in advance of payments and since a payment dispute with an employer takes time and money to settle on the merits and finality, failure to make prompt payment invariably disrupts the contractor's cash flow, and such a disruption can have serious and sometimes permanent consequences for the contractor. That potential disruption gives the employer significant leverage in any negotiations between the parties for compromise.<sup>64</sup>

#### *8.4.3 The Interim or Partial Arbitral Award and the Merits of the DAB Decision*

The court noted that a NOD issued in respect of a DAB decision is capable of covering the paying party's dissatisfaction with two different aspects of the DAB decision: (a) the quantum that it is required to pay the receiving party; and (b) the need to make *prompt* payment of that sum. The dispute over the paying party's failure to *promptly* comply with its obligation to pay the sum that the

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<sup>63</sup> *Ibid*, para 71

<sup>64</sup> *Ibid*, paras 73 & 74

DAB finds it is liable to pay is a dispute in its own right which is capable of being “finally settled by international arbitration” and it can be referred to a separate arbitration.<sup>65</sup> Where both the dispute over the paying party’s non-compliance with a binding but non-final DAB decision as well as the dispute over the merits of that DAB decision are put before the same tribunal, the tribunal can: (a) make an interim or partial award which finally disposes of the first issue (i.e., whether the paying party has to promptly comply with the DAB decision); (b) then proceed to consider the second issue (i.e., the merits of the DAB decision), which is a separate and conceptually distinct matter; and (c) subsequently, make a final determination of the underlying dispute between the parties.<sup>66</sup>

#### *8.4.4 Is Set-Off Against a DAB Decision Permissible?*

The court further emphasised the need for compliance with DAB’s decision and stated that any application by the paying party to set off against sum adjudicated by DAB is not permissible because the tribunal’s Interim Award is a final determination as to the paying party’s obligations to make prompt payment. Once the award on the merits of the parties’ underlying dispute had been issued, inevitably, an account would have to be taken of the amounts actually due one way or the other, as well as of any payments that might already have been made. But, an award on the merits of DAB decision, if eventually made, would not alter the Interim Award or render it any less final, but the inevitable monetary *consequences and effects* that flow from the Interim Award.<sup>67</sup>

#### *8.4.5 Issuance of NOD as a Condition Precedent to Arbitration*

The court also said the issuance of a NOD is a condition precedent to a dissatisfied party’s ability to seek a review of a DAB decision on the merits through either negotiation aimed at amicable settlement or arbitration.<sup>68</sup> Earlier, it was observed that failure to give a NOD renders the DAB decision final and binding upon both parties. This notwithstanding, it is also appropriate to look

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<sup>65</sup> *Ibid*, para 83

<sup>66</sup> *Ibid*, para 88

<sup>67</sup> *Ibid*, para 99

<sup>68</sup> *Ibid*, para 59



at what common law provides with respect to condition precedent clauses and the general effect.

In the House of Lords case of *Bremer Handelsgesellschaft mbH v Vanden Avenne Izegem PVBA*,<sup>69</sup> the court held that for a notice to amount to a condition precedent, the time for service must be set out and the notice makes it clear that failure to serve will result in a loss of rights under the contract. Applying this principle to the NOD sub-clause, the starting point is to observe that in the NOD sub-clause, it is not expressly stated what right would be lost. Therefore, the natural meaning of the sub-clause leads to a conclusion that a dissatisfied party failing to give a NOD loses the right to revisit issues in dispute that had been subject of a DAB decision, thus giving the other party a double-edged sword that bars the dissatisfied party from revisiting both the claim and any issues that relates to it.

### **8.5 Enforcement of a Dispute Adjudication Board Decision**

The court's interpretation of the clauses 20.4 and 20.6 in *PT Perusahaan v CRW* case that parties must "*promptly give effect to [a DAB decision]*" irrespective of any disagreement or dissatisfaction with it reinforces the adage "*pay now, argue later*" as the approach in enforcing DAB decisions in the 1999 Red Book.<sup>70</sup>

For a DAB decision that has become final and binding upon the parties, a party that fails to comply with such a decision would be in breach of contract and the other party retains a right to seek for enforcement in either of the following two ways; (i) enforcement of expert's decision in accordance with rights available to

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<sup>69</sup> [1978] 2 Lloyd's Rep 109

<sup>70</sup> See Eugene Tan and Rupert Coldwell (Clyde & Co. LLP), "Another (Unsuccessful) Challenge to the Finality of Interim Arbitral Awards in Singapore and Enforcing DAB Decisions on International Projects under FIDIC", Kluwer Arbitration Blog (June 15, 2015). Available at: <http://arbitrationblog.kluwerarbitration.com/2015/06/15/another-unsuccessful-challenge-to-the-finality-of-interim-arbitral-awards-in-singapore-and-enforcing-dab-decisions-on-international-projects-under-fidic/>. [Accessed on 11 January 2018].

him or her, or (ii) refer it for arbitration and seek for transformation, if satisfactory and appropriate, of the decision into an arbitral award.<sup>71</sup>

## **9.0 Conclusion**

Within the relatively short period DBs have been in existence, they have evolved and become the internationally accepted mechanisms for avoiding and resolving disputes in huge and complex construction projects. Multilateral Development Banks and Major International Financiers have also embraced the concept of DBs and require States and Institutions seeking funding to adopt a standard contract form approved by them that incorporate dispute resolution clauses with DAB as the first step mechanism for resolving disputes.

Unless expressly provided in the dispute resolution agreement, a DRB issues advisory opinions or non-binding recommendations of the parties' rights and obligations and it is for the parties to decide on the next course of action including opting for a negotiated settlement. With DRBs' recommendations being admissible in latter arbitral or judicial proceedings that deals with the same dispute, the chances of getting a decision with different findings are often remote and parties avoids spending more time and money on disputed issues by opting to use DRBs recommendations as basis for settlements.

An *ad-hoc* DB is appointed with the objective of adjudicating a dispute in accordance with the terms of its appointment. The role of DAB in the FIDIC Red book includes a dispute avoidance process of giving an opinion on a matter referred by the parties. The standard form also expressly provides for a dispute resolution by DAB if and when one or both parties do not agree with a decision of the Engineer. A decision of DAB is binding, and parties must promptly comply with it. The purpose of issuing a NOD is not to negate the binding effects of a DAB decision but to give parties another chance to amicably settle the dispute or have it finally settled through arbitration. If no NOD is given, the decision becomes final and binding.

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<sup>71</sup> Christopher R. Seppälä (*supra* fn. 4). For more information on enforcement of an expert decision and arbitral award, see Hazron Maira, *Arbitration and Expert Determination: A Comparative Overview of the Differences between the Two Mechanisms*. (2017) 5(1) *Alternative Dispute Resolution*, pages 124-127.

The process by DBs of resolving disputes and disagreements as they occur as opposed to procrastinating and settling them at the end of the contract has the effect of improving the contractor's cash flow thus avoiding unnecessary delays and associated cost overruns. This enables the works to be completed on schedule, thus allowing both the employer and the contractor realise the benefits contemplated at the time of concluding the contract, as well as helping maintain ongoing commercial relationships. Moreover, by having a DB as the first step under the dispute resolution regime prescribed in the Contract, the jurisdiction of the arbitral tribunal is restricted to the dispute(s) previously submitted and adjudicated by the DB.

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## **Making Africa Arbitration-Friendly: Challenges and Opportunities for Africa's Growing Economies**

*By: Christopher Oyier Ogweno\**

### **Abstract**

*Due to the growing volume of trade and international investment in Africa, dispute resolution has become a key concern for stakeholders at various levels. A fair and equal partnership between investors, African governments and the private sector is necessary to idealize foreign investment in Africa and enhance trade. Historically, most commercial disputes originating in Africa have been subcontracted to European arbitration destinations at the preference of foreign or even local investors. For foreign investors, the preference of arbitration destinations outside Africa may reflect their misgivings about the arbitration institutions in Africa or sheer eurocentrism. Conversely, local investors' preference for external arbitration may be driven by their unpleasant experiences or observations in pursuing local arbitration. This paper argues that Africa has clear capability to arbitrate international commercial disputes through readjustment of the prevailing arbitration culture and increased collaboration in the field of commercial arbitration.*

### **1.0 Introduction**

Arbitration is not a new phenomenon in Africa. It predates colonialism and has been the dominant mode of resolving disputes alongside conciliation, negotiation and mediation. It in fact resembles customary legal methods of dispute resolution. International commercial arbitration is also not entirely new in Africa. The upsurge in global trade and investment has progressively called for the adoption and application of uniform legal rules in the area of international commercial arbitration. This has led to rapid evolution of legal rules, practices and institutional arrangements for resolution of international

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\*LLB (Hons) (University of Nairobi), LLM (University of Nairobi-ongoing) Postgraduate Diploma in Law (Kenya School of Law-ongoing). The Author wishes to acknowledge Dr. Kariuki Muigua for his teaching, mentorship and encouragement in preparation of this paper.



disputes by arbitration.<sup>1</sup> In Western countries, the flurry of activities in so far as international arbitration is concerned, has been expressed by amendments to existing laws to bring them in line with the growing body of generally accepted provisions on arbitration coupled with liberal practices and modification of rules for the enforceability of agreements to arbitrate.<sup>2</sup> Contemporary scholars have noted that despite this unification and massive liberalization, African countries have had minimal representation and participation in the field of harmonization, unification and modernization of the law of international trade.<sup>3</sup> This paper will critically discuss the peculiar challenges to international commercial arbitration in Africa, and highlight opportunities towards its growth.

## **2.0 Challenges facing International Commercial Arbitration in Africa**

Whilst investment in Africa has substantially grown, many international commercial disputes arising in Africa are still being resolved at international arbitration centres outside the continent. In essence, while the option is open for parties to commercial transactions to refer their disputes to arbitral institutions in Africa, most prefer to 'export' their matters to London or Paris under the rules of large international arbitral institutions.<sup>4</sup> This highlights the averse attitude towards arbitration centers based in Africa. Although the centres are gradually gaining ground with local investors, more needs to be done to ensure that arbitration disputes arising in Africa are resolved in Africa. Hence the need to understand the existing and potential challenges to arbitration in Africa. According to Paul Ngotho, some of the challenges facing international

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<sup>1</sup> Samson L. Sempasa, "Obstacles to International Commercial Arbitration in African Countries" (April 1992) 41 *The International and Comparative Law Quarterly*, 2, 388.

<sup>2</sup> *Ibid*, 389.

<sup>3</sup> Schmitthoff, "Progressive Development of the Law of International Trade", in Report of the Secretary General (UN Doc.A/6396, para.210), reprinted in (1968-70) I(1) UNCITRAL Y.B. II.

<sup>4</sup> Steven Finizio & Thomas Führich, "Africa's Advance' Africa - Expert View: Surveying Africa - Commercial Dispute Resolution, (May-June 2014) Centre for Dispute Resolution, 26.

commercial arbitration are Afrocentric while others are universal.<sup>5</sup> He also notes that even the universal ones may be compounded when they occur in Africa. At the at the London Court of International Arbitration (LCIA), Africa-related arbitrations have surged from two in 2002 to 30 in 2013, which accounts for 10% of its total arbitration caseload.<sup>6</sup> The predominant challenges to commercial arbitration in Africa are discussed below.

### **2.1 Incongruous Colonial History of African Countries and Its Influence on Arbitration Legislation**

Owing to colonial history, the influence of English law of arbitration in the former East and Central African colonial countries of Kenya, Uganda, Tanzania, Zambia, Malawi and Seychelles is quite different from the influence of continental arbitration legislation in the former French Belgian and Portuguese colonies of Angola, Mozambique, Madagascar, Mauritius, Rwanda and Burundi, and different still from the experiences of countries under the dual English and Roman-Dutch legal systems in the southern Africa States of Botswana, Lesotho, Swaziland and Zimbabwe.<sup>7</sup>

Apart from the historically common law and civil law heritage, there are various customary laws, laws based on certain faiths, for example, Islamic or Sharia and African traditional religions, that run through the African legal systems. This diversity presents a major challenge in realizing uniform arbitration practice and rules that can be consistently applied in throughout Africa.

### **2.2 Politicization of Commercial Disputes in Africa**

National politics is at the heart of understanding how commercial arbitration works in Africa. International commercial disputes often involve huge capital investments with colossal sums of money. Disputes often revolve around large infrastructural projects, leasing and sale of land, natural resources such as oil

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<sup>5</sup> Paul Ngotho, "Challenges facing Arbitrators in Africa" presentation at the East Africa International Arbitration Conference at The Norfolk Hotel, Nairobi - JULY 28-29, 2014 at [www.ngotho.co.ke](http://www.ngotho.co.ke) accessed on 14/1/2018.

<sup>6</sup> Ibid.

<sup>7</sup> Sempasa, 391.

and gas, and public expenditure. For instance, at the International Centre for Settlement of Investment Disputes (ICSID), which handles major investment treaty disputes often governed by bilateral investment treaties (BITs), oil, gas and mining accounted for 26% of its disputes, while construction, power, water and transportation accounted for a further 37% of its arbitration hearings.<sup>8</sup>

The obvious public interest in such disputes has resulted to unnecessary political infiltration of the arbitral process. The vested political interests are thus a major concern to the international investors and multinational companies (MNCs) that may wish to pursue commerce in Africa. Alternatively, the MNCs and international investors agree to invest on condition that disputes that arise will be resolved by 'impartial' arbitral institutions in the West.

### **2.3 Interference by National Courts**

Kariuki Muigua<sup>9</sup> notes that courts exercise authority over arbitration matters either as a matter of statutory or inherent powers. National arbitral legislations may thus give national courts the powers to intervene in arbitration proceedings. Court interference intimidates investors since they are never sure what reasoning the court might adopt should it be called upon to deliberate on international commercial disputes.<sup>10</sup> For instance, the Ugandan Arbitration and Conciliation Act, 2000<sup>11</sup> provides under section 34 that the High Court may set aside the award if it finds that it is against the public policy of Uganda. A similar entrenchment is found in section 35 (2) (b) of the Kenyan Arbitration Act. The Kenyan Constitution also potentially allows interference with the arbitral process if there are alleged violations of various human rights such as natural

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<sup>8</sup> Anthony Notaras & Jodi Bartle, "Arbitration in Africa: High stakes and big claims in resolving disputes in Africa" (2015) *Legal Business*, 104.

<sup>9</sup> Kariuki Muigua, "Promoting International Commercial Arbitration in Africa" (2014) East Africa International Arbitration Conference at The Norfolk Hotel, Nairobi - JULY 28-29, 2014 at < <http://ciarbkkenya.org/assets/promoting-international-commercial-arbitration-in-africa-eaia-conference-presentation.pdf>> accessed on 20/1/2018.

<sup>10</sup> *Ibid*, 5.

<sup>11</sup> (Ch 4)23.

justice and access to information.<sup>12</sup> While most arbitral laws permit such interventions from courts, commercial stakeholders legitimately fear the mortal consequences of court action should subsequent arbitral awards be set aside by courts on such grounds.

#### **2.4 Perceptions of Corruption**

While corruption is not an exclusively an African phenomenon, observations of corruption in Africa are not far from truth. African countries reportedly consist a majority of the most corrupt counties in the world.<sup>13</sup> The accuracy of such reports may be debatable as there are multiple underlying interests to such information. Nevertheless, perceptions of corruption have been reflected in the economic and political cycles of many African counties. Corrupt dealings between potential investors unscrupulous government officials to land lucrative tenders and trade deals have come to the fore in subsequent public procurement disputes. The potential of the enforceability of arbitral agreements tainted with corruption was highlighted in the Kenyan case subsequently discussed.

In *World Duty Free Company Limited v the Republic of Kenya*,<sup>14</sup> the claimant alleged that the Kenyan government had expropriated its duty-free complexes in Kenya. Kenya alleged that its underlying agreement with the claimant was unenforceable because it had been obtained with a 'personal donation' of \$ 2 million to the incumbent president. Based on its conclusion that bribery was against transnational public policy, the ICSID tribunal held that the contract was void and dismissed the claimant's allegations.

#### **2.5 Mistrust and Suspicion**

Multinationals have extensively lobbied for liberal arbitration rules through institutions such as the International Chamber of Commerce. The resulting rules

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<sup>12</sup>Kariuki Muigua, "Constitutional Supremacy over Arbitration in Kenya" at <[http://www.kmco.co.ke/attachments/article/120/Constitutional%20Supremacy%20over%20Arbitration%20in%20Kenya\\_03\\_dec.pdf](http://www.kmco.co.ke/attachments/article/120/Constitutional%20Supremacy%20over%20Arbitration%20in%20Kenya_03_dec.pdf)> accessed on 20/1/2018.

<sup>13</sup> According to *Forbes 2016 Corruption Index*, Somalia, South Sudan, Libya, Sudan, Nigeria, and Kenya were listed as some of the most corrupt countries globally.

<sup>14</sup> ICSID Case No. ARB/00/7.

are passed on as representing global consensus of modern commercial practice while in real sense, they represent the underlying interests of the multinational corporations.

The suspicions are symptomatized by the systematic referral of arbitral matters outside of Africa and exacerbated by the perceived preference for non-African arbitrators.<sup>15</sup> Consequently, African States resort to the familiar option of litigation of international disputes. Speculation is also rife that rules of international investment arbitrations have been particularly developed so as to benefit large multilateral corporations at the expense of poor developing states.

## **2.6 Institutional Weaknesses**

Institutional structures such as the ICC, AAA, and LCIA, which the arbitration momentum in the West, have largely been absent in African continent.<sup>16</sup> The effect of this can be discussed in twofold. First, is that there is lack of up-to-date information about the progressive development arbitration process in the area of international commerce. Secondly, the applicable rules, forms and processes in most international commercial arbitrations largely embody the ideals of the Western arbitration centres. The absence of African input is overwhelmingly regretted as African parties (private or state entities) have to submit to the rules developed from practice in the Western states.

Regional institutions in Africa have not convincingly stamped their authority in international commercial arbitration. Their appeal as centers of global dispute resolution is minimal hence they attract few matters. In some instances, the national laws where the centres are located allow undue court interruption in the arbitral process. Other institutional weaknesses include funding limitations that compromise the centres' ability to maintain a proper secretariat and retain highly-qualified staff.

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<sup>15</sup>Chanu Peiris, "International Arbitration and Developing Countries: What are the Benefits and what is the Way?" *Forward?* (2014) 4.

<sup>16</sup>Sempasa, 395.

## **2.7 Political and Civil Unrest**

Political and civil unrest present fundamental obstacles to the conduct of arbitral proceedings and the enforcement of awards. Many states in sub-Saharan Africa are plagued with political turmoil that essentially frustrates any attempts to conduct arbitration in the specific countries or enforce awards against them. Current examples include South Sudan, Democratic Republic of Congo (DRC), Somalia, and Burundi. Investors and corporations in these countries may well be aware of the high risks that they may not get arbitral awards enforced in these jurisdictions. This wards off potential investors who view the existence of conducive executive machinery and supportive legal infrastructure as potential investment attraction determinants.

## **3.0 Opportunities for International Commercial Arbitration in Africa**

Foreign investment in Africa grows, so does the demand for dispute resolution. Reports indicate that in 20 years, foreign direct investment (FDI) rose by 853% from just over \$6bn in 1994 to \$57.2bn in 2013, compared to a global average of 466% growth.<sup>17</sup> It invariably follows that there has been tremendous increase in international arbitrations involving Africa. At the International Chamber of Commerce (ICC), the number of African parties involved in ICC arbitrations more than doubled in the past ten years, from 68 in 2005 to 163 in 2014.<sup>18</sup> Further in 2016, the ICC reported an approximate 50% increase in the number of participating parties in ICC arbitration in North and Sub-Saharan Africa.<sup>19</sup> Against the challenges discussed and the consistent increase in the volume of arbitrations involving Africa, the following are some brief recommendations on how to make the continent a global arbitration hub.

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<sup>17</sup>Anthony Notaras & Jodi Bartle, "Arbitration in Africa: High stakes and big claims in resolving disputes in Africa" (2015) *Legal Business*, 104.

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

<sup>19</sup>International Chamber of Commerce (ICC), "ICC reveals record number of new Arbitration cases filed in 2016" (Paris, 18/01/2017) at < <https://iccwbo.org/media-wall/news-speeches/icc-reveals-record-number-new-arbitration-cases-filed-2016/> > accessed on 24/1/2018.

### **3.1 Developing Clear and Predictive Legal Framework for International Arbitration**

One observer notes that a clear and predictive legislative framework regulating the investment sector is key to entrenching international commercial arbitration in Africa.<sup>20</sup> African states must further acknowledge investor concerns regarding a predictable investment environment and enforcement of the rule of law, and awareness of preferred international practice with regard to resolution of disputes.<sup>21</sup> The legal infrastructure of a particular country forms part of the commercial calculus of its potential trade and investment partners.<sup>22</sup> As a result, States seek to present stable, predictable, transparent and efficient legal environments in order to attract business interest. Development of the legal environment is achieved both through domestic reform of institutions and international integration.<sup>23</sup>

Towards strengthening the legal framework for international commercial arbitration, a number of African states have acceded to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958 and adopted the 1985 UNCITRAL Model Law on International Commercial Arbitration. The national laws have incorporated arbitration friendly solutions such as the ability of national courts to grant interim protection reliefs.<sup>24</sup> under the Nairobi Centre for International Arbitration (NCIA) 2015 Arbitration Rules, the arbitral tribunal has powers to make interim and conservatory orders on the application of any party.<sup>25</sup>

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<sup>20</sup>Herbet Smith Freehills, "Commercial Arbitration in Africa: Present and Future" (1/2/2017) at < <https://www.herbertsmithfreehills.com/latest-thinking/commercial-arbitration-in-africa-present-and-future>> accessed on 21/1/2018.

<sup>21</sup> Ibid.

<sup>22</sup>British Institute of International and Comparative Law, "Report on the seminar, 'International Arbitration and Developing Countries: What are the Benefits and what is the Way Forward?' Temple Garden Chamber Series in International Adjudication on 11 September 2014.

<sup>23</sup> Ibid.

<sup>24</sup> See for instance section 7 of the Kenyan Arbitration Act, 1995.

<sup>25</sup> Nairobi Centre for International Arbitration (NCIA) Arbitration Rules, 2015, Rule 27.

### **3.2 Professional Training and Mentorship of Arbitrators**

The relevant stakeholders must recognise that arbitration is by its nature a wholly different method of dispute resolution compared to litigation, requiring an entirely different approach from the onset. To this end, the arbitral institutions across Africa should strengthen engagement with professional associations and educational institutions to enhance the skill pool and quality training for arbitrators. Structured mentorship is also necessary for the new arbitrators to gain the relevant skills and disengage themselves from litigious inclinations.

### **3.3 Strengthening Regional Arbitration Institutions**

As opposed to creating new arbitral institutions, there is need to strengthen the existing centers. Government-led initiatives to develop infrastructure like modern conference and telecommunication facilities should be encouraged. Work processes should be modernized to reduce timelines and cost of cases. The centres' secretariats must also be well-equipped to expedite administration of arbitral disputes referred to the centers through financial incentives and training on best practices. For instance, under the Asian-African Legal Consultative Committee (AALCC) Framework, the staff in the regional centres are granted certain immunities and privileges to better carry out their arbitration roles.<sup>26</sup>

### **3.4 Bolstered Collaboration**

The regional institutions should embrace collaboration to create a uniform driving force toward building Africa as a hub for home-grown solutions to parties within the continent.<sup>27</sup> Areas of collaboration include the development of uniform rules for international commercial arbitration and human-resource training and capacity building.

Moreover, the arbitral centres in Africa should also enter cooperation agreements with already established global institutions such as the ICSID and

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<sup>26</sup>Nachiketa Mittal, "Arbitration in Africa: 'Chindia' Perspective" (2016) 13 *Transnational Dispute Management (TDM)* 9.

<sup>27</sup>Collins Namachanja, "The Challenges facing Arbitral Institutions in Africa" CIArb Centenary Conference between 15-17 July 2015, 28.



the ICC. Under these agreements, certain proceedings may be held in Africa to avoid unnecessary expenses and inconvenience to the parties. According to its 2017 Annual Report, ICSID reported developed partnerships with other arbitration institutions to complement its ability to offer hearings around the world.<sup>28</sup> From Africa, ICSID has an existing agreement with the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and has collaborated with the Nairobi Centre for International Arbitration in conference-hosting and training on arbitral practice.<sup>29</sup> Other regional centres should intensify efforts to collaborate with ICSID to facilitate hearing of investment disputes within the continent.

Finally, efforts to establish an arbitration authority to strengthen trade and investment flows between Africa and China have led to the establishment of the China Africa Joint Arbitration Centre (CAJAC) in South Africa.<sup>30</sup> This novel development clearly recognizes China as the leading generator of African business growth through multi-sectoral investments.

#### **4.0 Conclusion**

Trade and investment are key economic development drivers for states. Recent developments in the field of international commerce have witnessed the unification of rules, procedures and practice of international commercial arbitration. In order to benefit from international trade and investment, many African states have embraced the Model Law and updated their arbitration legislation. This has been seen as an attempt to assure foreign investors that the prevailing legal systems in African states can sufficiently protect their commercial interests through promotion of international commercial

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<sup>28</sup>International Centre for Settlement of Investment Disputes (ICSID), *2017 Annual Report*, 43 at

< <https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20AR%20EN.pdf>> accessed on 24/1/2017.

<sup>29</sup> ICSID Annual Report 2017, 55.

<sup>30</sup> Francis Kariuki, "The Vision of Co-building China-Africa Joint Arbitration Centres in Different Legal Systems" at < <http://www.kmco.co.ke/attachments/article/195/Co-building%20ChinaAfrica%20Joint%20Arbitration%20Centres%20in%20Different%20Legal%20Systems.pdf>> accessed on 24/1/2018.

arbitration. Despite the clear move towards embracing international commercial arbitration, viability of commercial arbitration in Africa is still low. Clear strategies of engagement in arbitration must be developed and adhered to by the governments, investors and corporations doing business in Africa. Regional institutions also have a key role in promoting Africa as a global arbitration destination through collaboration with similar institutions outside the continent.

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## **Embracing Online Dispute Resolution in Kenya: Feasibility of an Online Dispute Resolution Portal for E-commerce Disputes in Kenya**

*By: James Ngotho Kariuki\**

### **Abstract**

*With the significantly rapid developing ICT sector and the corresponding growth of e-commerce, there is an urgent need for a direct and more efficient dispute resolution mechanism for online trade disputes in Kenya. Proliferation of online commerce comes with the inevitable increase of disputes in the area. It has become difficult to ignore the changes brought about by online commerce to the world of dispute resolution. This paper therefore seeks to evaluate the feasibility of the establishment of an online portal purposed for the efficient resolution of online trade disputes in Kenya. It will outline the legal framework necessary to serve as a foundation for the ODR-portal. The paper will also highlight the structure of European Union's ODR model currently in place as a point of reference. The aforementioned information will be analysed with the general intention of assessing what possible direction Kenya needs to take to embrace Online Dispute Resolution as an amicable dispute resolution mechanism for e-commerce disputes and in the same spirit contribute to the enhancement of access to justice in Kenya.*

### **1.0 Introduction**

The e-commerce scene in Kenya has grown alongside the general global growth in the area.<sup>1</sup> Many Kenyans have better access to the internet thanks to the proliferation of technology, such as smartphones and other portable devices such as laptops and tablets, and as a result is often dubbed as the 'Silicon Savannah' of East Africa.<sup>2</sup> Consequently, Kenyans are able to transact on e-commerce platforms available in their region.

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\* MCI Arb, LL. B (Hons) (Strathmore Law School), Certified Professional Mediator (MTI).

<sup>1</sup> International Chamber of Commerce (ICC) on Digital trends, available at: <https://iccwbo.org/global-issues-trends/trade-investment/digital-trade/> -accessed on 13 January 2018.

<sup>2</sup> Price Waterhouse Coopers (PWC) Report, Disrupting Africa: Riding the Wave of the Digital Revolution available at: <https://www.pwc.com/gx/en/issues/high-growth->

There are various models of e-commerce. The common ones include Business-to-Consumer (B2C) where transactions are between individual customers and businesses that usually involve the transfer of the final good or service to the consumer and Business-to-Business (B2B) where two businesses transact online e.g. between a wholesaler and a retailer.<sup>3</sup> Others include Consumer-to-Business (C2B) where consumer's sell their commodities to businesses<sup>4</sup> and Consumer-to-Consumer (C2C) there transactions are made between consumers aided by a platform which allows them to interact e.g. eBay.<sup>5</sup>

One the main advantages of e-commerce is the fact that it saves time and costs that would otherwise arise from performing the transaction through brick and mortar means. However, where a dispute arises, parties still eventually resort to physical interaction so as to facilitate the resolution of the dispute. This diminishes the aforementioned advantage of having to transact without physical interaction ergo, creating an avenue for dispute resolution within the online sphere would greatly reduce the exertion and expenses associated with conventional (offline) means.

## **2.0 The Concept of Online Dispute Resolution (ODR)**

ODR refers to Online Dispute Resolution. There is no universal definition of ODR. It is however considered by some as online extension of ADR mechanisms.<sup>6</sup> Others are of the view that forms of ADR significantly incorporate Information and Communication Technology in their execution, result in ODR<sup>7</sup>.

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markets/assets/disrupting-africa-riding-the-wave-of-the-digital-revolution.pdf - accessed on 13 January 2018.

<sup>3</sup> Kumar, V., & Raheja, E. G, 'Business to Business (b2b) and Business to Consumer (b2c) Management', *International Journal of Computers & Technology*, 3(3b), (2012), 447-451.

<sup>4</sup> Chen, D. N., Jeng, B., Lee, W. P., & Chuang, C. H. (2008). An agent-based model for consumer-to-business electronic commerce. *Expert Systems with Applications*, 34(1), 469-481

<sup>5</sup> Dan, C., 'Consumer-To-Consumer (C2C) Electronic Commerce: The Recent Picture', *International Journal of Networks and Communications*, 4(2), (2014) 29-32.

<sup>6</sup> Kallel S, 'Online Arbitration', *25 Journal of International Arbitration* (2008), 345.

<sup>7</sup> Mercedes M A and Gonzalez N M, 'Feasibility Analysis of Online Dispute Resolution in Developing Countries', *44:1 Inter-American Law Review* 2012, 44.

Additionally ODR has also been conceived as the transposition of the traditional ADR mechanisms online without substantive differences from their traditional counterparts except being more convenient and effective.<sup>8</sup>

United Nations Commission on International Trade Law (UNCITRAL) established a working group on Cross-Border ODR in 2010. The group assigned was 'Working Group III. It is tasked with the development of rules that will govern cross-border ODR for disputes arising out of e-commerce transactions.<sup>9</sup> The group on the 16<sup>th</sup> of December 2016, came up with the Technical Notes on Online Dispute Resolution which define ODR as a "mechanism for resolving disputes through the use of electronic communications and other information and communication technology".<sup>10</sup>

From the above, it is clear that the underlying common feature of ODR is that it is a mechanism for resolving disputes that incorporates various aspects of information and communication technology to facilitate the resolution of the dispute.

### **3.0 Kenyan Legal Framework**

#### **3.1 Constitution of Kenya (2010)**

The Constitution of Kenya recognises Alternative Dispute Resolution as an avenue to justice in Kenya. It states that, '*in the exercise of judicial authority, courts and tribunals shall be guided by alternative forms of dispute resolution including mediation arbitration and traditional dispute resolution mechanisms.*'<sup>11</sup> It further bestows responsibility of the state to ensure access to justice for all persons at a reasonable fee that shall not impede them.<sup>12</sup>

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<sup>8</sup> Zheng S T, *Electronic Consumer Contracts in the Conflict of Laws*, Hart: Oxford and Portland, Oregon, 2009, 152.

<sup>9</sup> NCTDR, available at < <http://odr.info/uncitral-cross-border-odr/> > accessed on 13 January 2018.

<sup>10</sup> Paragraph 24, *Technical Notes on Online Dispute Resolution of the United Nations Commission on International Trade Law (UNCITRAL)* 2016.

<sup>11</sup> Article 159, *Constitution of Kenya* (2010).

<sup>12</sup> Article 48, *Constitution of Kenya* (2010).

In addition to the above express provisions on access to justice the Constitution also obliges the court not to impede justice on the account of procedural technicalities. It urges the court to minimise on formalities related to proceedings so as to give room for proceedings on the basis of informal documentation. It also stated that no fees should be charged for the commencement of proceedings.<sup>13</sup>

The constitution also recognises every citizen's right of access to information held by the state. This right facilitates access to justice by providing the citizen with adequate knowledge of their respective rights. This makes it possible for them to seek redress from the court or any other ADR mechanism.<sup>14</sup>

Access to justice in the Constitution is also advocated through upholding one's right to administrative action that is efficient, expeditious, lawful, reasonable and procedurally fair.<sup>15</sup> Another right critical to the enhancement of one's access to justice that is upheld by the constitution is the right to a fair and public hearing.<sup>16</sup> Only by exercising fairness during the hearing process can the proper procedural execution of the available mechanisms result in justice to the one who seeks it.

It is clear from the above provisions that the Constitution promotes access to justice through ADR. From the language applied in Article 159, the Constitution does not limit alternative means to those expressly provided.<sup>17</sup> This means that the Constitution is able to accommodate other methods of dispute resolution not been expressly provided for as long as they fall in line with the general principle of the promotion of access to justice.

It can therefore be derived that ODR as a form of dispute resolution will be in conformity with the primary legislation relating to ADR mechanisms in the

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<sup>13</sup> Article 22, *Constitution of Kenya* (2010).

<sup>14</sup> Article 35, *Constitution of Kenya* (2010).

<sup>15</sup> Article 47, *Constitution of Kenya* (2010).

<sup>16</sup> Article 50, *Constitution of Kenya* (2010).

<sup>17</sup> Chief Bayo Ojo, 'Achieving Access to Justice Through Alternative Dispute Resolution' *Chartered Institute of Arbitrators (Kenya) Journal*, 1 2013 1.



country. It incorporates the use of technology to enhance access to justice in Kenya as well as serve as an alternative to litigation and adjudication through the courts.

### **3.2 Consumer Protection Act**

In online and related disputes, the Consumer Protection Act states that a supplier in an internet agreement must disclose all prescribed information to the consumer.<sup>18</sup> It also provides an opportunity for the consumer to accept or decline the agreement or correct any errors in it.<sup>19</sup> In addition, the supplier must deliver a copy of the agreement in writing within the prescribed period after the consumer enters the agreement.<sup>20</sup> Since most of the relevant contractual information mentioned above is communicated online, the practicality of ODR is enhanced.

Parties may agree to resolve the dispute using any procedure available in law.<sup>21</sup> The effect of this provision is the fact that parties to a consumer agreement can choose to adopt ADR mechanisms to resolve their disputes. Although ODR is not expressly recognised under any Kenyan law, it can be incorporated once a recognised procedure for the process is enacted.

The Act aims to promote the social and economic welfare of Kenyan consumers by providing a consistent, accessible and efficient system of resolution of disputes arising from consumer transactions.<sup>22</sup> ODR for e-commerce disputes will therefore be an actualisation of this aim as it intends to ease the dispute resolution procedures within e-commerce.

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<sup>18</sup> Section 31 (1), *Consumer Protection Act* (No. 46 of 2012).

<sup>19</sup> Section 31 (2), *Consumer Protection Act* (No. 46 of 2012).

<sup>20</sup> Section 32, *Consumer Protection Act* (No. 46 of 2012).

<sup>21</sup> Section 88, *Consumer Protection Act* (No. 46 of 2012).

<sup>22</sup> Section 3 (4) (g), *Consumer Protection Act* (No. 46 of 2012).

#### **4.0 Feasibility of E-commerce ODR in Kenya *vis-a-vis* the European Union Model**

##### **4.1 European Union ODR Model in England**

England has benefitted from significant strides in the European Union (EU) regarding the development of ODR. The EU established an online dispute resolution platform for online disputes.<sup>23</sup> This applies to member states through the Online Dispute Resolution for Consumer Disputes and Amending Regulations (Regulation on consumer ODR).<sup>24</sup>

These regulations apply to all out-of-court dispute resolution processes concerning contractual obligations stemming from online sales or service contracts between consumers and traders.<sup>25</sup> It dictates that the platform ought to provide an electronic complaint form which can be filled in by the complainant.<sup>26</sup> More importantly, the platform offers an electronic case management tool free of charge, which enables the parties to conduct the dispute resolution procedure online through the ODR platform.<sup>27</sup>

For this system to work, member states are obliged to establish 'ODR contact points'. These will provide a local platform to lodge claims in respective state.<sup>28</sup> The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations bring the regulation into force in England. It mandates online

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<sup>23</sup>EU ODR Platform, available at <  
<https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.show&lng=EN>> accessed on 22 December 2017.

<sup>24</sup>*Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

<sup>25</sup> Article 2, *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

<sup>26</sup> Article 5 (4) (a), *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

<sup>27</sup> Article 5 (4) (d), *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

<sup>28</sup> Article 7, *Regulation on Consumer ODR*, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

traders within England to provide a link to the EU online platform on their website which is easily accessible to the consumers.<sup>29</sup>

In England, online platforms such as the 'ODR Contact Point' have been set up to educate the public on what they need to know before they engage in online dispute resolution and to link them to the EU site.<sup>30</sup>

When a dispute arises, the consumer will need to fill in an online complaint form and submit it to the ODR Platform. This includes details about the trader, the consumer the purchase item and the complaint itself. Relevant support documents such as the invoice should be uploaded as well.<sup>31</sup> The complaint will be sent from the ODR Platform to the respective trader, who will propose an dispute resolution body to the consumer. The trader and the consumer have 30 days to agree on the dispute resolution body that will deal with the dispute.<sup>32</sup> Where the disputants cannot agree on a dispute resolution body to handle the dispute within 30 days, the ODR Platform will not be able to proceed with the complaint any further.<sup>33</sup>

If they both agree on a dispute resolution body to handle their dispute, the ODR Platform will automatically transfer the complaint to that entity. Once the transfer has occurred, the dispute resolution body will have three weeks to determine if it is competent to handle the dispute. If it is competent to do so, it will handle the case and should reach an outcome in 90 days.<sup>34</sup>

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<sup>29</sup> Regulation 19A, *Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations* 2015.

<sup>30</sup> ODR Information website, available at < <https://www.odrcontactpoint.uk/> > accessed on 22 December 2017.

<sup>31</sup> European Union Online Dispute Resolution Procedure, available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.complaints.timeLine&uuid=#step-one> -accessed on 22 December 2017.

<sup>32</sup> European Union Online Dispute Resolution Procedure, available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.complaints.timeLine&uuid=#step-one> -accessed on 22 December 2017.

<sup>33</sup> Ibid

<sup>34</sup> Ibid

#### **4.2 E-commerce ODR in Kenya**

This part seeks to identify what would be the most practical approach to be taken in the actualisation of ODR in Kenya. This will involve the level of involvement of the state, private institutions and individuals in the development of the process.

The Judiciary has recently taken steps to embrace ADR in a bid to enhance access to justice as well as reduce the backlog of cases through the enactment of the court-annexed mediation program.<sup>35</sup> In the same light, the Judiciary has also taken other steps to improve the justice system through the Judiciary Transformation Framework (2012-2016).

The Judiciary Transformation Framework pushed for the promotion of ADR mechanisms in the administration of justice.<sup>36</sup> At the core of the framework, the judiciary intended to put in place an elaborate ICT strategic plan that will enable the judiciary to harness technology in the pursuit of justice.<sup>37</sup> Apart from the management applications of ICT that the judiciary intended to apply, the framework fell in line with the promotion of ODR. It proposed a tele-justice system which simply refers to the incorporation of teleconferencing into the justice system.<sup>38</sup>

The framework also proposed the digitalisation of court records. The effect of this could be less reliance on physical copies of documents thus facilitating the shift to an independent online platform for administering justice. It also proposed an SMS inquiry system that is going to be part of an overall complaints management system. The framework proposed the extension of the application of ICT to incorporate training programmes that will disseminate the

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<sup>35</sup>Kenya Judiciary, FAQ's on Court Annexed Mediation, available at: <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf> -accessed on 14 January 2018.

<sup>36</sup> The Judiciary, Republic of Kenya, *Judiciary Transformation Framework 2012-2016*, 2012, 14.

<sup>37</sup> Ibid 21.

<sup>38</sup> Ibid 46.

know-how on dispute resolution to the public. The framework also proposed the implementation of a Local Area Network within the court areas so as to facilitate a communication portal that will serve as a platform for the incorporation of virtual court systems.<sup>39</sup> Despite the timeline for the framework expiring in 2016 the judiciary maintained the above agenda and is still in the process of implementation as seen in their current strategy document, 'Sustaining Judiciary Transformation: A Service Delivery Agenda' (2017-2021). Chapter 5 of the document on their digital strategy reflects this.<sup>40</sup> This Judiciary, a central player in the administration of justice, thus is arguably in an ideal position to spearhead the establishment of an ODR portal.

Additionally, the Communications Authority of Kenya is mandated to regulate communication services in the country.<sup>41</sup> Among its functions, it is also mandated to facilitate the development of e-commerce in Kenya.<sup>42</sup> This makes it another potential key player in the development of ODR for e-commerce. Besides the Judiciary, it can also work with local ADR experts as well as key local ADR institutions such as the recently established Nairobi Centre for International Arbitration (NCIA)<sup>43</sup>, the Chartered Institute of Arbitrators (Kenya) (CI Arb-K)<sup>44</sup> and/or the Strathmore Dispute Resolution Centre (SDRC)<sup>45</sup>, in the development of an ODR platform. It can also provide the licence for the operation of the online platform as well as its general compliance with internet regulations.<sup>46</sup>

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<sup>39</sup> Ibid 47.

<sup>40</sup> The Judiciary, Republic of Kenya, *Sustaining Judiciary Transformation: A Service Delivery Agenda 2017-2021*, 44.

<sup>41</sup> Section 5, *Information and Communications Act*, (2011).

<sup>42</sup> CAK Website 'What we do', available at: <http://ca.go.ke/index.php/what-we-do> - accessed on 10 January 2018.

<sup>43</sup> Nairobi Centre for International Arbitration website available at: <http://ncia.or.ke/about-ncia/> - accessed on 11 January 2018.

<sup>44</sup> Chartered Institute of Arbitrators (Kenya) website available at: <http://www.ciarbkenya.org/> - accessed on 11 January 2018.

<sup>45</sup> Strathmore Dispute Resolution Centre available at: <https://www.strathmore.edu/sdrc/> - accessed on 11 January 2018.

<sup>46</sup> Section 10, *Kenya Information and Communications Act* (2009).

The development of ODR procedures is made possible by ODR platforms<sup>47</sup> and ODR providers.<sup>48</sup> On one hand, ODR platforms host ODR services and can be managed by third party providers and the other hand, ODR providers are professionals or institutions that become involved at the request of the parties in conflict.<sup>49</sup> Institutions poised to provide ADR services such as the CIArb-K, NCIA and SDRC as well as individual experts in the area can act as ODR providers once they have taken the necessary steps to embrace ODR. ODR can also greatly benefit government services. The government can set up an alternate ODR platform and actively act as an ODR provider. This can be done through the incorporation of ODR in institutions that provide public services online. Institutions such as the Insurance Regulatory Authority (IRA) through their ERS and Agents portals,<sup>50</sup> the Kenya Revenue Authority (KRA) through their online services such as customs online payment,<sup>51</sup> and the Postal Corporation of Kenya (PCK) through their soon to come Virtual Post Office services,<sup>52</sup> just to mention a few, are some that would benefit from an ODR portal.

An inevitable debate in the actualisation of ODR for e-commerce in Kenya will be the level of government involvement. It has been argued by some that ODR does not need government interference and that many ODR services should

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<sup>47</sup> These are internet based locations where interested parties can submit their claims to be resolved online.

<sup>48</sup> These are the organizations that give rise to locations on the internet where disputes can be resolved online

<sup>49</sup> Nicuesa V, 'Resolución electrónica de conflictos' in Peguera M (ed), *Principios De Derecho De La Sociedad*, Aranzadi, 2010, 409.

<sup>50</sup> IRA Website, available at < <http://www.ira.go.ke/> > accessed on 16 January 2018.

<sup>51</sup> KRA Website, available at < <http://www.kra.go.ke/index.php/kra-portal> > accessed on 16 January 2018.

<sup>52</sup> Postal Corporation Website, available at < <https://www.posta.co.ke/virtualoffice/> > accessed on 16 January 2018.

take root on their own.<sup>53</sup> Facilities such as Anywhere Arbitration,<sup>54</sup> Ujuij,<sup>55</sup> and Modria<sup>56</sup> operate online free from government interference. The use of email correspondence e.g. G-Mail and Yahoo Mail may also be free from government regulation. However, self-regulation resulted to several disagreements between consumer groups the most prominent of which the internet based businesses were suggesting that a mandatory ODR process should be integrated before going to court thus restricting immediate recourse to the court.<sup>57</sup>

This prompted consumer to demand the retention of direct access to court. Similarly, this is seen in our Consumer Protection Act where any acknowledgement in a consumer agreement that requires a dispute to be submitted to an arbitration is invalid since it prevents the party from filing an action in the High Court.<sup>58</sup>

This was further encouraged by the shortcomings of ODR providers through their lack of transparency, neutrality, appropriate complaint mechanisms and poor recognition of cultural and linguistic differences.<sup>59</sup>

As Kenya begins to embrace ODR, we should take the above situations into account. Government involvement in the process is indeed critical in that it will be able to create favorable standards that ODR providers should abide by. This is the case in the UK through their ODR regulations. The state will have to take

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<sup>53</sup> Chornenki G, *The Corporate Counsel Guide to Dispute Resolution*, Canada Law Book Inc., Aurora, 1999, 7-10.

<sup>54</sup> Anywhere Arbitration <available at: <http://www.anywherearbitration.com/>> accessed on 12 January 2018.

<sup>55</sup> Ujuij, available at: <http://www.ujuij.org/whatisujuij.html> > accessed on 12 January 2018.

<sup>56</sup> Modria, available at < <http://modria.com/product/> > accessed on 12 January 2018.

<sup>57</sup> United Nations Conference on Trade and Development, 'E-Commerce and Development Report 2003 (Internet edition prepared by the UNCTAD secretariat): Chapter 7: Online dispute resolution: E-commerce and beyond', available at <http://www.unctad.org> > accessed on 8 January 2018.

<sup>58</sup> Section 88, *Consumer Protection Act* (No. 46 of 2012).

<sup>59</sup> Rabinovich-Einy O, 'Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape', 6 *Yale J. L. & Tech*, 2003-2004, 12.

initiative to come up with new standards that will regulate ODR as an avenue for dispute resolution due to the complexities that arise in dealing with technology and cyberspace.

From the above, it would be adequate to propose a hybrid system of operation where the state, through the Communications Authority of Kenya in collaboration with the Judiciary could propose policy general regulations that would govern online platforms. This would be complemented by current local ADR providers who can also assist to develop policy in the area that can later concretize into regulations that will provide the structure of the process. At the same time, they can provide required professional services through the ODR portal. This way, there will be a combination of both the state's resources and those of the private individuals and bodies to further the establishment and growth of ODR for e-commerce in Kenya.

As is often the case, innovation presents itself with its own challenges and in this case, there are challenges that may hinder the application and operation of ODR for e-commerce disputes in Kenya. For one, the online world in general has been plagued with issues surrounding cybersecurity.<sup>60</sup> The security of information online can be compromised and this may affect ODR by tampering with the confidentiality associated with the dispute resolution procedures applied through the platform.

Despite the proliferation of technology in Kenya, a significant portion of the populace have not benefitted enough from this development in that they cannot afford or access the technology.<sup>61</sup> As a result, they may not have access to the supporting technology required to sustain ODR such as a stable internet connection and/or an input device e.g. computers and smart-devices. This in turn limits those who can partake in the process.

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<sup>60</sup>Singer, P. W., & Friedman, A., 'Cybersecurity: What Everyone Needs to Know', Oxford University Press. 2014, 11.

<sup>61</sup>National Information & Communications Technology (ICT) Policy (2016) available at < <http://icta.go.ke/pdf/National-ICT-Policy-20June2016.pdf> > accessed on 25 January 2018.



The efficiency associated with ODR comes at the price of greatly diminishing face-to-face interaction. Some benefits associated with personal interaction include real time improvising in the face of unforeseen circumstances and personal verification of the identities of the parties and other participants in the dispute. It is easier to falsify your identity online thus may be a potential loophole for fraud in the application of ODR. However, this can be mitigated by incorporating audiovisual communication such as video-conference calls.

### **5.0 Conclusion and the Way Forward**

As commerce takes an online direction, dispute resolution procedures ought to adapt to the shifting landscape so as to maintain the speed, efficiency and accessibility brought about by the online world and the technology that supports it.

Online Dispute Resolution is keen on maintaining these qualities by utilising the same online resources to facilitate timely communication of issues and the eventual resolution of disputes.

Kenya has the legal, institutional and individual capacity necessary to bring ODR mechanisms to fruition. Kenya has also embraced e-commerce greatly enough to substantiate the need for an online dispute resolution mechanism. Thus, the development of an online portal and corresponding dispute resolution procedure will be an invaluable improvement to access to justice in the field of e-commerce.

To charter a way forward, the following are some of the areas where action would be key to the foundation for the actualisation of ODR for e-commerce in Kenya:

#### **5.1 Need to Formulate ODR Policy and Legislation**

The current institutions and individual experts dealing with the promotion of alternative methods of dispute resolution should engage in the development of policy that will be aimed at formulating legislation that will specifically regulate ODR for e-commerce and its practice in Kenya.

## **5.2 Establishment of Online Platforms**

The State with assistance from experts in the field of ADR should mobilise to create an online platform for the resolution of disputes online. Guidelines on how the platform will be utilised and governed should be contained in the proposed ODR legislation. Government's involvement in the initiative is essential for the maintenance of standards that are favourable to the general citizenry.

Government institutions such as KRA and the others aforementioned should engage in establishing dispute resolution links to their online platform guided by the proposed ODR legislation to address the specific grievances associated with the services they provide to the public.

## **5.3 Defining a Clear and Practicable ODR Procedure**

This would entail clearly outlining the steps that a party seeking ODR will use in order to seek recourse. The following series of steps may form the crux of the ODR process.

First, the aggrieved party should make a submission describing the dispute in question. This can be done through email or directly from the proposed ODR platform. The platform may also link its domain to a mobile application which will greatly improve access to the platform.

The second step would involve the classification of the dispute by the ODR providers and allocating the dispute to the most appropriate method. The platform should also give an opportunity for the parties in dispute to select their desired method. e.g. online arbitration, mediation etc.

The third step would outline the details behind the exchange of information regarding the case such as the complaint, the corresponding defences, evidence and even witness statements if any. This could be communicated through the ODR platform.

Where the process necessitates a hearing, all the participants may be brought together virtually through audio-visual means such as a video conference. Alternatively, participants can also be brought together through a teleconference setting. These instances create real-time interaction without physical confrontation.

The final determination will be made by the ODR provider within a predetermined period of time. As ODR develops, future determinations may even be made by a fully autonomous programme specialised for the task or an actual human being with the requisite qualifications. In some instances, the programme may be semi-autonomous relying, to a certain degree, on a human aspect.

However, as a first step, into the field of ODR, actual (human) practitioners should be the only resolvers to begin with as the latter autonomous methods may be utilised once confidence in them is established

The final decision can be communicated to the parties through an electronically-written communication such as an email. Alternatively, the decision can be communicated to the parties in another hearing setting, either audio-visual or just audio which can be later put down in writing. This example doesn't cover all the aspects of the process but it demonstrates the feasibility of ODR for e-commerce with regard to its applicability here in Kenya.

#### **5.4 ODR Education**

Learning institutions should engage in including ODR an avenue for dispute resolution. In Kenya, this can be incorporated into our local universities' curriculums for courses such as Law, IT and related courses. The consequence of these actions would be the increased awareness of the existence of ODR as a mechanism to resolve disputes. More so, it would lead to growth of localised expertise thus prompting further development in the area.

### **5.5 Updating the Existing Legal Framework**

The law ought to adapt to changes in technology where novel aspects emerge and regulation is needed for its smooth application. However, the rate at which technology changes is significantly faster than the rate at which the law can keep up. This creates a discrepancy between the two and this discrepancy drags the adaptation process limiting the optimisation potential of new technologies. Changes in the operation of e-commerce enterprises in Kenya will directly affect the operation of ODR thus, lawmakers should be keen to act upon these changes as soon as they arise.

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contact

*marketing@ciarbkenya.org*

Chartered Institute of Arbitrators, Kenya

Nicholson Drive, off Ngong Road

between Bemuda Plaza and

Central Church of Nazarene

P.O. Box 50163-00200, Nairobi

Tel: 2712481, 2722724 Fax: 2720912

Mobile: 0734 652205 or 0722 200496

Email: *info@ciarbkenya.org*

Website: *www.ciarbkenya.org*