

Alternative Dispute Resolution



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Kenya Branch

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Editor's Note

Welcome to the latest issue of the *Alternative Dispute Resolution Journal*, Volume. 9 No. 2, 2021, a publication of the Chartered Institute of Arbitrators- Kenya Branch (CI Arb-K).

The Journal is a leading publication committed to scholarly discourse on Alternative Dispute Resolution (ADR) and other related fields of knowledge.

ADR is an indispensable tool of access to justice in Kenya and across the globe. It seeks to ensure effective, efficient, cost effective and expeditious management of disputes. ADR discourse revolves around the use of negotiation, Traditional Justice Systems, mediation, arbitration and other mechanisms in achieving access to justice. The Journal delves into pertinent and emerging issues on ADR with the aim of creating awareness and enhancing the use of ADR as a tool of access to justice.

Since its inaugural issue, Volume 1, Issue 1, in 2013, the Journal has grown from strength to strength to become a leading and most cited publication in the field of ADR. The editorial team is committed to continuous improvement of the Journal and takes on board feedback from readers worldwide.

The Journal is peer reviewed and refereed to adhere to the highest quality of academic standards and validity of data.

This volume captures a collection of rich articles on ADR and provides an avenue for comprehensive discourse and critique on emerging issues in the field. The themes covered by the papers include: *Mediation Advocacy in Kenya; Arbitration Law and the Right of Appeal in Kenya; A Critical Analysis of Judgments on Whether Arbitrators are Employees; Alternative Dispute Resolution as a Means of Access to Justice; Changes to Civil Litigation and Mediation Practice under the Mediation Bill, 2020; Contending with the Schools of Thought on ADR Before and During Arraignments; Promoting Peaceful and Inclusive Societies for Sustainable Development in Kenya; The Disruptive Impact of COVID-19 on Arbitration Practice in the East African Region; A Critique of the Small Claims Court in Kenya; Enunciating the effect of the Doctrine of Sovereign Immunity of States on International Arbitration and Enhancing the Role of ADR in Managing Community Land Disputes in Kenya.*

The outbreak of the COVID-19 pandemic and the continued efforts to mainstream ADR into the legal system in Kenya have resulted in a host of challenges and opportunities

for ADR in Kenya. The Journal offers insight and analysis on these and other issues facing ADR in Kenya with the aim of enhancing its uptake in the country. The informality of ADR should however not be lost.

We hope that the content of the Journal will trigger appropriate debate and responses towards improved use of ADR as a tool of access to justice.

The Journal is a key asset for scholars, ADR practitioners, students and everyone who seeks information on ADR.

CIArb-K wishes to thank the Publisher, contributing authors, Editorial Team, Reviewers, Scholars and those who have made it possible to continue publishing such an important publication that is respected in the field of ADR.

Dr. Kariuki Muigua, Ph. D; FCIArb; C.Arb
Editor, Nairobi,
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Mediation Advocacy in Kenya – Remoulding The Gladiator in the Room to the Valuable Ally of Dispute Resolution

By: Jacqueline Waihenya* & Arthur Igeria†

This paper considers the role of lawyers within the Mediation process in Kenya and attempts to shed light on the best practice for Mediation Advocacy and practice generally and the Court Mandated Mediation Program in particular. This follows persistent murmurs from the Mediator community that lawyers are often the stumbling block to a successful mediation settlement agreement. The article aims to deconstruct the role of the lawyer in the mediation process as well as the interplay between the lawyer's role as protector of their client's interest and the Mediator's goal of achieving a satisfactory settlement between the disputants, and how to pivot both to achieve the real purpose of mediation which is a "Win-Win" outcome.

1. Introduction:

The growing prevalence and influence of mediation as a dispute resolution mechanism means that the advocate must acquire a completely new tool box for dispute resolution. It also requires the disputants to adopt a collaborative approach to dispute resolution.

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This is a huge departure from the traditional adversarial approach of our common law based legal system.¹ Mediation practice was introduced fairly recently within the formal dispute resolution framework in Kenya with the enactment of Act No. 12 of 2012² that established the Court Mandated Mediation Process. To the consternation of many a mediator a good number of advocates automatically engage their gladiatorial adversarial approach during the mediation process. It takes a skilled mediator to manage this tendency. One of the cures to this state of affairs is to encourage advocates to acquire more than a passing knowledge of the process of mediation³ and to discern when to utilize mediation advocacy skills to the maximum advantage of their clients.

The now oft quoted definition of mediation is to that it is a dispute resolution process alternative to litigation, in which a third-party neutral who is mutually acceptable to the disputants but who has no authority to make a binding decision for them assists the disputants achieve a resolution that is acceptable to all of them. The third party neutral in this case being the mediator. Since the introduction of mediation in Kenya and in many other jurisdictions, the mediation process has largely presumed that a party's advocate is an extension of the party or client they represent. Little is said about the advocate's role within the mediation process. This is notwithstanding the fact that in many jurisdictions Kenya included, mediation as a dispute resolution process continues to rapidly expand into new frontiers and the participation of advocates increases at an equally fast rate. The net effect is that mediation is here to stay, the participation of advocates in the mediation process is here to stay. Therefore, the courts, mediators and advocates require to make adjustments to fit the evolving dynamics of the changing legal environment regarding dispute resolution.

¹ *Kathy Douglas and Becky Batagol, The Role of Lawyers in Mediation: Insights from Mediators at Victoria's Civil and Administrative Tribunal (2014) 40 Monash U.L. Rev.758 pg.759. Available at Heinonline Last accessed on 5th February 2021*

² *Statute Law (Miscellaneous Amendments) Act No.12 of 2012 introduced Sections 2, 59A, 59B, 59C and 59D into the Civil Procedure Act (Cap 21) and Order 46 which defined mediation, the mediator and otherwise established for the Mediation Accreditation Committee and its mandate and provided the modalities for Court to refer matters to mediation as well as the enforcement of mediation settlement agreements arrived at through this process.*

³ *Majid Ali & Li Lu Geng, Alternative Dispute Resolution (Adr) In Pakistan: The Role of Lawyers in Mediation Procedure (2019) International Journal of Research Available at <https://journals.pen2print.org/index.php/ijr/> Last accessed on 5 February 2021*

2. Mediation Advocacy and the Mediation Advocate:

The advocate at the mediation table seeks to secure their client's best interests within a new paradigm which dictates collaboration and peaceful resolution to the dispute. Within the mediation construct the parties seek solutions that that serves their best interests. The dilemma arises as the advocate at a mediation session is unable to determine upfront whether his opponents will seek resolution through competitive or cooperative means. The competitive negotiator being characterized with making large demands, providing few concessions and challenging the opposing party's positions and conclusions. Whilst the cooperative approach seeks to understand both parties' objectives and finding creative solutions that maximize the outcome for both sides.⁴ Research supports a conclusion that competitive negotiators generally achieve higher settlements but they are also most likely to fail at mediation whilst cooperative negotiators are more likely to achieve a settlement but may fail to maximize all potential gains for their clients.⁵

Whether the advocate at a mediation chooses a competitive or cooperative approach they should appreciate that the mediation process even within court mandated mediation is separate from litigation. Consequently, the trial advocacy skill set required in litigation rarely leads to success in mediation. The advocate at a mediation session should disregard adversarial tactics as these may impede achieving the satisfactory results in mediation.⁶ Such tactics include reliance on technicalities, seeking a "winner take it all" solution, and seeking to destroy the adversary's case. The advocate and their client must engage with the mediator and the counterparty team and work collaboratively to uncover underlying interests and needs all the while creating and evaluating options that can meet such interests and needs.⁷

Within the mediation advocate-client relationship it is also important for the advocate to sensitize their client on what mediation entails and what outcomes to expect. This therefore requires thoughtful and detailed preparation for the mediation sessions.

⁴ Peter Robinson, *'Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy'* (1998) 50 *Baylor L Rev* 963. Available at Heinonline. Last accessed on 8 February 2021

⁵ Peter Robinson *Ibid*

⁶ James K L Lawrence, *'Mediation Advocacy: Partnering with the Mediator'* (2000) 15 *Ohio St J on Disp Resol* 425 Available at Heinonline. Last accessed on 7 February 2021

⁷ *Ibid*

Another key aspect is the relationship with the advocate and the mediator. The advocate takes steps to establish credibility with the mediator as a mediation partner. Rather than weakening the advocate's position, by being collaborative the advocate provides the mediator with the tools to help them achieve the desired results of the mediation process.⁸ One of the most overlooked aspects of the mediation process is that the advocate in a mediation session is also constantly negotiating with the mediator with a view to achieving a settlement. The advocate should not lose sight of this.

2.1 Mediation Models:

The original and classic mediation model is the facilitative model where the mediator asks questions, validates and normalizes the parties' perspectives, seeks out the interests behind the respective positions they have taken and assists them to explore and analyze the options for resolutions without making any recommendations.⁹ An evaluative mediator on the other hand guides parties to a resolution by drawing the parties' attention to the respective weaknesses of their cases and even hazarding what a judge might decide. They assist parties and their advocates evaluate their legal positions and cost-benefit analysis. Most evaluative mediators will favour caucusing and adopt a "shuttle diplomacy" format in the mediation process. They may take proposals to the other party and in many cases do have a direct bearing on the final resolution. They keep an eye out for justice and fairness in the event there is an uneven negotiating power dynamic in the dispute.¹⁰ A more recent approach is transformative mediation where the parties are encouraged to deal with underlying causes of their dispute with a view to repairing their relationship as a basis for settlement.¹¹ A fourth approach is settlement mediation where the parties are encouraged to compromise to settle the dispute.¹² Different mediators may adopt different styles and/or approaches which may be founded upon the nature of the dispute before them or from a composite of approaches..

⁸ James K L Lawrence *Supra*

⁹ Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation* (2000) Mediate.com. Available at https://www.rchss.sinica.edu.tw/cibs/law/1.%20Monthly%20Seminar%20Since%202008/Papers/2009/20090211/Chen-Chieh%20Ting_Styles%20of%20Mediation_%20Facilitative,%20Evaluative,%20and%20Transformative%20Mediation.pdf Last accessed on 7 February 2021

¹⁰ Zena Zumeta *Ibid*

¹¹ Kariuki Muigua, *Making Mediation Work for All Understanding the Mediation Process* (2019)7(1) Alternative Dispute Resolution Process pg.120

¹² Kariuki Muigua *Ibid*

2.2 Spectrum of Advocate’s Involvement in Mediation:

In a study carried out in Australia Olivia Rundle developed a spectrum to define advocates’ involvement within the mediation process principally informed by the type of case, the style of the mediator appointed as well as the individual advocate’s approach. She noted that the advocate’s involvement in some cases differs depending on the stage of the case.¹³

The spectrum is below for immediate reference in this paper:

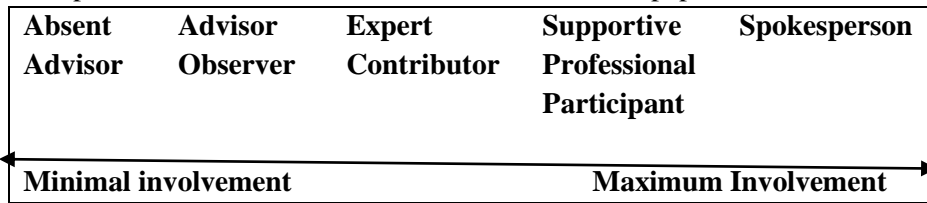


Fig. 1: Adapted from Rundle’s Spectrum¹⁴

2.2.1 The Absent Advisor:

This advocate may or may not prepare their client and once they have attended the formalities of arranging the date for the mediation will allow their client to attend and negotiate in person and without them.

2.2.2 The Advisor Observer:

The Advisor Observer will attend the mediation in addition to preparing for the same but will remain a non-participant. Rundle suggests that this role is most suitable for mediation in complex cases where data gathering or discovery is required as a prelude the substantial proceeding is carried out.

2.2.3 The Expert Contributor:

Under this approach the advocate attends and provides expert legal advice during the mediation and engages the other party’s lawyer on legal issues. They also play the role of reality testing with their client given the proposals that may be presented during the mediation.

¹³ Kathy Douglas and Becky Batagol *Supra*

¹⁴ Olivia Rundle, ‘A Spectrum of Contributions That Lawyers Can Make to Mediation’ (2009) 20 Australasian Dispute Resolution Journal 220

2.2.4 The Supportive Professional Participant:

The advocate takes an active and participatory approach which includes negotiating for and on behalf of their client. Per Rundle this approach is most suitable for court connected mediation but the perspective taken by such advocate must be one where they explore the parties' interests as opposed to positions.

2.2.5 The Spokesperson:

This is the most lawyer-centric approach and is most suitable for evaluative mediation.

2.3 The Mediation Advocate:

There is a prevalent misconception amongst litigation advocates worldwide and particularly within the court annexed mediation system that mediation is easy. The advocates prepare their clients for mediation with a minimum settlement threshold and proceed until the threshold is met. During mediation sessions, they address the mediator with a view to persuading the mediator to compel the counterparty to accept their position. In actual fact the real audience that the mediation advocate faces is the opposing party and their advocate both of whom are inherently hostile to their position and/or any arguments they may prefer in support of their position.¹⁵

Given this circumstance the mediation advocate should approach the mediation process with the right audience in mind. Useful techniques for the advocate include (1) a bold statement of assurance to the opposing party that they are inclined towards a mutually beneficial resolution of the dispute; (2) a clear demonstration that they have a keen knowledge and understanding of the case and process at hand; (3) a demonstration of their skill; (4) a highlight of the strengths of their client's case coupled with the weaknesses of the opposing side's case. This will enable the opposing party consider the strength of their perceptions; and (5) avoiding exaggeration as this causes the opponent to dismiss everything wholesale.¹⁶ Every mediation advocate needs to know that mediations function best when each side makes a meaningful effort to inform the other side through persuasive communication of their interests and in turn seek to understand their counterparty's interests and needs distinguished from their respective positions. The converse is that mediations function poorly when each side seeks to rely exclusively on their own claims and defenses.¹⁷

¹⁵ Richard M Markus, 'Fundamental Misconceptions about Mediation Advocacy' (1999) 47 Clev St L Rev 1 at pg.4 Available at Heinonline. Last accessed on 7 February 2021

¹⁶ Richard M. Markus *Ibid*

¹⁷ Richard M. Markus *Ibid*

A skillful mediation advocate understands and appreciates that the outcome of mediation could include many settlement alternatives some of which may not be apparent at the commencement of the mediation process. These could include payment amount, payment terms, property transfers, future business relationships, public statements, and policy changes.¹⁸

3. Key Roles of the Advocate during Mediation: The Anatomy of the Mediation Process for the Advocate

Preparing for mediation is similar to preparing for litigation, arbitration and adjudication in relation to collating information and documents and compiling the case brief. However, there is a marked departure in the advocate's role and responsibilities once the mediation session begins.¹⁹ For many advocates this goes against the very grain of their training and the expectations of parties as it requires the parties to speak for themselves and only look to their advocate for advice, guidance or information. Further, advocates are not allowed to cross examine the counterparty or spar with the other advocate as happens in litigation and arbitration. They are now required to think and act in terms of party interests and not the automatic anchor of their positions.²⁰

In this new norm the successful advocate will be the one who (1) adapts to framing and defining issues that require to be resolved and, in this regard, should (2) seek clarifications where there has been miscommunication and where necessary (3) call for time outs to confer with their clients and provide the necessary reality checks regarding any settlement offers on the table and (4) identifies issues that may act as stumbling blocks to appropriate resolutions.²¹

As mediation is proving to be quite the popular ADR mechanism several pointers of mediation advocacy are important to note by any advocate seeking to win with mediation. These include (1) know your mediator; (2) match your strategies to that of the mediator; (3) use the mediator as a resource; (4) work with your client; (5) work with the other side; (6) where possible use advocacy aids particularly audio-visual exhibits and other materials; (7) keep your chin up and continue working where the

¹⁸ Richard M. Markus *Supra*

¹⁹ Michael Lang, *From Advocate to Advisor: The Role of the Lawyer in Mediation* (2010) Mediate.com. Available at <https://www.mediate.com/articles/langlawyerrole.cfm> Last accessed on 5th February 2021

²⁰ Michael Lang *Ibid*

²¹ Michael Lang *Ibid*

mediation sessions seems to drifting towards failure; and (8) attend trainings in mediation practice and procedures.²²

3.1 Pre-Mediation:

The mediation advocate’s role at this stage requires him to critically analyze whether the case at hand is suitable for mediation. If found suitable then to take steps to initiate the case for mediation or where they are the respondents to take steps to prepare for the mediation. Preparation entails explaining the process and giving the client guidelines on what will be expected of them. It is very important for the advocate to emphasize to the client that the role of making the final decision towards a settlement rests with the party and not the advocate. It is also very useful to assist the client consider the various criteria and nature of acceptable options for settlement.²³

The skilful mediation advocate understands that going into the mediation process particularly within the court mandated mediation setting entails a “new beginning”. Therefore, they must discard the positional approach undertaken to bring the case within the litigation apex which seeks to assign blame and entrench positions. They must reengineer their understanding of the case from a future-oriented perspective. This will mean considering and evaluating potential areas of agreement/disagreement as well as compiling all relevant documents and/or information required for the Mediation. At this stage the mediation advocate attempts to anticipate the information and/or documents that the mediator will seek and will prepare to attend the mediation session with them. At all times the advocate must be prepared to evaluate and reassess whether or not to release them to the other party and/or mediator as the mediation session unfolds.²⁴

3.2 Preliminary Meeting:

Exhibiting a collaborative approach in the initial stages of a mediation will include: (a) arriving early; (b) warmly greeting opposing counsel and their client; (c) expressing genuine empathy for the difficulties experienced by opposing counsel's client; (d) expressing apology for the mutual frustration in not being able to reach an agreement and acknowledging that sometimes reasonable people will disagree. This is extremely

²² Richard C. Reuben and Leonard L. Riskin *The Lawyer Turns Peacemaker; A Quick Course in Mediation Advocacy; Mandatory Arbitration Clauses Under Fire* (1996) American Bar Association Journal, Vol. 82, No. 8, pp. 54-62 at pgs.56&57 Available at <http://www.jstor.org/stable/27839648> Last accessed on 5th February 2021

²³ James K L Lawrence *Supra*

²⁴ James K L Lawrence *Supra*

important because most likely it will be the first time the opposing party has heard the case presented by the opposing lawyer; (e) crafting the opening presentation at the mediation to emphasize being a reasonable person and seeking a reasonable outcome for this dispute; (f) specifically omitting comments that may insult or offend the opponent when making the opening statement; and (g) apologizing for those aspects of the presentation that will be difficult for the other side to accept as part of your view of this case. The more congenial negotiator seeks to use the beginning of the mediation to enhance her credibility and charismatic influence with opposing advocate's client and possibly even the opposing advocate himself.²⁵

3.3 Mediation Sessions:

The Mediation Advocate who views the mediation as an opportunity for their clients to participate actively in discussions about, and settlement of, their own disputes becomes a valued ally in the mediation process.²⁶ The effective mediation advocate prepares their client to attend the mediation sessions with an open mind. They therefore assist their clients in some of the following ways during the mediation (1) They acknowledge the client's central role and, in particular, do not speak for the client; instead, they offer advice, guidance and information; (2) They do not challenge or cross-examine the other party, spar with the other party or treat mediation like litigation; (3) They maintain a supportive, cooperative demeanor and demonstrate commitment to the mediation process by words and behavior; (4) They do not treat mediation as an adversarial process or as a means for finding the truth; instead, they acknowledge the importance of searching for solutions; (5) They assist in framing and defining the issues to be resolved; (6) They provide normative information, usually in private, about the benefits and risks of specific proposals; (7) They act as an agent of reality, helping the client to balance the risks of accepting or rejecting settlement offers and the potential complications of presenting the case to a third party for decision as well as the time, stress and expense of a trial; (8) They help manage the process by asking for breaks, for opportunities to speak privately with the client or for caucusing with the mediator; (9) They assist their clients to communicate by summarizing discussions or clarifying matters that are confusing or where miscommunication is preventing constructive problem-solving, or worse, leading to increased conflict; (10) They help clients stay focused on the issues at hand, the information presented and options for settlement as well as remaining calm as they deal with the frustration over the pace of progress or feeling overwhelmed by direct

²⁵ Peter Robinson *Supra*

²⁶ Michael Lang *Supra*

confrontation with the other party; (11) They encourage clients to find creative solutions that will resolve the dispute; and (12) they draft documents as and when they may be required²⁷

3.4 Caucus Sessions:

A major tactic employed by mediators is caucusing which entails a mediator meeting separately with each party during the course of mediation.²⁸ For mediators' caucuses are an important tool to tease out underlying issues and otherwise communicate bottom lines, fall back positions and disputant's priorities.

Particularly where disputants are antagonistic towards each other caucusing has proved to be a useful tool because (1) the other party is not present to act as a continuing stimulus; (2) parties tend to be more comfortable in bringing out what they consider to be sensitive information in the absence of their counterparty; (3) the mediator is able to interact more intimately and warmly without appearing partial which encourages sharing of information even confidential information. This is because information shared within the caucus remains confidential unless the party specifically empowers the mediator to disclose it; (4) in the absence of the opposing party the mediator has greater leverage to challenge the party's positions and getting them to take more responsibility; and (5) the mediator can test potential solutions within a safe environment.²⁹

A skilled mediation advocate must prepare for and attend the caucus as most of the questions that a mediator is bound to ask require to be addressed by the advocate such as the strengths and weaknesses of their case; the best- and worst-case scenarios of further court action and in the alternative at the very least such advocate should be able to explain to their client and where necessary support any reality checks.³⁰

²⁷ Michael Lang *Supra*

²⁸ Gary L. Welton, Dean G. Pruitt and Neil B. McGillicuddy, *The Role of Caucusing in Community Mediation* (1988) *The Journal of Conflict Resolution*, Mar., 1988, Vol. 32, No. 1 (Mar., 1988), pp. 181-202. Available at <https://www.jstor.org/stable/174094> Last accessed on 11 February 2021

²⁹ Welton, Pruitt and McGillicuddy *Ibid*

³⁰ Richard M. Calkins, *Caucus Mediation – Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace and Healing* (2006) *Drake Law Review* Vol.54 pg 259 at pg.264

An advocate's participation begins with ensuring that all key decision makers are present during the mediation and especially during the caucus.³¹ Contrasted to trial advocacy where the goal is to impeach, discredit, and undermine the opponent to make him a loser within the caucus session a mediation advocate should abandon the rhetoric and posture appropriate for the courtroom. He should rather respond to the mediator's questions openly and in a manner that sufficiently communicates his client's best-case scenario and highlight the issues that are critical to the client.³²

The caucus is the safest environment within which to make settlement proposals, float figures, and suggest creative ways to reach resolution knowing that the mediator will not disclose such to the other side until the most opportune moment. Open communication in this way is a most effective tactic which enables the mediator identify the points of convergence, possible areas of compromise and ultimately the most appropriate resolution in the case. Another useful tactic is to use the mediator as a sounding board for possible solutions or even to provide a forum for a client to vent and express their feelings, which in some instances has enabled a party feel that they have had their "day in court" and frequently acts as a catharsis for settlement.

3.5 Post Mediation:

Many mediators have experienced a successful mediation where the parties have participated in mediation sessions, arrived at a mediation settlement which did not, most unfortunately, see the light of day because the parties did not agree and sign a mediation settlement agreement. This is the stage at which the mediation advocate's most important contribution can be made. It is critical that counsel for both parties sculpt the terms and conditions of the mediation settlement agreement in a format that will be binding upon the parties.³³ To avoid long protracted engagement on the terms and conditions to be included in the mediation settlement agreement it is desirable that the mediation advocate crafts the terms of the agreement in simple language devoid of the complexities of legalese. Each advocate is further duty bound to explain the agreed terms and conditions, as well as their full tenor and effect to their respective clients.³⁴

³¹ Richard Calkins *Ibid*

³² Richard Calkins *Supra*

³³ Brian Jerome, *The Attorney, the Client and the Mediator* (2016) Mediate.com Available at <https://www.mediate.com/articles/JeromeB3.cfm> Last accessed on 11 February 2021

³⁴ Brian Jerome *Ibid*

3.6 Executing the Mediation Settlement Agreement:

Anecdotal evidence suggests that parties are more likely than not to comply voluntarily with the terms and conditions of a mediation settlement. It is posited that this is because that contrasted to a court-imposed judgment whose legitimacy lies in the force of law a mediation settlement agreement is a result of consensus and predominantly always reflects what the parties want and often incorporates the idiosyncrasies of the parties involved.³⁵

Within the Kenyan context mediation settlement agreements resulting from the Court Mandated Mediation program are enforceable as a judgment of the court³⁶ and no appeal lies from such a judgment.³⁷ Further per section 59D of the Kenyan Civil Procedure Act all written agreements entered into with the assistance of qualified mediators may be registered and enforced by the Court.

In systems not supported by court connected mediation various approaches have been utilised to enforce mediation settlement agreements, to wit, (1) as written contracts with some jurisdictions requiring the mediation settlement agreement to read that the same will be enforceable by a court of law; and (2) as a consent arbitral award although this can only apply where a valid arbitration clause and/or agreement exists.³⁸ There has been a great deal of speculation as to whether the latter could be enforceable under the New York Convention³⁹ although the recent advent of the Singapore Convention⁴⁰ may have created better options for enforcement on the international scene. However, the Singapore Convention can only be invoked where the mediation settlement agreement results out of a mediation and its nature is international and commercial.⁴¹ It does not

³⁵ Cathleen Cover Payne, *Enforceability of Mediated Agreements* (1986) *Journal on Dispute Resolution* Vol.1:2

³⁶ Section 59C(3) of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)

³⁷ Section 59C(4) of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)

³⁸ Bobette Wolski, *'Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research'* (2014) 7 *Contemp Asia Arb J* 87. Available on Heinonline Last accessed on 11 February 2021

³⁹ 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards

⁴⁰ 2019 the Singapore Convention on recognition and enforcement of international mediated settlement agreements

⁴¹ Elisabetta Silvestry, *The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation?* (2019) *Revista Eletrônica de Direito Processual* Available on DOI: 10.12957/redp.2019.44558 Last accessed on 11 February 2021

apply to (1) domestic mediations;⁴² (2) settlement agreements arising out of family, inheritance or employment law;⁴³ (3) settlement agreements arising out of or within court proceedings;⁴⁴ and (3) settlement agreements that have been recorded and/or are enforceable as an arbitral award.⁴⁵

The mediation advocate therefore requires to understand the dynamics of the jurisdiction they are mediating in and further to understand what can and what cannot be enforced either within the domestic or international context and adjust their strategies accordingly.

4. Ethical Considerations for the Mediation Advocate:

Mediation is a peculiar form of dispute resolution which imposes on a mediation advocate a variety of duties and responsibilities, to all parties involved in the mediation.⁴⁶ Where mediation is court connected there are further duties to the administration of justice and the courts themselves. Further, the mediation process is fraught with accompanying tensions and dilemmas for the advocate with a dearth of guidance on how counsel should conduct himself should the duties to the client, to his firm and that of the mediation process collide.⁴⁷

A mediation advocate is engaged in the practice of law and is governed by the rules of conduct issued by the law society or bar association⁴⁸ and they are officers of the Court. Generally the ethical conduct a mediation advocate is required to observe within the conduct of the mediation process will include the traditional duties to his client of honesty, courtesy, competence, diligence and confidentiality which remain the same as in trial advocacy.⁴⁹ The parties and by extension their advocates may accept additional conduct obligations where the mediation agreement dictates or where additional duties

⁴² Article 1, Singapore Convention

⁴³ Article 2, Singapore Convention

⁴⁴ Article 3(a), Singapore Convention

⁴⁵ Article 3(b), Singapore Convention

⁴⁶ Valencia Soh Ywee Xian, *Mediation Advocacy: Doing Good, Doing Right and Doing Well* (2016) Contemporary Issues in Mediation pgs.17–34 Available at https://doi.org/10.1142/9789813108370_0002 Last accessed on 11 February 2021

⁴⁷ Valencia Xian *Ibid*

⁴⁸ Bobette Wolski, "On Mediation, Legal Representatives and Advocates" [2015] UNSWLJl 2; (2015) 38(1) UNSW Law Journal 5 Available at <http://classic.austlii.edu.au/au/journals/UNSWLJl/2015/2.html> Last accessed on 11 February 2021

⁴⁹ Kathy Douglas and Becky Batagol *Supra* pg.761

may be applicable pursuant to statute or regulation such as with institutional mediations.⁵⁰

In particular, the ethical considerations of the mediation advocate are directed to the court, mediators and third parties as follows: -

4.1 Duty to Court:

Section 1A of the Kenyan Civil Procedure Act provides the overriding objective outlined to be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Section 1A (2) requires a party to civil proceedings and/or their advocate 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. Section 59B provides for reference of screened cases to mediation to be carried out in accordance with the mediation rules. The Judiciary of Kenya Practice Directions on Court Annexed Mediation⁵¹ further encourages parties to undertake mediation⁵² in all civil actions filed in the High Court, Environment Land Court, Employment and Labour Relations Courts, subordinate courts and tribunals throughout the country⁵³ and all civil actions are subject to mandatory screening for mediation.⁵⁴ Attendance for all parties is mandatory and they may be accompanied by their advocate or a representative⁵⁵ and the mediator is empowered to issue guidelines as may be appropriate⁵⁶ on pain of their pleadings being struck out⁵⁷ and being condemned to pay costs among other remedies in the event of default.⁵⁸

Where an advocate is acting for a client whose matter is in court and referred to mediation, ethics require them to inform their client of the above provisions of the law, and to require their client to comply.

⁵⁰ Bobette Wolski *Supra*

⁵¹ Gazette Notice No.7263 of 20th July 2018

⁵² Rule 1(a) of the Practice Directions

⁵³ Rule 1(b) of the Practice Directions

⁵⁴ Rule 2(a) of the Practice Directions

⁵⁵ Rule 7(a) of the Practice Directions

⁵⁶ Rule 7(b) of the Practice Directions

⁵⁷ Rule9(i)(b) of the Practice Directions

⁵⁸ Rule9(i)(c) of the Practice Directions

4.2 Duty to Mediators:

The Kenya Judiciary Practice Directions define a mediator separately from a court to be an impartial third party appointed to conduct a mediation.⁵⁹ We can contrast this to the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada⁶⁰ which defines “tribunal” to include “mediator”. The importance in distinguishing whether mediators ought to be regarded as courts or as other parties for the purpose of the rules is an important one because lawyers may be construed as owing different standards of honesty and candour depending on who they are dealing with. If mediators are treated as courts, practitioners cannot mislead or deceive them on any matter and arguably this includes matters pertaining to their client’s interests, BATNAs (Best Alternative to a Negotiated Agreement), bottom lines and negotiation strategies⁶¹.

The mediation advocate must therefore bear this in mind when representing a client during a mediation. He must treat the mediator with respect, conduct himself with decorum during the mediation sessions, and act in his client’s best interests. These are also ethical considerations that may not be apparent to some mediation advocates.

4.3 Duty to Third Parties including Opponents:

An advocate owes general duties of honesty, fairness and courtesy to third parties, including their opponent in respect of statements of material fact and law. However, some overstatement and puffing in mediation in relation to a client’s position, values, bottom line and alternatives to settlement is routinely tolerated provided that they are not an excessive overstatement as to amount to an outright lie or otherwise exceed the legitimate assertion of the rights or entitlements of their client.⁶² A legal representative is further not obliged to share any information with the opposing party and unless the settlement arises out of fraud or outright misrepresentation they are under no obligation to ensure that a mediated settlement agreement is fair to the opposing party.⁶³

⁵⁹ Rule 1(c) of the Practice Directions

⁶⁰ Federation of Law Societies of Canada, *Model Code of Professional Conduct* (2019) Available at <https://flsc.ca/national-initiatives/model-code-of-professional-conduct/> Last accessed on 11 February 2021

⁶¹ Bobette Wolski *Supra*

⁶² Bobette Wolski *Supra*

⁶³ Bobette Wolsk *Supra*

The ethical considerations that arise here are underpinned by the advocate's duty to act in the best interest of their client. A successful mediation results in restoration of the relationship between the disputants which the mediation advocate should not lose sight of. This will benefit his client as much as it benefits the third party/opponent.

The mediation advocate is aware that his client is in charge of the mediation process. He is ethically obliged to guide his client towards a successful conclusion of the mediation. This includes ensuring that his client does not antagonize their opponent by offensive language and behaviour. The ethical consideration is thus directed to the third party/opponent. The mediation advocate should maintain a clear balance so as not to be perceived as being in conflict with their client's interest.

Whilst a mediator code of ethics has been issued by the Kenyan Judiciary ⁶⁴ there does not exist a similar code of conduct for advocates appearing in mediations in Kenya and this is an area ripe for legal reform with the involvement of all stakeholders taking into account the foregoing parameters.

5. Conclusion:

The Mediation Advocate is another specialization of practice that has begun to become entrenched in Kenya. With its growing prevalence and popularity as an appropriate dispute resolution mechanism mediation is sure to experience an upward trend of growth. The experience in many jurisdictions however demonstrates a measure of discomfort with having advocates present within the mediation process primarily because many import their gladiatorial tendencies within the mediation process, sometimes with less than desirable outcomes and mediators are therefore hesitant to embrace the advocate wholeheartedly.

To the mediation advocate it cannot be gainsaid that the practice before a mediator differs significantly from appearing in the traditional litigation, arbitration and adjudication arenas. To the mediator it is critical to recognize, capitalize and harness the value that a mediation advocate can bring to the mediation process where their strengths can be brought to bear to benefit their clients, the mediator and ultimately the practice of mediation within and without the court connected systems.

⁶⁴ Kenya Judiciary Code of Ethics for Mediators under the Pilot Court Annexed Mediation Program

An important area that further emerges within this dynamic revolves around the ethical considerations which have some aspects that are peculiar to mediation. The writers therefore posit that this is an area ripe for not only scholarly consideration but also law reform.

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Arbitration Law and the Right of Appeal in Kenya

By: *Kariuki Muigua**

Abstract

The paper critically discusses the right of appeal under the arbitration law in Kenya. One of the hallmarks of arbitral practice is limitation of court intervention in the process. However, the law envisages certain instances where parties to an arbitration may seek recourse to the High Court in instances such as enforcement or setting aside of an award. Section 35 of the Arbitration Act which provides the mechanism for setting aside of an award is silent on whether an appeal lies to the Court of Appeal pursuant to the High Court's decision. Consequently, conflicting decisions have emanated from the Court of Appeal on whether section 35 of the Arbitration Act confers a right of appeal. It was not until recently that the Supreme Court of Kenya sought to put the matter to rest. The paper seeks to critically analyse the foregoing provision and relevant decisions on the right of appeal under the arbitration law in Kenya. It will also suggest the best approach in interpreting the right of appeal in order to promote the purpose of arbitration while safeguarding the right of access to justice especially for the business community in the country.

1. Introduction

Arbitration is one of the forms of Alternative Dispute Resolution (ADR). ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation.¹ The legal basis for their application is provided under the Charter of the United Nations which is to the effect that the parties to a dispute shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.² Arbitration has been defined as private and consensual process where

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¹ Muigua, K., & Kariuki, F, *ADR, Access to Justice and Development in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf> (accessed on 04/11/2020)./

² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XV1.

parties to a dispute agree to present their grievances to a third party for resolution.³ It is an adversarial process and resembles litigation in many ways.⁴ Arbitration falls under the category of coercive ADR processes and parties are bound by the final award expect for limited grounds of appeal.⁵

Several benefits have been attributed to arbitration. It is a private and confidential⁶. Parties enjoy a lot of autonomy and considerable control over the proceedings including the appointment of an arbitrator and the process of arbitration.⁷ Further, it has the ability to promote expeditious and cost-effective management of disputes.⁸ Arbitration also ensures finality of dispute resolution due to the binding nature of an arbitral award.⁹

Due to its private and confidential nature, arbitration is characterised by limited court intervention in the process.¹⁰ Consequently, questions have emerged over the years on the extent of court intervention in arbitration and whether some of the decisions of an arbitral tribunal are subject to appeal. The paper thus seeks to critically discuss the right of appeal under the arbitration law in Kenya. In doing so, the paper will analyse salient provisions of the Arbitration Act which confer or deny court intervention in the arbitration process and judicial interpretation of the right of appeal under the arbitration law in Kenya. Of particular interest, the paper will focus on section 35 of the Arbitration Act and with the aid of relevant court decisions, it will critically analyse whether the section confers the right of appeal on decisions made under section 35. Notably, the right to appeal under the provisions of section 39 of the Arbitration Act in relation to any

³ Khan, F., *Alternative Dispute Resolution*, A paper presented at the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁴ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited (2015).

⁵ Muigua, K., *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf> (accessed on 22/10/2020).

⁶ Muigua, K., *Settling Disputes Through Arbitration in Kenya*, Glenwood Publishers, 3rd Edition, February 2017, P 3.

⁷ *Ibid.*

⁸ Gaakeri, J., 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' *International Journal of Humanities and Social Science*, Volume 1, No. 6, June 2011.

⁹ See generally Valverde, G., 'Potential Advantages and Disadvantages of Arbitration v Litigation in Brazil: Costs and Duration of the Procedures' *Law and Business Review of the Americas*, Volume 12, No. 4.

¹⁰ Bachand, F., 'Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism' *Dispute Resolution Journal* 83 (2012).

questions of law is only restricted to domestic arbitrations only. Section 39 is to the effect that ‘where in the case of a domestic arbitration, the parties have agreed that—an application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or an appeal by any party may be made to a court on any question of law arising out of the award, such application or appeal, as the case may be, may be made to the High Court’.¹¹ Section 39(3) is also categorical that ‘notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection(2)’.¹² This was indeed affirmed by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*, where the Dissenting Opinion of Justice D.K. Maraga, CJ & P stated that:

*[102] It is indeed true that Section 35 is silent on appeals against High Court decisions thereunder. As a matter of fact, the explanatory notes on the UNCITRAL Model Law acknowledge that appeals may lie to a higher Court against the first instance Court decisions on arbitral proceedings but only in limited circumstances as may be determined by each State in its adaptive legislation. **The Kenyan Arbitration Act allows appeals under Section 39 thereof only in domestic arbitrations and by the consent of the parties.** In this case, parties never consented to any appeal. In the circumstances, given the clear, categorical and unambiguous wording of Sections 10 and 32A and, more importantly, the said overall objective of the enactment of the Arbitration Act No. 4 of 1995 as is manifest from the Parliamentary Hansard report of 20th July 1995, I find no warrant whatsoever to imply the silence in Section 35 as a tacit right of appeal against decisions made thereunder.*

It is worth pointing out that, while section 39 is quite clear, appeals on decisions rendered by the High Court under section 35 have not been as clearly provided for. Thus, while this paper will comment on section 39, it will mainly focus on appeals under section 35 of the Act as these have been the most controversial.

¹¹ Sec. 39(1), Arbitration Act, No. 4 of 1999 (2009), Laws of Kenya.

¹² Sec. 39(3), Arbitration Act.

2. Legal Framework on Arbitration in Kenya

The Arbitration Act is the primary legal instrument governing arbitration in Kenya. The Act defines arbitration as any arbitration whether or not administered by a permanent arbitral institution.¹³ The Arbitration Act also provides for both domestic and international arbitration.¹⁴ The Act governs certain aspects pertinent to the practice of arbitration including the composition and jurisdiction of the arbitral tribunal, conduct of arbitral proceedings, arbitral award and termination of arbitral proceedings, recourse to the High Court against an arbitral award and recognition and enforcement of awards.¹⁵ The Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.¹⁶ Pursuant to this provision, Order 46 of the Civil Procedure Rules allows parties to a dispute who are not under disability at any time before judgment is pronounced to apply to court for referral of the dispute to arbitration.¹⁷

The Constitution of Kenya enshrines the fundamental right of access to justice and mandates the state to ensure access to justice for all persons.¹⁸ Article 159 of the Constitution provides that:

“(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

(2) 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;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

Previously, the idea of access to justice in Kenya had been equated to litigation which for a long time has been the predominant mechanism through which parties enforce their

¹³ Arbitration Act, No. 4 of 1995, s. 3 (1), Government Printer, Nairobi.

¹⁴ *Ibid*, s. 3(2)(3).

¹⁵ *Ibid*.

¹⁶ Civil Procedure Act, Cap 21, Laws of Kenya, S 59, Government Printer, Nairobi; see also sections 59A, 59B and 59C.

¹⁷ Civil Procedure Rules, Order 46, Rule 1, Government Printer, Nairobi.

¹⁸ Constitution of Kenya 2010, Article 48, Government Printer, Nairobi.

rights.¹⁹ However, there has been a paradigm shift under the Constitution of Kenya, 2010 which mandates courts and tribunals while exercising judicial authority to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.²⁰ Arbitration thus enjoys constitutional recognition in Kenya pursuant to this provision. Courts have slowly embraced this shift and acknowledged the different aspects of what constitutes access to justice as was captured by the High Court in the case of *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd*²¹ in the following words:

[110] “Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

While the High Court in the above case seemed to give prominence to the formal adjudicatory processes²², ADR has been embraced by the courts. In addition, while the effectiveness of ADR processes under the guidance and direction of courts may have its pros and cons (which are beyond the scope of the current discussion), it is indeed a step in the right direction in making access to justice accessible by the public.

3. Right of Appeal Under the Arbitration Law in Kenya

In interpreting the right of appeal under the arbitration law in Kenya, the point of departure is to note that the law envisages limitation of judicial intervention within the parameters provided. This has been succinctly captured by the Arbitration Act which provides that *‘except as provided by the Act, no court shall intervene in matters governed*

¹⁹ International Development Law Organization, ‘*Enhancing Access to Justice through Alternative Dispute Resolution in Kenya*’ available at <https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya> (accessed on 04/11/2020).

²⁰ Constitution of Kenya 2010, Article 159 (2) (c), Government Printer, Nairobi.

²¹ *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* High Court Constitutional Petition No.328 of 2011 [2012] eKLR.

²² See also *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR, where the Court emphasized that *“the right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Courts.”*

by the Act.²³ The concept of limitation of judicial intervention is generally accepted in arbitral practice across the world. The English Arbitration Act provides that *'in matters governed by this Act the court should not intervene except as provided by this Act.'*²⁴ Further, the UNCITRAL Model Law on International Commercial Arbitration provides that *'in matters governed by this law, no courts shall intervene except where so provided in this law.'*²⁵

Limitation of judicial intervention in arbitration is in line with the principle of finality of arbitration which is aimed at facilitating expeditious settlement of disputes. To this extent, it has been rightly observed that unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act and thus *the role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration but will also be a clear negation of the legislative intent of the Arbitration Act* (emphasis added).²⁶ The Supreme Court of Kenya, while commenting on the same in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*, stated as follows:

[52] We note in the above context that, the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates that, *"the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process."* It was also reiterated that the limitation of the extent of the Courts' interference was to ensure an, *"expeditious and efficient way of handling commercial disputes."*

[53] Similarly, the Model Law also advocates for "limiting and clearly defining Court involvement" in arbitration. This reasoning is informed by the fact that *"parties to an arbitration agreement make a conscious decision to exclude court*

²³ Arbitration Act, No. 4 of 1995, S 10.

²⁴ Arbitration Act, 1996 (Chapter 23), United Kingdom, S 1 (c).

²⁵ UNCITRAL Model Law on International Commercial Arbitration (United Nations Document A/40/17, annex 1) Section 5.

²⁶ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Op Cit.

jurisdiction and prefer the "finality and expediency of the arbitral process." Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.

The principle of finality of arbitration which is the basis of limitation of court's intervention in arbitral proceedings has been upheld in numerous court decisions. In *Kenya Shell Limited v Kobil Petroleum Limited*²⁷, the Court of Appeal in upholding the principle decided that as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act underscores that policy.²⁸ Further in *Mahan Limited v Villa Care*²⁹, the Court while giving effect to the principle of finality of arbitration decided as follows:

'It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that *the decision of the Arbitrator would be final and binding on them* (emphasis added). It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they agreed to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act'.

A similar position was also held in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*³⁰ where the Court of Appeal decided that:

'that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that *the arbitrators' award shall be final*, it can be taken that as long as the given award subsists, it is theirs (emphasis added). But in the event it is set aside

²⁷ Kenya Shell Limited v Kobil Petroleum Limited NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR.

²⁸ *Ibid.*

²⁹ Mahan Limited v Villa Care, HC Misc. Civil App. No. 216 of 2018 [2019] eKLR.

³⁰ Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Supreme Court Petition No. 12 of 2016 (2019) eKLR

as was the case here, that decision of the High Court is final and remains their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily chose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved.”

The above position in *Nyutu case* was the position taken by the Court of Appeal, and the Supreme Court, when it was called upon to pronounce itself on the same issue had the following to say:

[48] That same view of the finality of High Court decisions is evident in other Court of Appeal decisions such as *Anne Mumbi Hinga v Victoria Njoki Gathara* Civil Appeal No. 8 of 2009; [2009] eKLR, *Micro-House Technologies Limited v Co-operative College of Kenya* Civil Appeal No. 228 of 2014; [2017] eKLR and *Synergy Industrial Credit Ltd v Cape Holdings Ltd* Civil Appeal (Appl.) No. 81 of 2016.

[49] However, in other cases, the Court of Appeal has taken a different position. For example, in the earlier case of *Kenya Shell Limited v Kobil Petroleum Limited* Civil Application No. 57 of 2006 (unreported) Omolo JA expressed himself thus: “[T]he provisions of Section 35 of the Arbitration Act have not taken away the jurisdiction of either the High Court or the Court of Appeal to grant leave to appeal from a decision of the High Court made under that section. If that was the intention, there was nothing to stop Parliament from specifically providing in Section 35 that there shall be no appeal from a decision made by the High Court under that section.”

[50] Similarly, in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited* Civil Application No. Nai. 302 of 2015; [2017] eKLR, the Court of Appeal rendered itself as follows:

“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.”

[51] Thus, it is evident that there is no consensus by the Court of Appeal both before and after 2010 on how Section 35 should be interpreted. There is need therefore to properly interrogate the matter and establish why, unlike other

provisions in the Arbitration Act, Section 35 does not specifically state that decisions of the High Court are final, and unlike Section 39, it does not also state that an aggrieved litigant may appeal to the Court of Appeal. We shall also need to understand the import of Section 10 of the Act and its relevance, if at all to the interpretation before us. A proper interpretation would also require a broader understanding of the principles of arbitration vis-a-vis the lingering powers of the Courts to intervene in arbitral proceedings. And finally, any interpretation adopted should not negate the fundamental purpose for which the Arbitration Act was enacted.

While agreeing with the position adopted by the Court of Appeal in Nyutu case, the Supreme Court had the following to say:

[57] Thus, it is reasonable to conclude that just like Article 5 [of the Model Law], Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.

[58] Having stated as above therefore we reject Nyutu's argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit the Court of Appeal's jurisdiction to hear appeals arising from decisions of the High Court determined under Section 35 of the Act. We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only. However, Section 10 cannot be used to explain whether an appeal may lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured. The question whether an appeal may lie against the decision of the High Court

made under Section 35 thus still remains unanswered because, just like Section 35, Section 10 does not answer that question.

Notably, in *GEO Chem Middle East v Kenya Bureau of Standards* [2020] eKLR, the Supreme Court also commented on the status of appeals under section 35 in the following words:

48. In the premises, we have no option but to hold that the Judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, was rendered in excess of jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks.

*49. In conclusion, having declined to delve into the merits of the Court of Appeal Judgment for the reasons stated, and having also found that the Appellate Court prematurely, and in excess of its jurisdiction, sat on an appeal that was not ripe, instead of remitting the same to the High Court for determination, what course of action is open to us? To answer this question, we must first address the issue as to whether the leave that triggered these proceedings in the first place, ought to have been granted. Or put another way, had the application for leave to appeal been made after the delivery of *Nyutu and Synergy*, would such leave have been likely granted by the Court of Appeal? It is to this question that we must now turn.*

*50. Towards this end, we have already made two critical observations, firstly, that in granting leave on 31st May 2018, the Court of Appeal did not interrogate the substance of the intended appeal and whether it fell within the said Section (read, Section 35 of the Arbitration Act). Secondly, that in granting leave, the Court of Appeal appeared to suggest or must be taken to have been suggesting that such appeals were open-ended. At that time there were two divergent schools of thought at Court of Appeal; the one which argued that appeals lay to the Court from decisions of the High Court and the other which was categorical that no such appeals could lie to the Court. And then came our decisions in *Nyutu and Synergy* of which we shall say no more, save that the window to appeal is severely restricted.*

51. *The applicable law is now settled regarding the vexed question as to whether an appeal lies or not, under Section 35 of the Arbitration Act and if so, under what circumstances. We appreciate the fact that at the time leave was granted, the Supreme Court was yet to pronounce itself on the issue. However, the law as enunciated must now henceforth be the yardstick for granting or refusing to grant leave to appeal in such matters. After our pronouncements in Nyutu and Synergy, it is not possible that the Court of Appeal can grant leave to appeal from a Section 35 Judgment of the High Court without interrogating the substance of the intended appeal, to determine whether, on the basis of our pronouncement, such an appeal lies. A general grant of leave to appeal would not suffice. Yet this is exactly what happened in the instant case before us.*

52. *In conclusion, having declined to delve into the merits of the substantive Judgment of the Court of Appeal for the reasons stated, and having further determined that the said Judgment was nonetheless rendered in excess of jurisdiction, and finally having determined that the initial leave to appeal was granted without interrogating the substance of the intended appeal, the only course of action open to us is to maintain the Ruling of the High Court.*

The precedent flowing from the above decisions is that arbitration being a private and confidential process is not subject to court intervention unless as provided under the Act in line with the principle of finality. Consequently, the Arbitration Act expressly bars certain matters from being subject of appeal. Under section 12 of the Act, *the decision by the High Court in relation to appointment of an arbitrator is final and not subject of appeal* (emphasis added).³¹ The Act also expressly bars appeals from the decision of the High Court on an application challenging an arbitrator (emphasis added).³² In addition, *the decision of the High Court on the termination of the mandate of the arbitrator is final and not subject to appeal* (emphasis added).³³ Further, the decision of the High Court upon an application for relief by an arbitrator who withdraws from his office is final and not subject to appeal.³⁴ Under section 17 of the Act, *the decision of the High Court on the jurisdiction of the Tribunal is final and cannot be appealed against* (emphasis added).

The Act, however, envisions certain instances that may warrant court intervention in the arbitral process in form of an application or appeal to the High Court. Under section 39

³¹ Arbitration Act, No. 4 of 1995, S 12 (8).

³² *Ibid*, S 14 (6).

³³ *Ibid*, S 15 (3).

³⁴ *Ibid*, S 16A (2).

of the Act, where parties have agreed that an application by an party may be made to a court to determine any question of law arising in the course of the arbitration or an appeal by an party may be made to a court on any question of law arising out of the award, such application or appeal may be made to the High Court.³⁵ The High Court is granted power under this provision such an application or appeal to determine the question of law arising or confirm, vary or set aside the arbitral award.³⁶ *The section further grants the right of appeal to the Court of Appeal against a decision of the High Court if the parties have agreed so prior to the delivery of the arbitral award and if the Court of Appeal is of the opinion that a point of law of general importance is involved* the determination of which will substantially affect the rights of one or more of the parties involved (emphasis added).³⁷ The import of this provision is that *parties through an agreement can allow for the right of appeal against a High Court decision made pursuant to section 39 of the Arbitration Act* (emphasis added). This provision mirrors the English Arbitration Act which allows appeals on questions of law arising out of an award with the agreement of all parties to the proceedings and with the leave of the court.³⁸ However, it must be pointed out that the right to appeal to the Court of Appeal under section 39 is only restricted to domestic arbitration and can only be on questions of law.³⁹

4. Right of Appeal Under Section 35 of the Arbitration Act

One of the contentious issues in arbitral practice in Kenya has been whether a right of appeal accrues automatically from the decision of the High Court under section 35 of the Arbitration Act. The section provides for recourse to the High Court against an arbitral award through an application for setting aside an award. The High Court upon such an application may set aside the award if it is proved that: *a party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the law to which the parties have subjected it or the laws of Kenya; the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings; the arbitral award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the*

³⁵ *Ibid*, S 39.

³⁶ *Ibid* S 39 (2).

³⁷ *Ibid*, S 39 (3).

³⁸ Arbitration Act, 1996 (Chapter 23), United Kingdom, S 69 (2).

³⁹ See *Kenyatta International Convention Center v Congress Rental South Africa [2020] eKLR*, Civil Application 231 of 2018; *GEO Chem Middle East v Kenya Bureau of Standards [2020] eKLR*, Petition (Application) 47 of 2019.

parties or the making of the award was induced or affected by fraud, bribery, undue influence or corruption (emphasis added).⁴⁰ The High Court may also set aside the award if it finds that *the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya or the award is in conflict with the public policy of Kenya* (emphasis added).⁴¹

The issue of the right of appeal under section 35 of the Arbitration was given prominence by the Supreme Court in the case *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited*⁴². The Supreme Court in the case decided *that an appeal may lie to the Court of Appeal against a decision of the High Court made pursuant to section 35 of the Arbitration Act upon grant of leave in exceptional cases* (emphasis added). Specifically, the majority of the Supreme Court judges had the following to say:

“[71] We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.

[72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire

⁴⁰ Arbitration Act, S 35 (2) (a)

⁴¹ *Ibid*, S 35 (2) (b)

⁴² *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Ltd*; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Supreme Court Petition No. 12 of 2016, (2019) eKLR

into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in AKN and another (supra) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the ‘no Court intervention’ principle.”

“[77] In concluding on this issue, we agree with the Interested Party *to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.*” (emphasis added)

The issue also arose in the case of *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR⁴³ where the Supreme Court held that:

[86] For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the Arbitration Act, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award.

Prior to the Supreme Court decision in the above cases, conflicting decisions had emanated from the Court of Appeal on whether a party dissatisfied with the decision of the High Court under section 35 of the Arbitration Act can appeal against such a decision. One school of thought has been that since there is no express bar of the right of appeal under section 35 of the Act, such decisions should be appealable to the Court of Appeal under Article 164 (3) of the Constitution of Kenya, 2010. This provision gives

⁴³ *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, Petition No. 2 of 2017.

the Court of Appeal unlimited jurisdiction to hear appeals from the High Court.⁴⁴ On the other hand, it has been contended that there is no right of appeal under section 35 of the Act and that where the Act requires the Court of Appeal's intervention, it explicitly states so with the example of section 39 of the Act.

In the Court of Appeal decision in *Nyutu Agrovet Limited -vs- Airtel Networks Limited*, the court dismissed an appeal emanating from a High Court decision under section 35 of the Arbitration Act and decided that:

'The principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrators' *award shall be final*, it can be taken that as long as the given award subsists it is theirs. But in the event that it is set aside as was the case here, that decision of the High Court is final remains their own. None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. *The High Court decision is final and must be considered and respected to be so because the parties voluntarily choose it to be so.* They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved. Despite the loss or gain either party may impute to, the setting aside remains where it falls. *The courts, including this Court, should respect the will and desire of the parties to arbitration* (emphasis added).⁴⁵

Further, the court rejected the notion that the right of appeal to the Court of Appeal automatically accrues under article 164 (3) of the Constitution and noted that the power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before the Court.⁴⁶

In, *Anne Mumbi Hinga -vs- Victoria Njoki Gathara*, the Court of Appeal also held that no right of appeal accrues under section 35 of the Arbitration Act and that appeals will only lie to the court in circumstances set out under section 39 of the Act.⁴⁷ The Court of Appeal in the case expressed itself as follows:

⁴⁴ Constitution of Kenya, 2010, Article 164 (3), Government Printer, Nairobi

⁴⁵ *Nyutu Agrovet Limited -vs- Airtel Networks Limited*, Civil Appeal No.61 of 2012 (2015) eKLR.

⁴⁶ *Ibid.*

⁴⁷ *Anne Mumbi Hinga -vs- Victoria Njoki Gathara*, Civil Appeal No. 8 of 2009; [2009] eKLR.

‘We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act’⁴⁸

Further, in *Micro-House Technologies Limited -vs- Co-Operative College of Kenya*, the Court of Appeal decided that there is no right of appeal from a High Court decision made pursuant to section 35 of the Arbitration Act.⁴⁹

However, the Court of Appeal has also held a different view on the issue of the right of appeal under section 35 of the Arbitration Act. In *Kenya Shell Limited -vs- Kobil Petroleum Limited*⁵⁰, the court decided that:

“The provisions of Section 35 of the Arbitration Act have not taken away the jurisdiction of either the High Court or the Court of Appeal to grant leave to appeal from a decision of the High Court made under that section. If that was the intention, there was nothing to stop Parliament from specifically providing in Section 35 that there shall be no appeal from a decision made by the High Court under that section.”

A similar position was also held by the Court of Appeal in the case of *DHL Excel Supply Chain Kenya Limited -vs- Tilton Investments Limited*, where the court in its interpretation of section 35 of the Arbitration Act decided as follows:

⁴⁸ *Ibid.*

⁴⁹ *Micro-House Technologies Limited -vs- Co-Operative College of Kenya*, Civil Appeal No. 228 of 2014, (2017) eKLR.

⁵⁰ *Kenya Shell Limited -vs- Kobil Petroleum Limited*, Civil Application No. 57 of 2006 (Unreported).

“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.”⁵¹

An analysis of the foregoing Court of Appeal decisions shows that prior to the Supreme Court decisions in *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited* and *Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR*, the question of whether the right of appeal accrues under section 35 of the Arbitration Act remained unsettled. Where the Court of Appeal decided that it has no jurisdiction, it has observed that the Court of Appeal’s intervention is only envisaged under section 39 of the Arbitration Act.⁵² Further, the court had also made the finding that the right of appeal is conferred by a specific statute and does not generally flow from article 164 (3) of the Constitution.⁵³ In other instances, where the court had decided that it had jurisdiction to entertain appeals under section 35 of the Act, it had taken the view that since the section is silent on the issue of appeal, it should be interpreted to confer jurisdiction to the Court of Appeal.⁵⁴ Further, in support of this view, the Court of Appeal had also decided that if the legislature had the intention of limiting the right of appeal under section 35, it would have expressly done so similar to other specific provisions of the Arbitration Act. Unlike section 35 of the Arbitration Act which does not expressly bar or allow an appeal from a High Court decision made pursuant to the section, the English Arbitration Act provides clarity on this issue. The Act provides that leave of the court is required for any appeal from a decision of the court on an application challenging an arbitral award.⁵⁵ Amidst the conflicting decisions that have emanated from the Court of Appeal in regard to the right of appeal under section 35 of the Arbitration Act, the Supreme Court has rendered some certainty on the issue in a number of cases it has decided dealing with the right of appeal under section 35 of the Arbitration Act.

⁵¹ DHL Excel Supply Chain Kenya Limited -vs- Tilton Investments Limited, Civil Application No. NAI. 302 of 2015; [2017] eKLR.

⁵² See *Nyutu Agrovet Limited -vs- Airtel Networks Limited*, Civil Appeal No.61 of 2012.

⁵³ *Ibid.*

⁵⁴ See *Kenya Shell Limited -vs- Kobil Petroleum Limited*, Civil Application No. 57 of 2006.

⁵⁵ Arbitration Act, 1996 (Chapter 23), United Kingdom, S 67 (4).

5. The Import of Supreme Court's Decisions on The Right of Appeal Under Section 35 of the Arbitration Act

In its interpretation of the right of appeal under section 35 of the Arbitration Act, the Court has emphasized the need to balance between finality and limited court intervention and decided that *leave to appeal may be granted where the High Court decision is patently wrong* (emphasis added). This was succinctly captured in the case of *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited*.⁵⁶ The parties had entered into a distributorship agreement where Nyutu Agrovet Limited was contracted to distribute telephone handsets belonging to Airtel Networks Kenya Ltd. A dispute arose when an agent of Nyutu placed orders for Airtel's products totalling Kshs.11 million for which Airtel made payment. Upon delivery, Airtel realised that the orders were made fraudulently. Nyutu had also failed to pay the said amount and the agreement between the parties was thus terminated and a dispute in that regard arose. The dispute was referred to arbitration and upon conclusion of the arbitral proceedings, an award of Kshs.541, 005,922.81 was made in favour of Nyutu Agrovet Limited.

Being dissatisfied with the award, Airtel Networks Kenya Limited filed an application before the High Court under section 35 of the Arbitration Act seeking to set it aside. The entire arbitral award was then set aside purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties. On appeal to the Court Appeal against the High Court decision setting aside the award, the court struck out the appeal and held that the decision by the High Court made under Section 35 of the Act was final and no appeal lay to the Court of Appeal. Aggrieved by the Court of Appeal decision, Nyutu Agrovet Limited filed an appeal to the Supreme Court. *The Supreme Court decided that an appeal can lie from the High Court to the Court of Appeal in very limited circumstances upon grant of leave* (emphasis added). The Court emphasized *the need to balance between finality and limited court intervention and decided that leave to appeal may be granted where the High Court decision is patently wrong* (emphasis added). The court noted that an unfair determination by the High Court should not be absolutely immune from appellate review. The court highlighted instances where leave to appeal may be granted including; *where there is unfairness or misconduct in decision making process, the need to protect integrity of the judicial process and prevent injustice and the importance of the subject matter including the economic value or legal principle at issue* (emphasis added).

⁵⁶ Nyutu Agrovet Limited -vs- Airtel Networks Kenya Ltd; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Supreme Court Petition No. 12 of 2016, (2019) eKLR.

A similar decision was made in the case of *Synergy Industrial Credit Limited -vs- Cape Holdings Limited*⁵⁷. The case emanated from a decision of the High Court which set aside an arbitral award under section 35 of the Arbitration Act on the grounds that the arbitrator acted outside the scope of reference. Dissatisfied with the ruling, the petitioner filed an appeal to the Court of Appeal. The Court of Appeal struck out the appeal and held that there was no right of appeal from decisions of the High Court made pursuant to section 35 of the Arbitration Act⁵⁸. Being aggrieved with the decision, the petitioner filed a petition before the Supreme Court.

The Supreme Court allowed the appeal and set aside the ruling of the Court of Appeal. It directed that the petitioner's appeal before the Court of Appeal be reinstated and heard on priority basis.⁵⁹ However, it is worth pointing out that the Supreme Court in analysing

⁵⁷ *Synergy Industrial Credit Limited -vs- Cape Holdings Limited*, Supreme Court, Petition No. 2 of 2017.

⁵⁸ *Synergy Industrial Credit Limited -vs- Cape Holdings Limited*, Court of Appeal No. 81 of 2016.

⁵⁹ The Court of Appeal has since heard and determined the Appeal in *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR, Civil Appeal No. 81 of 2016. In determining the appeal, the Court of Appeal held as follows:

Where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement. If the parties wished to restrict the arbitration to only the written agreements, we would have expected them to state so expressly in the arbitral agreement itself. Furthermore, a look at how the learned judge dealt with the question leaves no doubt in our minds that he did not confine himself to the real question, namely the terms of the arbitral agreement, but instead went into a determination that amounts to saying the arbitral award was erroneous under the law of contract.

This was tantamount to undertaking a merit review of the arbitral award, based on consideration of provisions of the written agreements far removed from the arbitral agreement itself, so as to reach a different finding from the arbitral tribunal, which we think the learned judge was not entitled to do.

.....

If, as we have found, the learned judge was not entitled to set aside the arbitral award on the basis that it dealt with disputes not contemplated by or not falling within the terms of the reference or contained decisions on matters beyond the scope of the reference to arbitration, then all the respondent's arguments on award of interest, compound interest, income opportunity loss and foreign exchange loss, which are founded on the argument

the issues in dispute stated that *there is no express right of appeal against the decision of the High Court in setting aside or affirming an award and leave to appeal will only be granted in very limited circumstances* (emphasis added). The court held that *the intended appellant must demonstrate that in arriving at its decision, the High Court went beyond the grounds set out under section 35 of the Act (emphasis ours)*. Further, it held that *leave to appeal may be granted where there is unfairness or misconduct in the decision-making process and in order to protect the integrity of the judicial process and to prevent injustices* (emphasis added). In summary, the Supreme Court decided that *the Court of Appeal has residual jurisdiction to entertain an appeal under section 35 of the Arbitration Act in exceptional and limited circumstances where there is need to correct palpable injustice* (emphasis added).

The Court, however, cautioned that care must be taken not to delve into merits of the award. Consequently, the Court of Appeal upon hearing the matter on merits set aside the ruling of the High Court and decided that where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement.⁶⁰ The Court of Appeal found that the *High Court decision was manifestly wrong* and that the learned judge was not justified in setting aside the arbitral award on the grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond the terms of the reference to arbitration, or had decided matters beyond the scope of the reference.⁶¹

The upshot of these decisions is that leave to appeal may be granted under section 35 of the Arbitration Act in very limited circumstances *in order to ensure fairness and integrity in the administration of justice* (emphasis ours). However, some have criticised the position of the Supreme Court in the above decisions arguing that it goes against the

that written agreements were the sole basis of the reference, cannot be sustained and therefore do not merit further consideration.

.....

Ultimately we find merit in this appeal. The learned judge was not justified in setting aside the arbitral award on the grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond the terms of the reference to arbitration, or had decided matters beyond the scope of the reference. The appellant will have the costs of the appeal. It is so ordered.

⁶⁰ Synergy Industrial Credit Limited -vs- Cape Holdings Limited, Civil Appeal No. 81 of 2016.

⁶¹ *Ibid.*

principle of finality in arbitration by allowing unwarranted court intervention.⁶² However, as correctly pointed out by the Supreme Court, *a balance ought to be struck between finality in arbitration proceedings and the need to promote the right of access to justice* (emphasis added).

6. Conclusion

The Supreme Court has rendered some certainty on the issue of the right of appeal under section 35 of the Arbitration Act. However, the decisions analysed in the foregoing discussion have not yet fully settled the issue of grant of leave under section 35 of the Arbitration Act and the grounds that will warrant the same. This necessitates *the need for legislative intervention that will see amendment of section 35 of the Arbitration Act in order to capture the Supreme Court's decision on the issue and provide certainty on instances that may warrant grant of leave to appeal* (emphasis added). Further, *section 35 of the Act ought to be interpreted in a way that promotes the purpose and objectives of arbitration law and limit court intervention while at the same time ensuring expeditious yet just resolution of disputes* (emphasis added). Thus, *there is need for a leave mechanism to ensure that frivolous appeals are sieved out and leave to appeal is only granted in matters raising substantive issues under section 35 of the Arbitration Act* (emphasis added). Through this, the sanctity of the arbitral process will be protected by ensuring that there is reduced court intervention yet at the same time safeguarding the right of access to justice.

⁶² See generally Mutubwa, M, 'Is Nairobi a Safe Seat for International Arbitration? A Review of the Latest Decision from the Supreme Court of Kenya and Its Possible Effects' *Alternative Dispute Resolution Journal*, Volume 8, No. 1.

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Changes to Civil Litigation and Mediation Practice Under the Mediation Bill, 2020: What of the Right of Access to Justice and the Independence of the Judiciary?

*By: Prof. Tom Ojienda, SC**

1. Introduction

The Mediation Bill, 2020¹ (hereinafter “the Bill”) was published on 15th June 2020 via **Gazette Notice No. 92 of 2020**. The Bill is for an Act of Parliament: **to provide for the**

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Prof. Ojienda, SC’s published articles include: “Sustainability and The Ivory Trade. Whither the African Elephant?” published in the 2002 issue of the East African Law Review; “Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?” in “Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform” by T. O. Ojienda (eds) pages 95 –

131; “Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law” published in “The Advocate; Learning Law by Doing Law: The Theoretical Underpinnings and Practical Implications of Clinical Legal Education in Kenya”; and “An Inventory of Kenya’s Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights” the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104; “Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project”, published in various journals including the Advocate, the Lawyer, and the Newcastle Law Bulletin; “Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective”; “Polygamous Marriages and Succession in Kenya: Whither “the other woman?”; “Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya” published in the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63; “Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity” published in Law society of Kenya Publication (2003); “Terrorism: Justifying Terror in Kenya?” published in The East African Lawyer, Issue No. 5 at pages 18-22; “Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights”; “A Commentary on Understanding the East African Court of Justice” published in the East African Lawyer, Issue No. 6 at pages 52-56; “Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003” published in The Advocate at page 36-40; “The Advocates Disciplinary Process-Rethinking the Role of the Law Society” published in The Lawyer, Issue No. 78 at pages 15-16; “Ramifications of a Customs Union for East Africa” published in The East African Lawyer, Issue No. 4 at pages 17-25; “Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution” published in the Moi University Journal Vol. 1 2006 No.1, pages 82–92; “Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas” published in the Moi University Journal Vol. 1 2006 No. 1, pages 105 – 131; “Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions” published in The East African Lawyer, Issue No. 12 at pages 19-24; “Implementing the New Partnership for Africa’s Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism” published in the Kenya Law Review, 2007 Vol. 1, pages 81-119; “Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya.” (with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812–1276; “Legal and Institutional Framework of the TJRC - Way Forward” published in the Law Society of Kenya Journal Vol. 6 2010 No. 1, pages 61 – 95; “A Critical Look at the Land Question in the New Constitution” published in Nairobi Law Monthly, Vol. 1, Issue No. 1 of 2010 at pages 76 – 81; and a Book Chapter entitled “Land Law in the New Dispensation” in a book edited by P.L.O. Lumumba and Dr. Mbondenyei Maurice. As a robust litigation counsel, Prof. Ojienda, SC, has successfully handled numerous landmark cases at the Supreme Court of Kenya, on Land and Environment Law, Electoral Law, Commercial Law, Family Law, and other areas of law. Prof. Ojienda, SC represents various individuals, State agencies, private entities, county governments and multinational agencies. He has represented these entities before Kenyan courts, from the subordinate courts, all the way to the Supreme Court of Kenya. Some of his landmark cases at the apex Court include, Independent Electoral and Boundaries Commission & 2 others v. Evans Kidero (Petition 20 of 2014); Justus Kariuki Mate & another v. Hon. Martin Nyaga Wambora (Petition 32 of 2014); In the Matter of the National Land Commission - National Land Commission v. Attorney General & 5 others

settlement of all civil disputes by mediation; to set out the principles applicable to mediation; **to provide for the establishment of the Mediation Committee;** to provide for the accreditation and registration of mediators; **recognition and enforcement of settlement agreements;** and related purposes. The Bill essentially codifies the use mediation as one of the forms of alternative dispute resolution mechanisms (ADR mechanisms), as opposed to the all-time use of the adversarial judicial proceedings in Court to adjudicate civil disputes.

Section 2 of the Civil Procedure Act² defines “mediation” as, “*an informal and non-adversarial process where an impartial mediator encourages and facilitates the resolution of a dispute between two or more parties, but does not include attempts made by a judge to settle a dispute within the course of judicial proceedings related thereto*”. Basically, mediation refers to the process whereby a mutually selected third party who is neutral and impartial, a mediator, assists the parties to a dispute – mostly a civil, commercial, or family dispute – to arrive at an amicable settlement agreement, which is then recorded as an enforceable contract as between the disputants. The mediator assists the parties to resolve the dispute by facilitating discussions between the parties, assisting them in identifying issues in contention, clarifying priorities, exploring areas of compromise, and generating options in an attempt to resolve the dispute.³

(Advisory Opinion Reference No 2 of 2014); Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR; Lemanken Aramat v. Harun Meitamei Lempaka & 2 others [2014] eKLR; Cyprian Awiti & another v. Independent Electoral and Boundaries Commission & 2 others [2019] eKLR; Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others; Martin Wanderi & 106 others v. Engineers Registration Board & 10 others [2018] eKLR; Moi v. Rosanna Pluda [2017] eKLR; Town Council of Awendo v. Nelson O. Onyango & 13 others, among many others which are available at www.proftomojiendaandassociates.com. Prof Ojienda, SC can be reached through tomojienda@yahoo.com.

¹ National Assembly Bill No. 17 of 2020, <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2020/TheMediationBill_2020.pdf> (Accessed on 1 July 2020); sponsored by Honourable Aden Duale, the immediate former Leader of Majority Party.

² Chapter 21, Laws of Kenya.

³ See e.g., **Rule 73 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, Republic of South Africa**, in *Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985) Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa*, Republic of South Africa, Government Gazette Notice No. 37448, 14 October 2014,

Mediation can take the form of **court-mandated pre-trial mediation**, where the parties to a civil dispute are encouraged by the Court to attempt to solve their dispute through mediation in the course of judicial proceedings, before their dispute proceeds to a hearing in the normal civil adjudication process in Court. On the other hand, **non-court-mandated pre-litigation mediation, or pre-action mediation, or pre-suit mediation** is mediation that occurs outside of the court system before disputants institute judicial proceedings in court, as an attempt at an out-of-court settlement of the civil dispute. Nonetheless, **it is court-mandated pre-trial mediation, as opposed to non-court-mandated pre-litigation mediation, pre-action mediation, or pre-suit mediation, which allows the parties to a civil dispute to file their civil cases in court first and pursue settlement through mediation within the court system. This form of mediation practice (pre-trial mediation) preserves judicial independence and the sanctity of the Judiciary (the courts) as the arm of Government vested with judicial power and authority in the resolution of legal disputes.** That being the case, mediation is not intended to replace the use of judicial proceedings to resolve civil disputes—court-mandated pre-trial mediation is a voluntary avenue merely to enhance the quality and the process of delivery of justice by making justice accessible and timely.

However, the Bill, as it is now, proposes to change the practice of civil litigation in the country as we know it by introducing non-court-mandated pre-litigation mediation, or pre-suit mediation, or pre-action mediation; that is, by making a **mediation certificate**, stating that mediation has been considered, compulsory in all civil disputes before the institution of judicial proceedings. The mediation certificate will be required from both the parties to the disputes and the advocates. The proposed changes will also interfere with the current practice of mediation under the structure of **Court-Annexed Mediation**, by removing mediation from the realm of the Judiciary, the Justice arm of Government, and placing it under the realm of the Office of the Attorney-General, which falls under the Executive arm of Government. As such, the proposed changes under the Bill are problematic as far as the right of access to justice and the judicial authority and the independence of the Judiciary are concerned.

Consequently, the Bill should be reviewed and amended accordingly prior to its enactment into law. First, this paper recommends that a mediation certificate should not be made mandatory for all civil disputes prior to the institution of judicial proceedings,

https://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf (Accessed on 2 July 2020).

but rather the usual demand letter stating that ADR mechanisms have been pursued but to no avail should be sufficient. On the other hand, submission of a civil dispute to mediation should be left to the mutual agreement of the disputing parties. Absent a mediation agreement (embodied as a clause within a written contract, or as a self-standing written agreement) between the parties to a civil dispute, the submission of a civil dispute to mediation should not be compulsory, unless of course the parties agree otherwise in the face of an actual dispute. This is in tandem with the concept of freedom of contract, which respects the autonomy of the contracting parties to enter into mutual agreements as between them, and to exercise free choice on the law to apply and the mechanisms and avenues for the resolution of contractual disputes, without external interference or control, especially by the Government and the Legislature. Second, mediation should be left under the supervision of the Judiciary and should not be transferred to the supervision of the Office of the Attorney-General.

2. Current Supervision of Court-Annexed Mediation by the Judiciary

Already, the Judiciary has been supervising the use of Court-Annexed Mediation, alongside the use of judicial proceedings, in the resolution of civil disputes within the court system. In April, 2016, the Judiciary commenced a pilot program which saw the introduction of Court-Annexed Mediation in Nairobi.⁴ The Court Annexed Mediation pilot program was supported by the World Bank's Judiciary Performance Improvement Project (JPIP).⁵ After a successful pilot program, the Judiciary has now rolled out Court-Annexed Mediation to other Counties.⁶

The Judiciary has implemented Court-Annexed Mediation in Kenya pursuant to **Article 159 of the Constitution of Kenya, 2010** (hereinafter "**the Constitution**"), and **Sections**

⁴ See Judiciary, *Court Annexed Mediation* <<https://www.judiciary.go.ke/about-us/our-programmes/alternative-dispute-resolution/#1585037930178-d5dc858c-1598>> (Accessed on 2 July 2020). See generally, Kariuki Muigua, 'Court Sanctioned Mediation in Kenya-An Appraisal' <<http://kmco.co.ke/wp-content/uploads/2018/08/Court-Sanctioned-Mediation-in-Kenya-An-Appraisal-By-Kariuki-Muigua.pdf>>.

⁵ See The World Bank, *Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans* (News, 5 October 2017) <<https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>> (Accessed on 2 July 2020).

⁶ See Judiciary, *Judiciary Roles out Court Annexed Mediation to other Regions* (News headlines, 23 October 2018) <<https://www.judiciary.go.ke/judiciary-rolls-out-court-annexed-mediation-to-other-regions/>> (Accessed on 2 July 2020).

59A, 59B, and 59D of the Civil Procedure Act,⁷ in relation to the use of mediation and the structure of the mediation process. **Article 159 of the Constitution** vests judicial authority in the Judiciary and encourages courts and tribunals to promote the use of ADR mechanisms in the exercise of judicial authority. To be clear, the implementation of Court-Annexed Mediation within the court system has been an endeavour by the Judiciary to promote the use mediation and other ADR mechanisms to supplement and not to supplant the use of judicial proceedings in the resolution of legal disputes.⁸

Section 59A of the Civil Procedure Act empowers the Chief Justice to appoint a Mediation Accreditation Committee and provides as follows:

59A. Establishment of Mediation Accreditation Committee

(1) There shall be a Mediation Accreditation Committee which shall be appointed by the Chief Justice.

(2) The Mediation Accreditation Committee shall consist of—

- (a) the chairman of the Rules Committee;*
- (b) one member nominated by the Attorney-General;*
- (c) two members nominated by the Law Society of Kenya; and*
- (d) eight other members nominated by the following bodies respectively—*
 - (i) the Chartered Institute of Arbitrators (Kenya Branch);*
 - (ii) the Kenya Private Sector Alliance;*
 - (iii) the International Commission of Jurists (Kenya Chapter);*
 - (iv) the Institute of Certified Public Accountants of Kenya;*
 - (v) the Institute of Certified Public Secretaries;*

⁷ The said amendments to the Civil Procedure Act, Chapter 21, laws of Kenya were brought about via Statute Law (Miscellaneous Amendments) Act, No. 12 of 2012 <<http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2012/No. 12 of 2012.pdf>>.

⁸ Accordingly, **Section 59C of the Civil Procedure Act** promotes the use of other ADR mechanisms in resolving legal disputes; it provides as follows:

59C. Other alternative dispute resolution methods

(1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.

(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order.

- (vi) the Kenya Bankers' Association;*
- (vii) the Federation of Kenya Employers, and*
- (viii) the Central Organisation of Trade Unions.*

(3) The Chief Justice shall designate a suitable person to be the Mediation Registrar, who shall be responsible for the administration of the affairs of the Committee under this Act.

- (4) The functions of the Mediation Accreditation Committee shall be to—*
- (a) determine the criteria for the certification of mediators;*
 - (b) propose rules for the certification of mediators;*
 - (c) maintain a register of qualified mediators;*
 - (d) enforce such code of ethics for mediators as may be prescribed;*
 - and*
 - (e) set up appropriate training programmes for mediators.*

As concerns the submission of disputes to mediation, the current mediation practice under **Section 59B of the Civil Procedure Act** embraces party autonomy in submitting disputes to mediation and equally empowers the Courts to require parties to submit their disputes to mediation, where the law so requires or where mediation seems appropriate. The said section provides as follows:

59B. Reference of cases to mediation

- (1) The Court may—*
- (a) on the request of the parties concerned; or*
 - (b) where it deems it appropriate to do so; or*
 - (c) where the law so requires, direct that any dispute presented before it be referred to mediation.*
- (2) Where a dispute is referred to mediation under subsection (1), the parties thereto shall select for that purpose a mediator whose name appears in the mediation register maintained by the Mediation Accreditation Committee.*
- (3) A mediation under this Part shall be conducted in accordance with the mediation rules.*
- (4) An agreement between the parties to a dispute as a result of a process of mediation under this Part shall be recorded in writing and registered with the Court giving the direction under subsection (1), and shall be enforceable as if it were a judgment of that Court.*

(5) *No appeal shall lie against an agreement referred to in subsection (4).*

Thereafter, the outcome of mediation, a settlement agreement reduced to writing and signed by the parties, is then registered in Court and enforced as an order of the Court.

Section 59D of the Civil Procedure Act empowers Courts to enforce private mediation settlement agreements and provides as follows:

59D. Power to enforce private mediation agreements

All agreements entered into with the assistance of qualified mediators shall be in writing and may be registered and enforced by the Court.

As a result, Court-Annexed Mediation is currently being practised in respect of disputes in the Commercial, Civil, and Family and Succession Divisions of the Court in various parts of the Country.⁹ Similarly, land disputes have also been the subject of Court-Annexed Mediation in Kenya.¹⁰ This means that, the cases must first be filed in Court and then the Court may order the parties to go to mediation at the beginning of or in the course of the judicial proceedings. As such, the mediation process is regulated by the Judiciary, in terms of the timelines, the establishment and appointment of the Mediation Accreditation Committee, the remuneration of mediators, and the adoption and enforcement of the mediation settlement agreement like any other order of the Court.¹¹

3. Proposed Changes to Civil Litigation and Mediation Practice Under the Mediation Bill, 2020

The Bill, if enacted, will apply to all civil disputes.¹² The problematic Clauses under the Bill are **Clauses 6, 8, 12(c), 22, 33, 34 and 40. Clause 6 of the Bill** provides as follows:

6. (1) There is established a Mediation Committee which shall be appointed by the Attorney-General.

⁹ See e.g., Family and Commercial and Tax Division, Nairobi, Practice Direction on Mediation, Gazette Notice No. 5214, 8 May 2017 <http://kenyalaw.org/kenya_gazette/gazette/volume/MTUxOQ--/Vol.CXIX-No.70/> (Accessed on 2 July 2020); Jillo Kadida, 'Mediation is a viable method of dispute resolution-Registrar' *The Star* (Nairobi, 28 October 2019) <<https://www.the-star.co.ke/news/big-read/2019-10-28-mediation-is-a-viable-method-of-dispute-resolution--registrar/>> (Accessed on 1 July 2020).

¹⁰ *Ibid.*

¹¹ See e.g., Paul Wang, 'Court-annexed mediation new justice frontier' *The Star* (11 March 2019) <<https://www.the-star.co.ke/opinion/columnists/2019-03-11-court-annexed-mediation-new-justice-frontier/>> (Accessed on 1 July 2020).

¹² Mediation Bill, 2020, clause 4.

- (2) *The Committee shall consist of—*
- (a) *nine members nominated by each of the following—*
 - (i) *the Chief Justice;*
 - (ii) *the Attorney-General;*
 - (iii) *the Law Society of Kenya;*
 - (iv) *Federation of Women Lawyers-Kenya;*
 - (v) *Dispute and Conflict Resolution International;*
 - (vi) *the institute of Certified Public Secretaries;*
 - (vii) *the Kenya Private Sector Alliance;*
 - (viii) *the Central Organisation of Trade Union; and*
 - (ix) *the Federation of Kenya Employers.*

(b) The Registrar who shall be the secretary to the mediation committee and an ex-officio member with no right to vote.

(3) The Attorney-General shall appoint the members of the Committee by notice in the Gazette.

(4) The members of the Committee shall serve for a term of three years, renewable once.

(5) The members of the Committee shall serve on part-time basis and shall be paid such allowances as may be determined by the Attorney-General in consultation with the Salaries and Remuneration Commission.

(6) The Attorney-General shall set the date of the first meeting of the Committee not later than seven days from the date of gazettelement of the members of the Committee.

Clauses 6(1), (3), (5) and (6) of the Bill should be amended to replace any reference to the Attorney-General with reference to the Chief Justice. This is because the supervision of mediation as an ADR mechanism falls within the ambit of the Judiciary as the bearer of judicial authority in Kenya, and not under the Office of the Attorney-General.

Clause 8 of the Bill provides that:

8. (1) The Attorney-General shall appoint a Registrar and other officers as may be necessary for the effective discharge of the functions of the Committee.

(2) A Registrar or officer appointed under this section shall serve on such terms as may be specified in the instrument of appointment.

Clause 8(1) of the Bill should be amended to replace any reference to the Attorney-General with a reference to the Chief Justice.

Clause 12(c) of the Bill provides that: “12. A person shall cease to be a member of the Committee if such person—(..) (c) resigns in writing, addressed to the Attorney-General (..).” **Clause 12(c) of the Bill** should be amended to replace any reference to the Attorney-General with a reference to the Chief Justice.

Clause 22 of the Bill provides as follows:

22. (1) A party to a dispute shall—

(a) take reasonable measures to resolve a dispute by mediation before resorting to judicial proceedings;

(b) co-operate with the other party and the mediator;

(c) participate in good faith in mediation process;

(d) maintain confidentiality as provided for in section 28; and

(e) if an agreement is reached, ensure the agreement is written and signed by all parties to the agreement.

(2) A party is considered to have taken reasonable measures to resolve a dispute by mediation by—

(a) notifying the other party of the issues that are in dispute and offering to settle them;

(b) responding appropriately to a notification under paragraph

(a);

(c) providing relevant information and documents to the other party to enable that other party understand the issues and how the dispute might be resolved;

(d) considering whether the issues could be resolved through mediation process;

(e) where mediation is agreed to —

(i) agreeing on a mediator to facilitate the process; and

(ii) attending the mediation process.

Clause 22 of the Bill should be amended accordingly, to expressly state that any attempt to resolve a dispute by mediation is merely recommendatory and voluntary, and not mandatory. Which means that a party to a civil dispute has the voluntary option of instituting judicial proceedings without attempting mediation at all and that a party

should not be penalised for not considering or attempting mediation before approaching the Courts. The word ‘*shall*’ in **Clause 22(1) of the Bill** should therefore be deleted and the word ‘*may*’ put in its place.

Clause 33 as read with Clause 34 of the Bill provide as follows:

33. An advocate shall, prior to initiating judicial proceedings, advise a party to consider mediation.

34. (1) A party shall file with the court a mediation certificate, at the time of commencing judicial proceedings, stating that mediation has been considered.

(2) A party entering appearance shall file with the court a mediation certificate, at the time that party enters appearance or acknowledges the claim, stating that mediation has been considered.

(3) An advocate shall file with the court a mediation certificate, at the time of instituting judicial proceedings, stating that the advocate has advised a party to consider mediation.

(4) A court may take into account the fact that a party has considered or participated in mediation when making orders as to costs, case management or such orders as the court may determine.

Based on current civil litigation practice, the mediation certificate is not really a necessary feature in the civil dispute resolution process, as it simply introduces a new obstacle to the right of access to justice. In the case of **Halsey v Milton Keynes General NHS Trust**,¹³ the England and Wales Court of Appeal (Civil Division) considered the question whether the Court has power to order parties to submit their disputes to mediation against their will. The Court found for voluntary submission of disputes to mediation and expressed itself in the manner that:

It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The court in Strasbourg has said in relation to article

¹³ [2004] EWCA Civ 576 (11 May 2004)
<https://docentes.fd.unl.pt/docentes_docs/ma/JPF_MA_29940.pdf>.

6 of the European Convention on Human Rights that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to "particularly careful review" to ensure that the claimant is not subject to "constraint": see Deweer v Belgium (1980) 2 EHRR 439, para 49. If that is the approach of the ECtHR to an agreement to arbitrate, it seems to us likely that compulsion of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it."¹⁴

In essence, the mediation certificate is additional to the usual demand letter that is existent in current civil litigation practice. That said, it should be sufficient for parties to state in the demand letter that their attempt at an out-of-court settlement of a civil dispute was unsuccessful, rather than putting in place the requirement of a mediation certificate before the institution of all civil suits in court. **Clause 34 of the Bill** should therefore be amended accordingly to do away with the requirement of a mediation certificate before one can proceed to institute judicial proceedings in respect of civil suits—through the deletion of **Clauses 34(1), (2), and (3) of the Bill**.

Clause 40 of the Bill provides as follows:

40. (1) The Attorney-General may make rules of practice and procedure and regulations generally for the better carrying into effect of any provisions of this Act.

(2) Without prejudice to the generality of subsection (1), the Attorney-General may make rules and regulations to provide for —

- (a) submission and referral of a dispute to mediation;*
- (b) appointment of a mediator;*
- (c) the conduct of mediation process;*
- (d) the forms to be used for submission or referral of a dispute to mediation, filing of a settlement agreement, or any matter to be filed;*
- (e) the requirements and the process of application for accreditation or registration of mediators, and related activities;*

¹⁴ *Ibid.* paragraph 9.

(f) training including continuous training for mediators; grounds for and the procedure relating to suspension or expulsion a mediator; professional conduct and etiquette of members; any fee which may be charged for anything done under this Act; and

(j) any other matters as may be necessary for the promotion of the objects of this Act and the regulation of mediation.

(3) For the purpose of Article 94(6) of the Constitution —

(a) the purpose and objective of the delegation under this section is to enable the Attorney-General to make Rules and regulations to provide for the better carrying into effect the provisions of this Act

(b) the authority of the Attorney-General to make Rules and regulations under this Act shall be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this section;

(c) the principles and standards applicable to the Rules and regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act.

Clause 40 of the Bill should be amended in its entirety to replace any reference to the Attorney-General with a reference to the Chief Justice because as already argued above, the Judiciary, being the bearer of judicial authority in Kenya, bears the mandate to supervise the use mediation as an ADR mechanism for the resolution of civil disputes in Kenya.

4. The Problem with the Proposed Changes to Civil Litigation and Mediation Practice under the Mediation Bill, 2020

The proposed changes under the Bill are problematic on many fronts, but mostly on the ground that if enacted, they will limit the right of access to justice under **Article 48 of the Constitution of Kenya**.¹⁵ Besides, they will interfere with the right to fair hearing, as guaranteed under **Article 50(1) of the Constitution**, which stipulates that: “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body”. Moreover, removing mediation from under the supervision of the Judiciary and placing it under the supervision of the Office of the Attorney-General is bad for both law practice and justice because, while the

¹⁵ **Article 48 of the Constitution** states 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.”

Judiciary is usually a neutral party in civil proceedings, the Office of the Attorney-General is not always neutral.¹⁶ The Attorney-General is usually a mandatory party in all civil proceedings where the Government is a party.¹⁷

The Office of the Attorney-General is an office within the Executive arm of Government. The Office of the Attorney-General is set up under **Article 156(1) of the Constitution**, which falls under **Chapter Nine of the Constitution** (which sets up the structure of the Executive arm of Government). In essence, the Office of the Attorney-General is vested with authority to represent the Government in Court as concerns civil disputes where the Government is a party,¹⁸ or, with the leave of the Court, to act as a friend of the Court in any civil proceeding in which the Government is not a party.¹⁹ In short, **the Office of the Attorney-General is not vested with judicial authority per the Government and institutional structure set up under the Constitution of Kenya, 2010.**

So, it goes without saying that **judicial authority in Kenya is vested only in the Judiciary of Kenya** as set up under **Chapter Ten of the Constitution**. In that regard, **Article 159(1) of the Constitution** provides 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.”* Moreover, **Article 159(2)(c) of the Constitution** stipulates that in the exercise of judicial authority, alternative forms of dispute resolution (ADR mechanisms), including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted. However, the use of ADR mechanisms in the resolution of legal disputes is subject to **Article 159(3) of the Constitution**, which states 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*

¹⁶ For instance, under **Clause 2 of the Mediation Bill, 2020**, *“party”* means *“a person who is party to a dispute, and includes a legal person, a national government, a county government or a state organ”*. This means that the Attorney-General will be a party in the disputes where the Government is a party.

¹⁷ **Section 12 of the Government Proceedings Act, Cap. 40, Laws of Kenya** provides for parties to civil proceedings where the Government is a party and states that: *“(1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be. (2) No proceedings instituted in accordance with this Part of this Act by or against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General.”*

¹⁸ Article 156(4) of the Constitution.

¹⁹ Article 156(5) of the Constitution.

morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.”

By applying a holistic approach to the interpretation of the Constitution,²⁰ **Article 159(3) of the Constitution** applies in like manner as concerns the other non-traditional methods of dispute resolution, such as reconciliation, mediation, and arbitration. This means that in the case at hand, **the structure set up for resolving disputes through mediation should not be in a manner that: “(a) contravenes the Bill of Rights; (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or (c) is inconsistent with this Constitution or any written law.”**

Therefore, it is of great concern that the mediation structure embodied in the Mediation Bill, 2020, as it is now, is likely to contravene the Bill of rights by limiting the right of access to justice under **Article 48 of the Constitution**, and the right to fair hearing under **Article 50(1) of the Constitution**, through the introduction of unnecessary barriers to access courts and thus place unwarranted restrictions to access justice in Kenya. Moreover, the Judiciary is the bearer of judicial authority under the Constitution of Kenya, 2010, hence the Judiciary should supervise the mediation procedure and process as opposed to the Office of the Attorney-General, as the Attorney-General will equally be a party in mediation proceedings involving the Government.

5. Comparative Study on the use of Mediation in the Judicial Systems in other Jurisdictions

A number of jurisdictions, such as South Africa, and the Australian State of New South Wales, have endeavoured to incorporate mediation into their judicial system and as such have in place a form of Court-Annexed Mediation;²¹ in order to reduce the number of

²⁰ **In the Matter of Kenya National Commission on Human Rights [2014] eKLR, Supreme Court Advisory Opinion Reference No. 1 of 2012, at paragraph 26**, the Supreme Court of Kenya elaborated on the principle of holistic interpretation of the Constitution as follows: *“But what is meant by a ‘holistic interpretation of the Constitution’” It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”*

²¹ Countries have adopted varied terms to refer to the interface between the Courts and mediation, such as court-annexed mediation, court-based mediation, court-assisted mediation, court-

civil disputes coming before the Courts, and to enhance access to justice for the public. However, the Court-Annexed Mediation procedure is usually built into the existing court system and is not divorced from the Judiciary. The mediation process is also mostly voluntary at the option of disputants who have the free choice on whether or not to submit their civil disputes to mediation, or pursue the usual litigation of civil disputes before Court. The Courts usually order parties to submit civil disputes to mediation when the parties agree to do so, when the law requires the parties to do so, or when it is necessary for the parties to do so on a case-by-case basis.

A. New South Wales, Australia

Mediation practice in Australia is not uniform, rather it varies across the States²² and Territories²³ of Australia.²⁴ Each State or Territory has its own court system, with the Supreme Court of each State or Territory as the Superior Court in each of the respective States or Territories. At the Federal level, the **Civil Dispute Resolution Act, 2011 (CDRA)**,²⁵ which came into operation in the Federal jurisdiction on 1st August 2011, provides a mechanism for the use of ADR mechanisms in the resolution of civil disputes at the Federal level.

This paper considers the Supreme Court of the Australian State of New South Wales (NSW) because it has in place a Court-Annexed Mediation procedure.²⁶ Flowing from

connected mediation, or judicial mediation; or the general interaction of the Courts and ADR mechanisms termed as Court-Annexed ADR.

²² Six States: Western Australia, South Australia, Queensland, New South Wales, Victoria, and Tasmania.

²³ The Australian Capital Territory, and the Northern Territory; plus external territories like Norfolk Island, Christmas Island and the Cocos (Keeling) Islands, the Jervis Bay Territory, the Ashmore and Cartier Islands, and the Coral Sea Islands.

²⁴ See generally, The presentation by the Honourable Justice P A Bergin, the Chief Judge in Equity of the Supreme Court of New South Wales, at the Aula Magna, Court of Cassation in Rome, on “*The Right Balance Between Trial and Mediation: Visions, Experiences and Proposals; A Look Beyond the EU, Australia*”, 19 October 2012 <<http://www.austlii.edu.au/au/journals/NSWJSchol/2012/38.pdf>>.

²⁵ <<https://www.ag.gov.au/legal-system/alternative-dispute-resolution/civil-dispute-resolution-act-2011>>; <<https://www.legislation.gov.au/Details/C2011A00017>>.

²⁶ See Supreme Court of New South Wales, *Court-Annexed Mediation*, <http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_mediationinthesccourt_annexed_mediation.aspx>; Supreme Court of New South Wales, *Mediation*, <http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_practiceprocedure/sco2_mediationinthesccourt_mediationinthescc.aspx#mediation_costs>.

the CDRA, NSW introduced to the **Civil Procedure Act, 2005**²⁷ (CPA) changes which have implications on the resolution of civil disputes through the use of ADR mechanisms; mediation proceedings are embodied under **Parts 4 and 20, Division 1 of the CPA**. There is also **Practice Note SC Gen 6**,²⁸ which came into force on 17th August 2005 and explains the Court's mediation procedures in respect of civil cases, and the Court's expectation of parties in proceedings that have been referred to mediation.²⁹

The Court can order parties to submit their civil dispute to mediation on the motion of a party, or on referral by a Court registrar, or on the Court's own motion; the Court may also decide against ordering mediation.³⁰ Parties to a civil dispute can agree to mediate, nominate a mediator, and then request the Court to make the appropriate order at any stage of the court proceedings before judgment is rendered.³¹ On the other hand, Court-Annexed Mediation is conducted by the Court Registrars and Officers of the Court, who are certified as qualified mediators by the Chief Justice;³² no other list of mediators is maintained by the Courts for Court-Annexed Mediation as the Court does not train or accredit private mediators.

Where parties choose to submit their matters to Court-Annexed Mediation, they do not choose a mediator but the Court assigns a mediator from among the Court Registrars and Court Officers qualified as mediators. The mediation listings are included in the Court lists alongside listings for court hearings of other civil cases being adjudicated before Court. However, the mediation sessions takes place at King Street Court Complex, where mediation rooms have been set up and are not accessible to the public. The parties in a mediation do not pay any fees to the mediators or for the use of the mediation rooms, but they bear their respective costs for legal representation.

However, the Supreme Court of New South Wales also has in place a Joint Protocol arrangement with mediation provider organisations who agree to maintain a panel of mediators suitable to mediate cases for the Supreme Court.³³ The Court refers civil

²⁷ No. 28 <<https://beta.legislation.nsw.gov.au/view/pdf/asmade/act-2005-28>>.

²⁸ <http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/320>.

²⁹ Practice Note SC Gen 6, paragraph 4.

³⁰ CPA, section 26; Practice Note SC Gen 6, paragraphs 5, 8 and 18.

³¹ Practice Note SC Gen 6, paragraph 7.

³² Practice Note SC Gen 6, paragraphs 8 and 16.

³³ Practice Note SC Gen 6, paragraphs 8-10, and 19-35. The Joint Protocol partner organisations include: the NSW Bar Association; the Law Society of New South Wales; the Institute of Arbitrators and Mediators Australia; the Australian Commercial Disputes Centre; LEADR; and the Australian Branch of the Chartered Institute of Arbitrators.

disputes which are the subject of court-ordered mediations to the Joint Protocol partner organisations to appoint a mediator from the panel of mediators suitable to mediate cases at the Supreme Court to mediate the dispute.³⁴ The Court may request the organisations to provide mediation at reduced costs or at no fees and the organisation nominated will endeavour to provide a mediator that can mediate on that basis.³⁵ Within fourteen days (14) after the conclusion of mediation, the plaintiff will fill and submit to the Principal Registrar a Joint Protocol Evaluation Form evaluating the referral of civil proceedings to mediation and the entry of any consent orders will be made.³⁶ The Principal Registrar will also forward a copy of the Joint Protocol Evaluating Form to the nominating Joint Protocol partner organisation.³⁷

It is remarkable how the Court-Annexed Mediation structure in use in NSW is supervised and controlled by the Courts and the Chief Justice who certifies Court Registrars and other officers of the Court as qualified mediators. The mediation structure is also engrained within the court system in that it is the Court that orders the parties to submit their disputes to mediation, either upon the request of the parties themselves, or a referral by the Registrar, or on the Court's own motion. This form of court-ordered mediation is beneficial in that, it respects the autonomy of the disputants while equally allowing for judicial control of the dispute resolution process whenever necessary to require parties to submit their dispute to mediation where this is more appropriate.

B. South Africa

Voluntary Court-Annexed Mediation is being rolled out in South Africa as a means to transform civil justice and enhance access to justice in South Africa.³⁸ On 1 December 2014, the **Rules of Voluntary Court-Annexed Mediation (the Mediation Rules)**, which constitute **Chapter 2 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa (the Magistrates' Courts' Rules)**,³⁹ came

³⁴ *Ibid.* paragraphs 23 and 26.

³⁵ *Ibid.* paragraphs 25 and 29.

³⁶ *Ibid.* paragraph 34.

³⁷ *Ibid.* paragraph 35.

³⁸ See Department of Justice and Constitutional Development, Republic of South Africa, Civil Law: Court-Annexed Mediation, <<https://www.justice.gov.za/mediation/mediation.html>> (Accessed on 2 July 2020).

³⁹ *Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985) Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa*, Republic of South Africa, Government Gazette Notice No. 37448, 14 October 2014,

into operation following their approval by the Minister of Justice and Correctional Services. According to **rule 70(1) of the Magistrates' Courts' Rules**, the Mediation Rules are made pursuant **section 34 of the Constitution of the Republic of South Africa, 1996**, which upholds the right to fair hearing by guaranteeing everyone the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁴⁰

Court-Annexed Mediation in South Africa came about through the leadership of the Chief Justice of South Africa, to introduce ADR mechanisms into the South African court system to ensure the delivery of quality and accessible justice to the public.⁴¹ As such, Court-Annexed Mediation is part and parcel of the court system in South Africa, and its purposes are to: (a) promote access to justice; (b) promote restorative justice; (c) preserve relationships between litigants or potential litigants which may become strained or destroyed by the adversarial nature of litigation; (d) facilitate an expeditious and cost-effective resolution of a dispute between litigants or potential litigants; (e) assist litigants or potential litigants to determine at an early stage of the litigation or prior to commencement of litigation whether proceeding with a trial or an opposed application is in their best interests or not; and (f) provide litigants or potential litigants with solutions to the dispute, which are beyond the scope and powers of judicial officers.⁴²

The Mediation Rules are being implemented in the designated Magistrates' Courts in South Africa through an Advisory Committee appointed by the South African Minister of Justice and Correctional Services.⁴³ The mediation process begins by parties to a dispute approaching **a mediation clerk in the Civil Section at the respective**

https://www.justice.gov.za/legislation/notices/2014/2014-03-18-gg37448_rg10151_gon183-rules-mc.pdf (Accessed on 2 July 2020).

⁴⁰ Section 34 of the Constitution of the Republic of South Africa is similar to Article 50(1) of the Constitution of Kenya, 2010.

⁴¹ According to rule 70(2) of the Magistrates' Courts' Rules, a resolution was made at an Access to Justice Conference held in July, 2011, and led by the Chief Justice of South Africa, towards achieving delivery of accessible and quality justice for all, that "*steps be taken to introduce alternative dispute resolution mechanisms, preferably court-annexed mediation or the Commission for Conciliation, Mediation and Arbitration kind of alternative dispute resolution, into the court system.*"

⁴² *Ibid.* rule 71.

⁴³ See Rule 74(2) of the Magistrates' Courts' Rules.

Magistrate’s Court with jurisdiction over the matter.⁴⁴ The mediation clerk assesses whether the dispute can be resolved by mediation—that is, contractual, neighbourhood, or family disputes. The mediation clerk then helps the parties to fill an application form to submit their civil dispute to mediation and organizes for the disputants to attend a meeting to discuss a mediation agreement.⁴⁵ The mediation will commence after the appointment of a mediator. The mediation **sessions take place in dedicated rooms within the designated Magistrates’ Courts, which are termed as Therisano Centres.** No court fees are charged for mediation, however, mediators charge fees based on a fixed tariff,⁴⁶ with each party to the dispute contributing equally to meet the mediation fees.⁴⁷

It is noteworthy that the referral of a dispute to mediation is at the option of the parties exercising their free will, before or after the commencement of litigation. This is captured under **rules 74 to 79 of the Magistrates’ Courts’ Rules**, which elaborate on the procedure for referral of a dispute to mediation at the instance of the litigants or the Courts. **Rule 75 of the Magistrates’ Courts’ Rules** states as follows:

75. (1) *Parties may refer a dispute to mediation-*
- (a) *prior to the commencement of litigation; or*
 - (b) *after commencement of litigation but prior to judgment;*
- Provided that where the trial has commenced the parties must obtain the authorisation of the court.*
- (2) *A judicial officer may at any time after the commencement of litigation, but before judgment, enquire into the possibility of mediation of a dispute and accord the parties an opportunity to refer the dispute to mediation.*

⁴⁴ See The Department of Justice and Constitutional Development, Republic of South Africa, *Mediation: Step by Step Procedure*, <<https://www.justice.gov.za/mediation/steps.html>> (Accessed on 2 July 2020).

⁴⁵ See Rule 76 of the Magistrates’ Courts’ Rules.

⁴⁶ *Rules Board for Courts of Law Act (107/1985): Fees payable to mediators, qualification, standards and levels of mediators*, Republic of South Africa, Government Gazette Notice No. 38163, 31 October 2014, Available at <<https://www.justice.gov.za/legislation/notices/2014/20141031-gg38164-gon854-mediation.pdf>> (Accessed on 2 July 2020).

⁴⁷ Rule 84 of the Magistrates’ Courts’ Rules.

As concerns mediators, their qualifications and accreditation, and the appointment of applicants onto the Panel of Court-Annexed Mediators, and their removal thereof, this is done by the Minister of Justice and Correctional Services.⁴⁸ Nonetheless, it is noteworthy that South Africa is moving towards a culture of judicial independence, where Court administration is controlled by the Judiciary and not the Executive.⁴⁹

6. Conclusion

Judicial litigation of civil disputes (and criminal matters alike) before Kenyan Courts has been faced with a number of challenges, including shortage of judicial staff (in this case, judges and magistrates),⁵⁰ delay in the hearing and determination of matters, hence a backlog of cases. As such, ADR mechanisms such as mediation have been applauded as a solution to the current challenges facing the Judiciary in doing away with the backlog of cases.⁵¹ However, such ADR mechanisms are merely an alternative to Court litigation in the nature of judicial proceedings. As such, they should not be used as means to interfere with the freedom of choice of litigants as concerns the legal means to resolve their disputes—a voluntary structure should be embraced in the use of mediation in the ADR mechanism in Kenya. At the same time, the setting up of structures for the use of ADR mechanisms to resolve disputes should not be used as an avenue to interfere with the authority, independence, and constitutional mandate of the Judiciary as the bearer of judicial authority in our constitutional structure of Government.

As such, aside from the parties freely choosing to submit their civil disputes to mediation, it is the Judiciary that is constitutionally mandated to supervise the legal means for the resolution of legal disputes and at the same time it is the Judiciary that bears the ultimate authority to recognize and enforce the outcomes of ADR mechanisms. A third party, like the Office of the Attorney-General, should not be allowed to overstep

⁴⁸ *Ibid.* schedule 2, paragraph 6. See also Rule 86 of the Magistrates' Courts' Rules.

⁴⁹ See e.g., *Chief Justice Mogoeng Seeks Judicial Independence*, a 2013 Annual Human Rights Lecture by Chief Justice Mogoeng Mogoeng at the University of Stellenbosch's Law Faculty <<http://www.saflii.org/za/journals/DEREBUS/2013/92.html>>; International Bar Association, *Beyond Polokwane: Safeguarding South Africa's Judicial Independence* (2008), pages 17-37.

⁵⁰ H.E. President Uhuru Kenya is yet to appoint the forty one (41) judges recommended for appointment by the Judicial Service Commission. See **Adrian Kamotho Njenga v. Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR.**

⁵¹ See e.g., Moses Odhiambo, 'Mediators likely to hear civil cases, reduce case backlog' *The Star* (29 June 2020) <<https://www.the-star.co.ke/news/2020-06-29-mediators-likely-to-hear-civil-cases-reduce-court-backlog/>> (Accessed on 1 July 2020).

its constitutional mandate and interfere with the authority and independence of the Judiciary on matters justice.

Consequently, **Clauses 6, 8, 12(c), 22, 33, 34 and 40 of the Mediation Bill, 2020** should be reviewed and amended accordingly, as indicated above, in order to prevent the imposition of any limitations on the rights of access to civil justice for the public, and to prevent any interference with the judicial authority and the independence of the Judiciary as the justice arm of Government.

Enhancing The Role of Alternative Dispute Resolution in Managing Community Land Disputes in Kenya

By: **James Ndungu Njuguna***

Abstract

The paper critically analyses the applicability of Alternative Dispute Resolution (ADR) mechanisms in managing community land disputes in Kenya in light of the Constitution of Kenya 2010 and the Community Land Act. The Constitution recognises ADR mechanisms and further encourages communities to settle land disputes through recognised local community initiatives consistent with the Constitution. The Community Land Act encourages the use of ADR mechanisms including traditional dispute resolution, mediation and arbitration in managing community land disputes. The paper discusses the efficacy of these mechanisms in managing community land disputes. It will analyse the nature of community land disputes and the viability or otherwise of ADR mechanisms in managing these disputes. The paper will then suggest reforms aimed at enhancing the role of ADR mechanisms in managing community land disputes in Kenya.

1.0 Introduction

Alternative Dispute Resolution (ADR) refer to a set of mechanisms that are utilized to manage disputes without resort to the often costly adversarial litigation.¹ It has also been defined as a set of practices and techniques aimed at permitting management of disputes outside the courts.² These mechanisms include negotiation, mediation, traditional dispute resolution and arbitration. ADR mechanism have been heralded as being simple, flexible, quick and promoting an accessible dispute resolution system in comparison to

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¹ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited, 2015

² Mnookin.R., *Alternative Dispute Resolution*, available at <https://www.researchgate.net/publication/30504345> *Alternative Dispute Resolution* (accessed on 11/03/2021)

litigation.³ Further, these mechanisms emphasise win-win situations, enhance access to justice and guarantee efficient and expeditious dispute resolution.⁴

Another key advantage of ADR mechanism is the promotion of the principle of party autonomy. Parties are left to construct their dispute management process in a manner that they deem fit by picking the type of dispute resolution they require, the appropriate person to preside over the dispute, the time and place of management of the dispute.⁵ Due to these advantages, it is thus not surprising that ADR mechanisms have been applied in managing a wide range of disputes including commercial, family, land, succession, intellectual property and political disputes. In Kenya, ADR has even been applied in managing criminal disputes.⁶

It is on this basis that the paper seeks to critically analyse the role of ADR in managing land disputes in Kenya. In particular, the paper will focus on the Community Land Act which envisages the use of ADR in managing community land disputes. The paper will discuss the efficacy of ADR mechanisms in managing disputes relating to community land, highlight the challenges in the use of ADR in managing these disputes and suggest solutions for the effective use of ADR in managing community land disputes.

2.0 Legal Framework on the Use of ADR in Managing Land Disputes in Kenya

Internationally, ADR mechanisms derive their basis from article 33 of the *Charter of the United Nations*. It stipulates that the parties....shall, first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.⁷

The *Constitution of Kenya* 2010 recognises the use of ADR mechanisms in management of disputes by the judiciary. It mandates courts and tribunals to promote alternative

³ Muigua.K & Kariuki.F., ADR, Access to Justice and Development in Kenya, available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/80138/Muigua_ADR%2c%20access%20to%20justice%20and%20development%20in%20Kenya.pdf?sequence=1&isAllowed=y (accessed on 11/03/2021)

⁴ S. Mishra, "Justice Dispensation through Alternate Dispute Resolution System In India," available at <http://www.legalindia.in/justice-dispensation-through-alternate-dispute-resolution-system-in-indiab> (accessed on 11/03/2021)

⁵ Kariuki.F & Ng'etich.R., The Promotion of Alternative Dispute Resolution Mechanisms by the Judiciary in Kenya and its Impact on Party Autonomy, *Alternative Dispute Resolution Journal*, 6 (2) 2018, 63-67

⁶ Republic v Mohamed Abdow Mohamed [2013] eKLR

⁷ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.⁸ Further, one of the principles of land policy under the Constitution is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.⁹ The Constitution also requires the National Land Commission to encourage the application of traditional dispute resolution mechanisms in land conflicts.¹⁰

The *Land Act* stipulates one of the guiding principles of land management and administration to be the use of alternative dispute resolution mechanisms in land dispute handling and management.¹¹

The *Community Land Act* enshrines the use of ADR mechanisms in management of disputes relating to community land. It stipulates that a registered community may use alternative methods of dispute resolution including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land.¹²

3.0 Nature of Land Disputes in Kenya

Land has been a major source of conflicts in Sub-Saharan Africa, where land access had traditionally been characterized as relatively egalitarian.¹³ Some of the factors that have been attributed to these conflicts include population pressure, agricultural commercialization and urbanization.¹⁴ Where these conflicts have not been managed effectively, they have often erupted into large scale civil strife and political movements.¹⁵ Land plays an important role in many African livelihoods and is intrinsically intertwined with people's identity and sense of belonging.¹⁶ Due to the

⁸ Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi.

⁹ *Ibid*, Article 60 (1) (g)

¹⁰ *Ibid*, Article 67 (2) (f)

¹¹ Land Act, No.6 of 2012, S 4 (2) (m), Government Printer, Nairobi

¹² Community Land Act, No. 27 of 2016, S 39 (1), Government Printer, Nairobi

¹³ Yamano.T & Deininger.K., Land Conflicts in Kenya: Causes, Impacts, and Resolutions., available at <http://www3.grips.ac.jp/~yamanota/Land%20Conflicts%20in%20Kenya%20%28FASID%20D%29.pdf> (accessed on 11/03/2021)

¹⁴ *Ibid*

¹⁵ Andre, C., & J.P. Platteau. 1998. "Land relations under unbearable stress: Rwanda caught in the Malthusian trap," *Journal of Economic Behavior and Organization*, vol. 34 (1): 1-47.

¹⁶ Onguny. P & Gillies. T., Land Conflict in Kenya: A Comprehensive Overview of Literature, available at <https://journals.openedition.org/eastafrica/879> (accessed on 03/11/2021)

sacrosanct status accorded to land among African communities, it is not surprising that it has often been a major source of widespread conflicts and civil strife.

The Constitution of Kenya, 2010 classifies land as public, community or private.¹⁷ Classification of land to include community land recognizes the traditional land tenure system that was prevalent among indigenous communities prior to the emergence of the modern land tenure system as a result of colonization. Land holding in pre-colonial Kenya comprised of a complex system of customary tenure in which rights of access to and use of land were regulated by intricate rules, usages and practices¹⁸. This was based on structures such as the clan and other lineal heritages.¹⁹ Disputes relating to land were managed through traditional approaches that were geared towards fostering peaceful co-existence among the Africans.²⁰

Classification of community land presents certain opportunities for Communities. It promises land security for many Kenyans who habitually reside in pastoralists or rural communities where land has traditionally been held under customary tenure.²¹ However, community land could be a possible source of conflicts owing to the emotive nature of land in Kenya. Despite the existence of the formal conflict management mechanisms, there has been perennial land and natural resource conflicts in Kenya.²², The paper thus seeks to interrogate the use of ADR and TDR mechanisms in the management of community land disputes in Kenya.

¹⁷ Constitution of Kenya, 2010, Article 61 (2), Government Printer, Nairobi.

¹⁸ Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land., available at http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf (accessed on 11/03/2021)

¹⁹ *Ibid*

²⁰ Muigua.K., *Resolving Conflicts Through Mediation in Kenya*, Glenwood Publishers Limited, 2nd Edition, 2017

²¹ The Community Land Act in Kenya: Opportunities and Challenges for Communities, available at <https://africanlii.org/article/20180609/community-land-act-kenya-opportunities-and-challenges-communities> (accessed on 11/03/2021)

²² Muigua. K., *Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects*, available at <http://kmco.co.ke/wp-content/uploads/2019/10/Effective-Application-of-Traditional-Dispute-Resolution-Mechanisms-in-Management-of-Land-Conflicts-in-Kenya-Challenges-and-Prospects-October-2019-5.pdf> (accessed on 11/03/2021)

4.0 Managing Community Land Disputes Through Litigation

The Constitution establishes the Environment and Land Court with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.²³ The jurisdiction of this court is stipulated under the Environment and Land Court Act and include inter alia the power to hear and determine disputes relating to community land.²⁴ The Community Land Act also envisages the use litigation in managing disputes relating to community land. It provides that where all efforts of resolving a dispute under the Act fail, a party to the dispute may refer the matter to court which may confirm, set aside, amend or review the decision which is the subject of appeal or make any order as it may deem fit.²⁵

However, litigation may not be an ideal mechanism for managing community land disputes. Conflict management through litigation can prolong for years before parties can get justice in their matters due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice.²⁶ Litigation is often slow and expensive and may not be appropriate in community land disputes where there is need for expeditious, efficient and cost effective dispute management for purposes of safeguarding the common interest of the community.

5.0 Use of Alternative Dispute Resolution Mechanism in Managing Community Land Disputes

ADR mechanisms derive their legal basis from the Constitution of Kenya which mandates courts and tribunals to promote reconciliation, mediation, arbitration and traditional dispute resolution mechanisms in exercising judicial authority.²⁷ The Environment and Land Court Act also provides for the use of ADR mechanisms in managing land disputes. The Act states that the court may adopt and implement 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.²⁸

²³ Constitution of Kenya, 2010, Article 162 (2) (b).

²⁴ Environment and Land Court Act, No. 19 of 2011, S 13 (2) (d)

²⁵ Community Land Act, No. 27 of 2016, S 42

²⁶ Muigua.K., ADR: The Road to Justice in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2018/08/PAPER-ON-ADR-THE-ROAD-TO-JUSTICE-IN-KENYA.pdf> (accessed on 12/03/2021)

²⁷ Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

²⁸ Environment and Land Court Act, No. 19 of 2011, S 20

The use of ADR mechanisms in managing community land disputes has been firmly entrenched under the Community Land Act. The Act provides that a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute resolution mechanisms for purposes of managing disputes concerning community land.²⁹ Further, it stipulates that any dispute involving community land shall, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by laws.³⁰ The Act gives precedent to ADR and provides that a registered community shall give priority to alternative methods of dispute resolution where a dispute or conflict relating to community land arises.³¹ Further, in managing disputes involving community land, the Act requires a court or any other dispute resolution body to apply the customary law prevailing in the area of jurisdiction of the parties to a dispute in settlement of disputes concerning community land so far as it is not repugnant to justice and morality or inconsistent with the Constitution.³² The ADR mechanisms recognised under the Act are traditional dispute resolution mechanisms, mediation and arbitration.

Use of ADR in managing community land disputes is efficacious. It has the ability to enhance access to justice and provides for cost effective, speedy and less formalistic management of disputes.³³ In addition to offering justice, the use of ADR can result in mutually satisfying results that are acceptable to all.³⁴ This is important in the context of disputes involving community land where there is need to preserve relationships for purposes of maintaining peace and cohesion within the community.

6.0 Challenges in Using Alternative Dispute Resolution Mechanisms to Manage Community Land Disputes

Despite their inherent benefits, ADR mechanisms suffer from a number of drawbacks that could potentially hinder their effectiveness in managing community land disputes. Use of traditional dispute resolution mechanisms could result in potential disregard for

²⁹ Community Land Act, No. 27 of 2016, S 39 (1)

³⁰ *Ibid*, S 39 (2)

³¹ *Ibid*, S 39 (3)

³² *Ibid*, S 39 (4)

³³ National Land Commission., Alternative Dispute Resolution as a Viable Tool in Land Conflicts: A Kenyan Perspective, available at <https://land.igad.int/index.php/documents-1/countries/kenya/conflict-3/530-alternative-dispute-resolution-as-a-viable-tool-in-land-conflicts-a-kenyan-perspective/file> (accessed on 12/03/2021)

³⁴ *Ibid*

basic human rights.³⁵ Further, use of traditional dispute resolution mechanisms can result in application of abstract rules and procedure and lack of consistency in decision making.³⁶ Further, modernization has resulted in mixing up of different cultures thus eroding traditions. Traditional justice systems are also regarded as inferior in comparison to formal justice systems.³⁷ This is evidenced by repugnancy clauses which limit the application of traditional justice systems. A clear example is the provision of the Constitution of Kenya to the effect that traditional dispute resolution mechanisms shall not be used in a way that contravenes the bill of rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality or is inconsistent with the Constitution or any written law.³⁸

Mediation on the other hand is non-binding in nature. Parties may choose to discontinue with the mediation process even after agreeing to submit a dispute to mediation.³⁹ The non-binding nature of mediation means that a decision cannot be imposed on the parties.⁴⁰ Further, due to lack of precedents, there is uncertainty in decision making. The process may also not be suitable when a party needs urgent protection like an injunction⁴¹. Such urgent protection measures may be needed in the context of community land in order to protect the status quo of the land or prevent any harmful activities from being carried over it.

Arbitration may not be a suitable tool in management of disputes involving community land. Arbitration is more formal than other ADR mechanisms and resembles litigation.⁴² The process could also end up being expensive due to the formalities involved thus

³⁵ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Op Cit

³⁶ *Ibid*

³⁷ Kariuki.F., *Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf> (accessed on 12/03/2021)

³⁸ Constitution of Kenya, 2010, Article 159 (3)

³⁹ Muigua.K., *Achieving Lasting Outcomes: Addressing the Psychological Aspects of Conflict through Mediation*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Addressing-the-Psychological-Aspects-of-Conflict-Through-Mediation-3RD-AUGUST-2018-1.pdf> (accessed on 12/03/2021)

⁴⁰ World Intellectual Property Organization, "Mediation: Frequently Asked Questions," available at <http://www.wipo.int/amc/en/mediation/guide/> (accessed on 12/03/2021)

⁴¹ Findlaw, "Alternative Dispute Resolution: Which Method Is Best For Your Client," available at <https://corporate.findlaw.com/litigation-disputes/alternative-dispute-resolution-which-method-is-best-for-your.html> (accessed on 12/03/2021)

⁴² Muigua. K., *Settling Disputes Through Arbitration in Kenya*, Glenwood Publishers Limited, 3rd Edition, 2017

defeating the principle of cost effective dispute resolution embodied in ADR mechanisms. Arbitration is also not efficient in managing disputes where there is need to maintain relationships due to its adversarial nature.⁴³ These shortcomings hinder the effectiveness of arbitration in managing community land disputes in Kenya.

7.0 Enhancing the Role of Alternative Dispute Resolution Mechanisms in Managing Community Land Disputes in Kenya

ADR mechanisms can be a viable tool in management of community land disputes in Kenya. However, there is need to address the underlying challenges with these mechanisms in order to enhance their efficacy in managing community land disputes in Kenya. There is need for development of a clear legal and policy framework for the application of traditional dispute resolution mechanisms. Such a framework should ensure respect for human rights while promoting African customary practices and systems.⁴⁴ However, it should be ensured that traditional justice system remain voluntary and consensual in accordance with their key attributes.

The role of mediation in managing community land disputes can be enhanced by encouraging communities to pursue it at the expense of litigation.⁴⁵ The informality of mediation makes it flexible, cost effective, expeditious and fosters relationships.⁴⁶ Since parties exhibit autonomy over the process and outcome of the mediation process, the outcome is usually acceptable and durable.⁴⁷ However, due to its informality and non-binding nature, the effectiveness of mediation as a tool for management of community land disputes in Kenya is limited. Mediation can be mainstreamed into the legal system in Kenya to ensure certainty and predictability. This will also facilitate enforcement of decisions thus making mediation a viable tool for managing community land disputes in Kenya.

⁴³ Njuguna. J., Arbitration as a Tool for Management of Community Land Conflicts in Kenya, 2019 Journalofcmsd Volume 3 (1)

⁴⁴ Kariuki. F., African Traditional Justice Systems, available at <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf> (accessed on 15/03/2021)

⁴⁵ Njuguna. J., Arbitration as a Tool for Management of Community Land Conflicts in Kenya, Op cit

⁴⁶ Muigua. K., Traditional Conflict Resolution Mechanisms and Institutions, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf> (accessed on 15/03/2021)

⁴⁷ *Ibid*

Arbitration on its own may not be effective in managing community land disputes in Kenya. Its adversarial in nature and resembles litigation in many aspects.⁴⁸ This makes arbitration less efficient in the context of community land disputes where there is need to maintain relationships. This challenge can be cured through the use of hybrid ADR mechanisms such as Med-Arb which combines both mediation and arbitration. Parties agree to mediate but if that fails to achieve a settlement, the dispute is referred to arbitration.⁴⁹ Parties are thus able to benefit from the positive attributes of both mediation and arbitration while mitigating their shortcomings.

The Alternative Dispute Resolution Policy⁵⁰ represents a good starting point towards strengthening the legal framework on ADR in Kenya. It recognises the applicability of ADR mechanisms in land disputes.⁵¹ There is need to achieve the vision of the policy in order to enhance the role of ADR in managing community land disputes in Kenya.

8.0 Conclusion

ADR mechanisms can play an important role in managing community land disputes in Kenya. Most of these mechanisms are able to address underlying issues in a dispute thus ensuring finality of disputes. This is essential in the context of community land disputes where there is need to maintain relationships and preserve the social fabric of the community. However, ADR mechanisms suffer from a number of challenges and shortcomings that can hinder their effectiveness in managing community land disputes in Kenya. Addressing the challenges facing ADR mechanisms is therefore important in enhancing their role in managing community land disputes in Kenya.

⁴⁸ Njuguna. J., Arbitration as a Tool for Management of Community Land Conflicts in Kenya, Op Cit

⁴⁹ Muigua. K., Settling Disputes Through Arbitration in Kenya, Glenwood Publishers Limited, Op Cit

⁵⁰ Alternative Dispute Resolution Policy (Zero Draft), 2019, available at <https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf> (accessed on 16/03/2021)

⁵¹ *Ibid*

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Enunciating the effect of the Doctrine of Sovereign Immunity of States on International Arbitration

By: *Edwin. N. Kimani** & *Peter. M. Muriithi***

Abstract

In the 21st Century States continue to be one of the main players in international business transactions. The onerous responsibility of states to provide goods and services to their citizens means that, they are by default involved in enormous commercial transactions and investment ventures. In several of these business transactions involving states for example; states and states, states and organizations, states and private individuals/companies, states overtime have adopted international arbitration as their preferred mode of dispute resolution. This is manifested especially in investment agreements and international commercial transactions involving states.

However, under public international law (international personality of states) states enjoy sovereign immunity as international legal persons. Sovereign immunity is a legal doctrine by which the sovereign or the state cannot, commit a legal wrong and is immune from civil suit or criminal prosecution.¹This has raised the concern as to the extent to which a State involved in international arbitration can invoke the doctrine of sovereign immunity and its impact on international arbitration. Inquisitively this paper asks; Is the doctrine of sovereign immunity a threat to international arbitration?

In answering these questions, this paper interrogates how various International Conventions that offer a legal framework for international arbitration have addressed these seminal issues. For example; The Convention on the Settlement of Investment Disputes between States and Nationals that was created to offer a mechanism for resolving investor state disputes.

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¹ Neeraj Aroram, Doctrine of Sovereign Immunity, <<http://www.neerajaarora.com/doctrine-of-sovereign-immunity>> lastly accessed on 3rd February 2021

1.0 Introduction

As States continue to be involved in international business transactions with private parties seeking to improve accessibility of government goods by its people several concerns arise. The involvement of the State which under international customary law enjoys sovereign immunity and their commitment to arbitration clauses in the commercial transactions agreements has raised various concerns. Key among them is the extent to which a State can invoke the doctrine of sovereign immunity in international arbitration. In determining what constitutes international arbitration, two elements are considered. These are: The nature of the dispute in question and the nationality of the parties involved in the arbitration.²

This criterion of determining whether arbitration is international in nature is adopted by the Arbitration Act No. 4 of 1995³ and UNCITRAL Model Law.⁴ To this end Article 1(3) of the UNCITRAL Model Law⁵ verbatim provides that: “*arbitration is considered to be international if:*

- a) the parties to an arbitration agreement have, at the time of conclusion of that agreement, their places of business indifferent states; or*
- b) one of the following is situated outside the State in which the parties have their place of business:*
 - i) the place of arbitration, if determined in, or pursuant to, the arbitration agreement;*
 - ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or*
- c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.”*

²Charles Manzoni, International Arbitration, The Key Elements; page 2-3 a presentation at 39 Essex Street on Wednesday 5th May 2004 <http://www.39essex.com/docs/articles/CMZ_International_Arbitration_050504.pdf>lastly accessed on 20thFebruary 2021

³Section 3(3) of the Arbitration Act No. 4 of 1995

⁴UNCITRAL Model Law on International Commercial Arbitration 1985 (With amendments as adopted in 2006) <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>lastly accessed on 20thFebruary 2021

⁵ *Ibid* No.4

The extent to which States can invoke the doctrine of sovereign immunity especially in international investment arbitration as part of international arbitration and its impact on investment has always been issue for concern for parties transacting with states.

Sovereign immunity is defined as ‘a legal defense to a court action granted to a sovereign tribal government and its entities that prohibits a lawsuit against itself, its entities and its employees unless the defense has either been abrogated as in the case of the United States (US) or the government has expressly waived its immunity’.⁶ The doctrine of sovereign immunity is a rule of customary international law which postulates that States or their representatives cannot be impleaded in the courts of another jurisdiction.⁷

As countries engage in commercial transactions with private parties, the place of the doctrine of sovereign immunity in arbitration has invoked a number of concerns. One of the concerns is the question whether a State should be immune from proceedings in a foreign country when it has entered into an agreement to arbitrate and the impact of the doctrine of sovereign immunity in enforcement or arbitral awards.⁸ In some jurisdictions such as the United Kingdom (UK), US, Australia and Canada which adopt a restrictive approach to sovereign immunity, foreign States engaging in commercial transactions do not enjoy absolute immunity as commercial transactions and an agreement to arbitrate are exceptions to the general rule of absolute immunity and this is clearly stated in their respective laws.⁹

When a private party enters into a contract with a State authority or agency, the fear in most cases when it comes to settling of disputes through arbitration is the ability of the State to invoke the defence of sovereign immunity even when the parties have agreed to refer their disputes to arbitration affecting the execution of the arbitral award. In most cases, the State will invoke immunity not only against jurisdiction but also against

⁶ ‘Sovereignty of Indian Tribes and the Sovereign Immunity Defense: Protecting Tribal Sovereignty, Conference’ <<https://law.und.edu/tji/files/docs/sovereign-immunity-bjones-nov2011.pdf>> accessed 23rd February 2021

⁷ Jasper Finke, ‘Sovereign Immunity: Rule, Comity or Something Else?’(2011) 21(4) The European Journal of International Law 853.

⁸ Rowland Alaba Akande, ‘Enforcement and Practicability of Sovereign Immunity Doctrine in International Commercial Arbitration’ (2014) 7(2) Journal of Politics and Law 143

⁹ KR Simmonds, ‘The Limits of Sovereign Jurisdictional Immunity: the Petrol Shipping Corporation and Victory Transport Cases’ 2010 11 (4) McGill LAW JOURNAL 290.

execution of the arbitral award at the enforcement stage.¹⁰ This has raised specific problems associated with the execution of an international arbitral award sought by a private party against a State.¹¹ It invokes the question whether the doctrine of sovereign immunity is a threat to the international arbitration which this paper seeks to address. This paper therefore interrogates the impact of the concept of State sovereign immunity in international commercial arbitration and especially its impact on investment arbitration.

2.0 Delimiting the Concept of Sovereign Immunity

The concept of sovereign immunity is entrenched in customary international law. States often claim the doctrine of sovereign immunity as a means of upholding their sovereignty. *Sovereign immunity* is a legal doctrine by which the sovereign or the state cannot, commit a legal wrong and *is immune from civil suit or criminal prosecution*.¹² The basis of the doctrine of sovereign immunity is from the common law principle borrowed from the British Jurisprudence that the King commits no wrong and that he cannot be guilty of personal negligence or misconduct of his servants.¹³

The doctrine of sovereign immunity, rests upon the foundation that it is contrary to the dignity of any sovereign that he should be impleaded in the Courts of any other sovereign unless he should-elect to waive his immunity.¹⁴ Article 2 of the United Nations (UN) Charter recognizes the principle of the sovereign equality of all its members and requires all States to respect each other.¹⁵ The doctrine of sovereign immunity seeks to enhance

¹⁰ QC Hazel Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property?' (1996) 12(1) *Arbitration International* 89.

¹¹ Giorgio Bernini and Albert Jan Van den Berg, 'The Enforcement of Arbitral Awards Against A State: The Problem of Immunity from Execution' In JDM Lew (eds), *Contemporary Problems in International Arbitration* (Springer 2017).

¹² NeerajAroram, *Doctrine of Sovereign Immunity*, <<http://www.neerajaarora.com/doctrine-of-sovereign-immunity>> lastly accessed on 3rd March 2021

¹³ NeerajAroram, *Doctrine of Sovereign Immunity*, <<http://www.neerajaarora.com/doctrine-of-sovereign-immunity>> lastly accessed on 3rd March 2021

¹⁴ Erwin H. Loewenfeld; W. T. Wells, *Doctrine of Sovereign Immunity*, The , 44 *Int'l L. Ass'n Rep. Conf.* 204 (1950).

¹⁵ *Ibid* No. 14

independence of the States. A State enjoys two forms of immunity: jurisdiction and execution.¹⁶

A. Types of immunity

States generally enjoy two types of immunity: -

- i. Immunity to Jurisdiction**
- ii. Immunity from execution**

i. Immunity to jurisdiction¹⁷

A state's immunity to jurisdiction results from the belief that it would be inappropriate for one State's courts to call another State under its jurisdiction. Therefore, State entities are immune from the jurisdiction of the courts of another State. However, this immunity can generally be waived by the State entity. Reference to arbitration is in many legal systems sufficient to demonstrate a waiver of immunity to jurisdiction by the State.¹⁸ However, certain developing countries may be hesitant to submit themselves to international arbitration, believing that arbitration is dominated by Western principles and would not give a developing country a fair hearing.¹⁹ These same developing countries may feel more secure submitting to arbitration under the United Nations Commission on International Trade Law (UNCITRAL) institutions and rules, which are often considered more culturally neutral than those of the ICC or other Western tribunals.²⁰

ii. Immunity from execution²¹

The State will also have immunity from execution, as it would be improper for the courts of one State to seize the property of another State. Immunity from execution may also generally be waived.²²

¹⁶ Christian Tomuschat, 'The International Law of State Immunity and Its Development by National Institutions' (2011) 44 Vanderbilt Journal of Transnational Law 1105.

¹⁷ <<https://www.lawctopus.com/academike/sovereign-immunity/>>lastly accessed on 3rd March 2021

¹⁸ <<https://www.lawctopus.com/academike/sovereign-immunity/>>lastly accessed on 3rd March 2021

¹⁹ Craig, Park and Paulsson, International Chamber of Commerce Arbitration (3rd edition 2000)

²⁰ Craig, Park and Paulsson, International Chamber of Commerce Arbitration (3rd edition 2000)

²¹ <<https://www.lawctopus.com/academike/sovereign-immunity/>>lastly accessed on 3rd March 2021

²² <<https://www.lawctopus.com/academike/sovereign-immunity/>>lastly accessed on 3rd March 2021

Waiving immunity from execution may be difficult for a government to address. As a general proposition under most legal systems, certain assets belonging to the state should not be available for satisfaction of the execution of an arbitral award; for example, the country's foreign embassies, or consular possessions. Therefore, some method may have to be made available for the private party to seize certain state assets, possibly through careful definition of those possessions available for seizure.²³

B. Nature of Immunity

Immunity can either be absolute or restrictive. Absolute immunity requires that a national court of another country cannot hear law suits and enforce judgments against a sovereign authority if the State in question has not waived its immunity.²⁴ This is the traditional and common law concept of sovereign immunity. According to absolute sovereign immunity, a State is immune from suits in another States' courts (jurisdictional immunity) and its assets cannot be seized to enforce a court judgment (execution immunity). A State claiming absolute immunity does so in regard to all the activities carried out by the State and no distinction exists between commercial and sovereign activities.

Where absolute sovereign immunity exists, no country can be compelled to accept the jurisdiction of another State and no legal action can be brought against the State within its borders unless it waives its sovereign immunity. In the case of; *Ministry of Defence of the Government of the United Kingdom versus Joel Ndegwa*,²⁵ the Government of the United Kingdom of Great Britain and Northern Ireland although they had entered into an arbitration agreement, when a dispute arose they argued that as a foreign state they had not consented to be sued in the Kenyan Court and was entitled to immunity. The Court upheld their argument and held that indeed it would not issue its process against the defendants unless they waived the immunity or that they consented to submit to the jurisdiction of the courts in Kenya in the matter in dispute. The doctrine of absolute immunity is well settled under international law.

²³ <<https://www.lawctopus.com/academike/sovereign-immunity/>> lastly accessed on 3rd March 2021

²⁴ W Mark, C Weidemaier and Mitu Gulati, 'Differing Perceptions? Market Practice and The Evolution of Foreign Sovereign Immunity' <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6274&context=faculty_scholars> accessed on 3rd March 2021

²⁵ 103 ILR 235 Civil Criminal Appeal 1982

Over time, as States continued to engage in international business, it was noted that when a State enters into a market place, the same treatment given to private individuals must be given to the State as was held in the case of *Liberian Eastern Timber Corporation v The Government of Liberia*.²⁶ The doctrine of restrictive immunity provides that foreign States are not presumptively immune when they engage in commercial acts.²⁷ The doctrine of restrictive immunity developed in order to ensure equality of parties. The doctrine of restrictive immunity is found on the distinction between acts *iure gestionis* and acts *iure imperii*. Acts *iure gestionis* are private, merchant like, commercial acts of the government state commonly referred to as commercial transactions. Acts *iure imperii* on the other hand are the public acts of the government commonly referred to as the sovereign acts. In accordance with the application of the restrictive immunity, a state can only claim immunity in regard to acts *iure imperii*.²⁸

A state engaging in commercial activities will be exempted from State immunity in jurisdictions that adopt a restrictive approach to State immunity.

3.0 The effect of the Doctrine of Sovereign Immunity of States on International Arbitration

Involvement of states in international arbitration especially international investment arbitration can be traced back to various disputes that arose between foreign investors and host states in the 1950's and 1960's. Various international incidents between foreign investors and host states confronted the World Bank in the 1950's and 1960's. These incidents made it imperative for the making of an international legal regime that would address and provide an acceptable mechanism for resolution of investor state disputes.²⁹

For example, on 10th May 1964, the Tunisian National Assembly shocked the world by rushing through a bill nationalizing all farmland that belonged to foreign investors. As a result, much of the one million acres of land and other assets were seized from large French corporations.³⁰

²⁶ 77 (S.D.N.Y, 1986)

²⁷ Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012).

²⁸ Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012).

²⁹ David A. Soley ICSID Implementation: An Effective Alternative to International Conflict (The International Lawyer, Vol. 19, No. 2 (Spring 1985), pp. 521-544)

³⁰ David A. Soley ICSID Implementation: An Effective Alternative to International Conflict (The International Lawyer, Vol. 19, No. 2 (Spring 1985), pp. 521-544)

In May 1951, Iran nationalized Aglo-Iranian Oil Company's (AIOC) assets, a British owned company. The British as the foreign investors in the oil industry in Iran through Aglo-Iranian Oil Company (AIOC) were unable to come to terms with Iranian demands for a fairer oil arrangement. This led to Iran's nationalization of Aglo-Iranian Oil Company's (AIOC) assets.³¹

In 1956, the Egyptian government nationalized the Suez Canal Company. The World Bank intervened and successfully mediated the settlement of claims by the Company's shareholders against the Egyptian Government.³² The World Bank was involved in settlement of many of these investor state disputes. The World Bank played an active role in seeking to have an amicable settlement of these investor state disputes.³³

However, it was apparent that there existed gaps in the existing structures for the settlement of investment disputes. This led to an initiative in the 1960's by the World Bank to have in place an acceptable mechanism for resolution of investor state disputes. The plan was to create a mechanism specifically designed for the settlement of disputes between host States and foreign investors. This led to the drafting of the ICSID Convention between the year 1961 and 1965 which offered a structured platform of resolving investor state disputes through arbitration.³⁴ This really paved a way for involvement of states in international commercial arbitration.

International commercial arbitration arises when private parties and a State engage in a transaction of commercial nature and incorporate an arbitration clause to arbitrate in case a dispute arises. Arbitration is a private method of dispute resolution, chosen by the parties themselves as an effective way of putting an end to disputes between them, without resort to court process. One of the peculiar characteristics of arbitration is the ability of the arbitral award to be obeyed in good faith making the arbitral decisions

³¹ Edward Henniker Major, Nationalization: The Anglo-Iranian Oil Company, 1951 Britain vs. Iran
<<https://sevenpillarsinstitute.org/articles/nationalisation-anglo-iranian-oil-company-1951-britain-vs-iran-2/>>

³² E. Mason & R. Asher, *The World Bank Since Bretton Woods* 18 (1973)

³³ Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA* page 98

³⁴ United Nations Conference on Trade and Development, *Course On Dispute Settlement (UNCTAD/EDM/Misc.232)* page 9

binding on the parties.³⁵ Further dispute resolution by way of arbitration is also commended for leading binding determination of a dispute and an award that is not subject to any appeal mechanism. The fact that an award is not subject to appeal on the merits gives the parties added security about the finality of the resolution process.³⁶

In the case of; *Kano State of Nigeria Development Board v. Fanz Construction Company Limited*,³⁷ the court affirmed that an arbitration clause does not operate as ouster clause but only operates as a legal right. It is in the expectations of the parties that indeed the parties involved in the disputes will enforce the arbitral award. However, in some cases this has not been the case as foreign States sometimes invoke the defence of sovereign immunity in international commercial arbitration.

The question on whether a foreign State can invoke the defense of sovereign immunity in arbitration has raised various concerns. State sovereign immunity as discussed above is entrenched international customary law. However, when a private investor carrying out activities such as infrastructural projects enters into an agreement with a State to provide it services, in most cases, the parties may agree to invoke arbitration incase a dispute arises. The expectation of the parties is that, in case a dispute is referred to arbitration, the parties will voluntary enforce the arbitral award. However, when a State raises the defence of sovereign immunity at the enforcement stage, then the essence of having an arbitration agreement in itself becomes futile.

The crux of the impact of sovereign immunity in international commercial arbitration has raised a number of critical issues whose impact possess as a threat to investment arbitration. Most jurisdictions will either adopt absolute or restrictive immunity. As noted earlier, absolute immunity grants a State total immunity from being sued or having it assets seized by foreign court unless they waive the immunity. In terms of international arbitration, where a country invokes absolute immunity, they enjoy total immunity even in commercial matters. This raises uncertainties in investment arbitration. Prior to 1997, Hong Kong adopted the restrictive approach in international arbitration just like the UK. However, in 1997 Hong Kong adopted the absolute immunity. This position was affirmed in 2010 in the case of *FG Hemisphere v The Democratic Republic of Congo*

³⁵ David Kariuki Muigua, 'Arbitration Institutions in East Africa' in E Onyema(ed), *The Transformation of Arbitration in Africa: The Role of Arbitral Institutions* (Kluwer Law International 2016).

³⁶*Ibid* No. 35 page 8

³⁷(1990) 6 SCNY p. 77

FACV 5-7/2010 by the Hong Kong Court of Final Appeal which held that after 1997, the absolute immunity in international arbitration applied in the Hong Kong legal system.

i) Arbitration as an exception to the doctrine of absolute immunity

A successful arbitral process is one in which the arbitral tribunal can grant an arbitral award that is enforceable.³⁸ If not, then the whole process becomes frustrated. Although the role of an arbitral Tribunal is to ensure that the parties reach an agreement, the enforcement of such an agreement is entirely the parties' obligations. Arbitration between a private party and State has raised a critical question as to when a State raises a defence of sovereign immunity.³⁹ Supporters of international arbitration argue that when it comes to international arbitration, once a state has agreed to arbitration, then it must be deemed to have waived immunity.⁴⁰ In fact Bernini and Berge note that by agreeing to arbitrate a State not only waives its immunity from jurisdiction but also from execution.⁴¹

In order to enhance and promote investment arbitration, some countries now adopt a restrictive approach to State immunity and this is well provided in their laws and case laws. In this case an agreement to international arbitration is recognized as an exception to the general rule of absolute immunity. In South Africa, the Foreign States Immunities Act (SAFSI) 87 of 1981 under Section 10 recognizes an agreement of arbitration as an exception to State immunity in arbitration. It provides that, 'a foreign state which has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, shall not be immune from the jurisdiction of the courts of the Republic in any proceedings which relate to the arbitration'.

In England, the restrictive sovereign immunity approach is adopted in its international arbitration. The England State Immunity Act 1978 (UKSIA) recognizes state immunity of other States from the jurisdiction of the UK courts subject to a number of exceptions

³⁸ Herbert Kronke, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer 2010).

³⁹ Rajesh Sharma, 'Enforcement of Arbitral Awards and Defence of Sovereignty: The Crouching Tiger and the Hidden Dragon' (2011) 1 Lapland Law Review 252.

⁴⁰ Yang (n 13).

⁴¹ Bernini G and Berg AJ, 'The Enforcement of Arbitral Awards Against A State: The Problem of Immunity from Execution' In JDM Lew (eds), *Contemporary Problems in International Arbitration* (Springer 2017)

under Section 2 of the UKSIA. Arbitration is one of the exceptions recognized under Section 2(5) of the UKSIA.

Where a country submits to the jurisdiction of the UK courts either after the dispute giving rise to the proceedings has arisen or by a prior written agreement.⁴² Section 9 of the UKSIA provides verbatim that:

“Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.”⁴³

In adopting the UK approach, Section 11(1) of the Singapore State Immunity Act (SSIA) indicates that:

“Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration. This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States...”

The approach is that once a State submits in writing to arbitration, it cannot come around and invoke the defense of State immunity. The Australia’s Foreign States Immunity Act (AUFISA) of 1985 adopts a restrictive approach to State immunity. The AUFISA recognizes the immunity of the other State’s from the jurisdiction of the Australian Courts.⁴⁴

When it comes to international commercial arbitration and State immunity, Section 17 of the AUFISA stipulates that where a State has entered into an agreement to arbitrate it waives its States immunity. Section 17 of the AUFISA categorically provides that:

⁴² UKSIA 1978, s 2(2)

⁴³ *Ibid* No.42

⁴⁴ AUFISI 1985, s 9

“Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration, including a proceeding: (a) by way of a case stated for the opinion of a court; (b) to determine a question as to the validity or operation of the agreement or as to the arbitration procedure; or (c) to set aside the award.”

In Kenya the Arbitration Act No. 4 of 1995, to a great extent adopts the restrictive sovereign immunity approach in international arbitration. The guiding provisions are Sections 5, 32A, 36 and 37 of the Arbitration Act No. 4 of 1995 read together. Section 5 of the Arbitration Act No. 4 of 1995 which provides for waiver of the right to object states verbatim;

“A party who knows that any provision of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is prescribed, within such period of time, is deemed to have waived the right to object.”

The interpretation of this provision is that where parties have entered into an arbitration agreement without raising any objection whatsoever, they cannot later claim to not be bound by such an arbitration agreement or the Arbitration Act No. 4 of 1995 as the case maybe. This hence restricts states as parties to international arbitration in Kenya to claim state immunity at the tail end of an arbitration process which they voluntarily entered into via an arbitration agreement.

Section 32A of the Arbitration Act No. 4 of 1995 buttresses this position by providing for finality of the arbitration award in the following terms;

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

Section 35 of the Arbitration Act No. 4 of 1995 provides for grounds for setting aside arbitration agreement. The Arbitration Act No. 4 of 1995 under Section 35 has deliberately omitted sovereign immunity as a ground of setting aside arbitral award.

Section 36 of the Arbitration Act No. 4 of 1995 provides for recognition and enforcement of arbitration awards. Section 36 (2) of the Arbitration Act No. 4 of 1995 outlines that an international arbitration award shall be recognized as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards. The New York Convention which Kenya is a party to deliberately omits sovereign immunity as a ground of setting aside arbitral award.

Lastly, Section 37 of the Arbitration Act No. 4 of 1995 provides for grounds for refusal of recognition and enforcement of an arbitral award. This section deliberately omits sovereign immunity as a ground for refusal to recognize and enforce an arbitral award. From the foregoing, one can only conclude that Kenya adopts the restrictive state sovereign immunity approach in international arbitration.

A state which voluntarily agrees to submit to an arbitration clause shall be deemed to have waived its State immunity from the court's jurisdiction if a restrictive approach to State immunity is adopted.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention),⁴⁵ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Conventions) are the key treaties that govern international arbitration enforcement in all of the signatory countries.⁴⁶

It is to be noted that, while Article V of the New York Convention lists grounds upon which a party may oppose an arbitration award, sovereign state immunity is not one of the grounds. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States⁴⁷ (herein ICSID Convention) adopts *the concept of*

⁴⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 21 UST 2517, 330 UNTST (hereinafter referred to as New York Convention)

⁴⁶ Convention on the Settlement of Investment Disputes between States and Nationals of other States, March 18, 1965, 17 UST 2517, 330 UNTS (hereinafter referred to as in Washington Convention).

⁴⁷ ICSID website < <https://icsid.worldbank.org/en/pages/icsiddocs/overview.aspx> > lastly

consent as a waiver to the doctrine of states sovereign state immunity. This concept of consent presumes that by states consenting to submit to international investment arbitration under the *aegis* of ICSID Convention, they are then estopped from claiming sovereign immunity in the arbitration process.

From the onset the ICSID Convention under the *preamble* provides that the contracting parties to the ICSID Convention which by *mutual consent* submit their dispute to conciliation or arbitration under the *aegis* of ICSID shall comply with the award rendered. This provision under the preamble of the ICSID Convention connotes an aspect of waiver of sovereign immunity by the states.⁴⁸

The preamble of the ICSID Convention also provides that no Contracting State shall by the mere fact of its ratification, acceptance or approval of the Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration. The interpretation of this provision is that states will only be considered to have submitted a dispute to ICSID for settlement only where it expressly does so. This eliminates the concept of tacit submission of disputes by states by mere fact of its ratification, acceptance or approval of the Convention.

Under Article 25 (1) of the ICSID Convention, ICSID acquires jurisdiction over an investor state dispute where parties to the dispute consent in writing to submit to the Centre. This provision prevents states from claiming the doctrine of sovereign immunity, as ICSID only acquires jurisdiction over an investor state dispute where parties to such a dispute submit it to ICSID through consent and in writing. Consensual submission of investor state disputes to ICSID by states connotes an aspect of waiver of sovereign immunity by the states.

Further to ensure effective settlement of investor state disputes, Article 25(1) of the ICSID Convention stipulates that when the parties have given their consent, no party may withdraw its consent unilaterally. This ensures parties are bound by their agreement to submit their investor state dispute to ICSID. It further pre-empts any party to such an agreement from claiming ICSID does not have jurisdiction as that party has unilaterally withdrawn its consent unilaterally. This ensures effective settlement of investor state disputes under the *aegis* of ICSID Convention.

accessed on 3rd March 2021

⁴⁸ Preamble of the ICSID Convention

To ensure states do not claim doctrine of sovereign immunity, Article 25(4) of the ICSID Convention gives contracting states, at the time of ratification, acceptance or approval of the ICSID Convention or at any time thereafter, an option to notify ICSID of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. This ensures states have power to decide which disputes to submit to ICSID as a sovereign state.

For example, in 1978, Papua New Guinea notified ICSID that it would submit only those disputes which are elementary to the investment itself.⁴⁹ Furthermore, to ensure states do not claim doctrine of sovereign immunity Article 26 of the ICSID Convention provides that a contracting state may require the exhaustion of local remedies. According to this Article, all local administrative and judicial remedies available to the contracting parties are to be exhausted before submitting the dispute to the jurisdiction of the ICSID. To uphold the concept of consent ICSID Convention adopts arbitration on a case by case basis. Being a party to the ICSID Convention does not mean unconditional consent to ICSID settlement of investor state disputes. According to the ICSID Convention, the contracting parties must consent in writing to submitting the dispute to the ICSID.⁵⁰

The UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law), when it comes to the grounds on which recognition or enforcement of arbitral award may be refused listed under Article 35, it is identical to those listed under Article V of the New York Convention. As such, the doctrine of sovereign immunity is not one of the grounds that a party may rely on to oppose an arbitration award UNCITRAL Model Law.

Some arbitration institutions have incorporated a provision which prevents a State from invoking the defence of sovereign immunity once they agree to arbitrate under their rules. The International Chamber of Commerce (ICC) is one of the leading arbitration institutions which have incorporated such a rule. Article 28(6) of the ICC Rules provides that:

“Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any

⁴⁹ Singh S & Sharma S, Investor-State Dispute Settlement Mechanism: The Quest for a Workable Roadmap (2013) 29 *Merkourios - International and European Law: General Issue* 91 (hereafter Singh S & Sharma S (2013)).

⁵⁰ Article 25(1) of the ICSID Convention

Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made...”

Whilst most of the developed countries have incorporated a provisions in their laws requiring that once a State submits to arbitration it waives its State immunity, this approach is still contentious especially in developing countries. On the other hand, it is argued that the consent to arbitration by a State is different from consent or waiver of sovereign immunity at the enforcement stage by the State.⁵¹ This approach has been adopted in Canada under the Canadian State Immunity Act (CSIA), which does not have an exception from immunity in arbitration agreements. In the case of *TMR Energy Ltd. v State Property Fund of Ukraine*,⁵² the Court affirmed that the mere act of a State to submit to an arbitration agreement should not be considered as an express waiver of jurisdiction immunity as this is yet to be definitively decided. Instead parties can rely on the exception regarding commercial activities and waiver of execution immunity in enforcing foreign arbitral awards.

This approach was also adopted in the case of *Collavino Inc. v Tihama Development Authority*,⁵³ where the Alberta Court of Queen’s Bench held that transaction at issue was for commercial purposes and so an exception to immunity applied. The Court held that the State Organ of Yemen, by agreeing to international commercial arbitration in a commercial transaction must be deemed to have waived execution immunity. The Canadian jurisprudence indicates that indeed engaging in commercial transactions in itself which is an exception to the rule of state immunity in itself is applicable to international commercial arbitration which involves transactions of commercial nature.

ii) International arbitration and commercial transactions juxtaposed with the doctrine of sovereign immunity

Generally, in most jurisdictions that adopt a restrictive approach to sovereign immunity, a foreign State is precluded from invoking state immunity in commercial transactions. This is the foundation of the doctrine of restrictive immunity though what amounts to commercial transactions will be based on a case by case basis. The UNICITRAL model law provides that:

⁵¹ *Ibid*

⁵² 2003 FC 1517

⁵³ 2007 ABQB 212.

*The term 'commercial' should be given a wide interpretation so as to cover matters arising from all the relationships of commercial nature, whether contractual or not. Relationship of commercial nature include, but are not limited to, the following transactions; any trade transaction for the supply or exchange of goods and services; distribution agreement; commercial representation or agency; factoring; leasing; construction works; consulting; engineering; licensing; investment; banking; financing; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.*⁵⁴

Disputes referred to arbitration will arise from commercial transactions. The recognition of commercial transactions as an exception to the rule of absolute immunity is fundamental international commercial arbitration.

In the UK, where a country engages in commercial transactions, it will then be precluded from invoking state immunity. The UKSIA clearly stipulates that immunity from execution subject to two exceptions where: (1) there is written consent to execution (submission to jurisdiction only will not be sufficient); or (2) where state property is used for commercial purposes.

In Singapore, the Singapore Immunity Act is modelled closely with the UKSIA and adopts a restrictive approach to State immunity. However, it has minor differences. The international conventions which Singapore is not a party such as; European Convention on State Immunity and the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships have no application in Singapore.

Generally, States are immune from the jurisdiction of the Singaporean Courts. Further, subject to Section 5 of the SSIA, a State does not enjoy state immunity in regard to proceedings relating to commercial transactions entered into by the State or contractual obligation of the State (whether commercial transaction or not) that falls to be performed wholly or partly in Singapore. The SSIA stipulates what constitutes commercial transactions which include: any contract for the supply of goods or service; any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar

⁵⁴ UNICITRAL Model Law, p 1

character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.⁵⁵ It exempts activities in the exercise of the sovereign authority from the rule.

In Australia, where a State is involved in commercial transactions, it will be exempted from State immunity.⁵⁶ In the case of *Firebird Global Master Fund II Ltd v Republic of Nauru*,⁵⁷ the High Court of Australia was called to determine whether a guarantee upon which the judgment was based was a commercial transaction upon which Section 11(1) of the AUFSIA applied.

Whereas the Court found that indeed the said transaction was commercial it invoked Section 32 of the AUFSIA which grants State immunity from execution of State property even if the same was a subject of arbitration. The court therefore upheld Nauru's claim to immunity from the execution against its property represented by the bank accounts held in Australia because the purposes upon which the accounts were in use or for which the monies in them were set aside, were not commercial purposes but of sovereign purposes.

Where a country adopts restrictive immunity in international arbitration, the State only enjoys immunity in relation to activities that involve exercise of sovereign power and not commercial activities. A foreign court will sue a particular State and have its assets seized in regard to commercial or private matters. It is therefore in no doubt that, where restrictive immunity is invoked, a distinction must be drawn between commercial versus sovereign activities and assets. In the case of *LR Avionics Technologies Limited v The Federal Republic of Nigeria*,⁵⁸ the question on whether the issuance of visas and passports constituted use of commercial purposes or sovereign activities was raised. In this case, the premises owned by Nigeria had been leased on commercial terms to a private company for the purposes of issuing visas and passports. The Commercial court held that indeed the issuance of visas and passports was not a commercial activity but sovereign and therefore the premises were immune from execution.

Whilst Kenya does not have a Statute on Foreign State sovereign immunity it is likely to follow the restrictive approach in England if the provisions of the Arbitration Act No.

⁵⁵ SSIA, s 5(3)

⁵⁶ AUFSI 1985, s 11

⁵⁷ [2015] HCA 43

⁵⁸ [2016] EWHC 1761

4 of 1995 are to be taken as a guideline. This interpretation is buttressed by the case of *Tononoka Steels Limited Vs Eastern And Southern Africa Trade And Development Bank*.⁵⁹ In this case, despite the fact that the Bank had been granted immunity from the legal process and suit by the Ministry of Foreign Affairs pursuant to the Privileges and Immunities Act, the Court of Appeal held that the Bank did not enjoy immunity for acts of a commercial nature. However, there is no general rule to what will amount to commercial or sovereign transactions. Kenya been an economic hub, as such time is ripe to discuss the need to enact a legislation governing foreign state immunity and arbitration.

iii) Delimiting Immunity from execution in Arbitration

The contentious question in this regard is that by submitting to arbitration, does a State also waive its sovereign immunity defence at the enforcement stage?⁶⁰ On one hand it is argued that once a State submits and consents to arbitration, it waives the defence of sovereign immunity against both the jurisdiction and immunity. Sharma argues that⁶¹:

“...In order to give effect to arbitration, a State, once it has agreed to arbitration, should not be allowed to raise the defence of sovereign immunity either during the arbitration process or during enforcement, except in a situation where diplomatic property or funds are involved.”

Whilst commercial transactions in countries that adopt restrictive approach to immunity would ensure that States do not invoke jurisdictional immunity, the same approach is different when it comes to execution immunity. When a private party and State party agree to arbitrate, their intention is to solve the disputes through arbitration. However, it is apparent that whilst the defence of sovereign immunity is not raised during the arbitration stage, the same is likely to be raised at the enforcement stage. The impact of the defence of sovereign immunity in international arbitration possess as a threat to international investment.

The doctrine of sovereign immunity protects a State from legal proceedings brought before the courts of other jurisdictions.

⁵⁹Civil Appeal No. 255 of 1998, Court of Appeal Nairobi [1999] EKLR

⁶⁰ Fox (2008) *The Law of State Immunity*. 2nd ed. Oxford University Press.

⁶¹ Sharma R, ‘Enforcement of Arbitral Awards and Defence of Sovereignty: The Crouching Tiger and the Hidden Dragon’ (2011) 1 *Lapland Law Review* 252 at p 255.

Therefore, whereas States will adopt a restrictive approach to immunity against jurisdiction, the case is not the same when it comes to immunity against execution, whereby in most states absolute immunity is applied.⁶² Actual execution of the arbitral award constitutes a separate phase from the arbitral proceedings and this is where the problem usually arises. Recognition and the enforcement of the arbitral award are usually a direct consequence of the award and logical final step of the arbitral proceedings.⁶³ In countries where restrictive approach to immunity is applied in the execution of arbitral awards different tests are either cumulatively or alternatively used for determining whether immunity from execution can be invoked.⁶⁴ These tests include the nature of funds tests (whether commercial or sovereign purposes) and the nature of the activity test (sovereign or commercial activity) as discussed above.

While the AUFSIA clearly exempts an agreement to commercial transaction between a State and a private party against jurisdiction immunity, Section 30 of the AUFSIA grants States immunity against State property in arbitral award. This is clearly indicated in Section 30 of the AUFSIA which stipulates that:

“...Except as provided by this Part, the property of a foreign State is not subject to any process or order (whether interim or final) of the courts of Australia for the satisfaction or enforcement of a judgment, order or arbitration award or, in Admiralty proceedings, for the arrest, detention or sale of the property.”

Whereas Section 5(3) of the SSIA lists down what will constitute commercial transactions, Section 15(2) of the SSIA grants State immunity from the execution of State property. Section 15(4) indicates that State property used for commercial activities shall be exempted from State immunity. These provisions indicate how various states have dealt with the issue of immunity from execution in arbitration.

⁶² Bernini G and Berg AJ, ‘The Enforcement of Arbitral Awards Against A State: The Problem of Immunity from Execution’ In JDM Lew (eds), *Contemporary Problems in International Arbitration* (Springer 2017)

⁶³ See the Swiss *LIAMCO case, Libyan American Oil Company v Socialist People's Libyan Arab Jamall.rya*, decided by the Tribunal Federal on June 19, 1980, reported in VI Yearbook: *Commercial Arbitration* (1981). See also *Cour d'Appel of Paris, June 26, 1981, Benvenuti and Bon/ant v The Government a/the People's Republic of the Congo*, repoted in *G Delaume, Transnational Contract, (Dobbs Ferry 1978-1984), Vol V, Booklet F at 81.*

⁶⁴ Bernini and Berg (n)

4.0 Conclusion

Diligent commercial private parties, while dealing with States and their entities must approach all dealings diligently taking into consideration the impact of the doctrine of sovereign immunity in such transactions. Parties need to be aware of the limitation of any waiver, and the approach to state immunity in all jurisdictions where the award or judgment would be enforced against State assets. Whereas developed nations have made reference to arbitration as an exception to the general rule of State immunity where a State has agreed to arbitration, certain developing countries have been hesitant in adopting this rule and submitting themselves to international arbitration. It is noted that developing countries may feel more secure submitting to arbitration under the UNCITRAL rules, which are often considered more culturally neutral than those of the ICC or other Western tribunals.

In order to ensure equality of parties in arbitration, a number of jurisdictions have expressly provided arbitration as an exception to the general rule of absolute immunity in their laws. Where parties have entered into an agreement to arbitrate, then it is presumed that the foreign State waived its State immunity. In most jurisdictions, it should be noted that even when a commercial transaction is upheld, the court will be reluctant to waive State immunity if the activities were for sovereign purposes and where it State property is involved. In countries adopting a restrictive approach to State immunity, where a foreign State agrees through a written agreement to arbitrate, then it will be presumed to have waived its immunity from the Arbitral Tribunal or a foreign State's court jurisdiction.

However, this will only apply to commercial transactions and where sovereign activities are involved, then a foreign country can invoke State immunity or waive the same. What amounts to sovereign and commercial activities has been litigated in a number of cases.

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Alternative Dispute Resolution as a Means of Accessing Justice: Case Study of Baringo County

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Abstract

Conflicts have been present in human societies since time immemorial, often leading to adverse effects on social, economic and political set up of families, clans and communities. In order to avert their occurrence, traditional societies developed some informal methods to resolve conflicts known as traditional dispute resolution methods (TRDM). In recent years, there has been a scrutiny of delivery of justice within common law court systems because of the numerous challenges that have bedeviled its processes. Studies have pointed out that court processes are costly, lengthy and stressful undertakings. This has made it difficult for the under privileged in society to access justice through the court. Research done on the use of TDRM and ADR have revealed that they are appropriate alternative methods to litigation.

This paper seeks to examine the use of TDRM and ADR as a means to access justice. It will reflect on the use of these mechanisms in Baringo County, identifying some of the challenges their use presents in the County. It will then analyze best practices from other African jurisdictions of Nigeria, Ghana, Rwanda and Botswana that are relevant to Kenya before concluding with some useful recommendations for reforms aimed at the promotion of TDRM and ADR mechanisms for dispute resolution within Kenyan communities.

Keywords: Access to justice, ADR, Baringo County, Constitution of Kenya 2010, TDRM

1. Introduction

There have been persistent complaints in the legal fraternity as well as from litigious Kenyan citizens that the formal court system in Kenya is not discharging its mandate

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effectively because it is choked with such problems as backlog of cases, exorbitant advocates/court fees, systems administrative weaknesses, financial constraints and corruption among others. These challenges cut across a majority of the courts in Kenya including those in Baringo County where the majority of the rural population is poor, marginalized and live far away from the location of the understaffed court stations. However, the promulgation of the new Constitution in 2010 was seen to expand the methods of accessing justice through the promotion and the application of TDRM and ADR mechanisms. Article 48 of the Constitution of Kenya 2010 enshrines the right of access to justice as a fundamental right and requires that the same should not be limited by time or scarcity of resources. Further, the Constitution also grants the courts and all state organs the power to promote TDRM and ADR as alternative ways of accessing justice.¹

Despite this explicit constitutional duty imposed on state organs and other state actors in Kenya, the current legal framework does not provide comprehensive guidelines on the linkage of TDRM and ADR mechanisms with the court system. These inadequacies have provided legal gaps which have made the operation and implementation of TDRM and ADR to remain superficial. This paper therefore seeks to establish the obstacles which hold back the implementation of TDRM and ADR using Baringo County as a case study, appraising the current legal and the institutional framework and making proposals for reforms using best practice derived from other African jurisdictions.

TDR and ADR mechanisms have been described to refer to a collection of practices used to help disputing parties to resolve disputes including negotiation, mediation, conciliation, restitution, arbitration as well as an array of hybrid practices such as med-arb, mini-trial and neutral evaluation. Historically, these mechanisms were known by such names as endogenous or indigenous approaches and existed within a particular cultural context. Each community developed their rules on how to resolve disputes and these rules were embedded in the traditions and cultures of the respective communities.²

Baringo County is home to some Kalenjin sub-tribes who are mainly the Tugen, the Pokot, the Njemps and other small communities from other tribes such as the Turkana, the Samburu, the Kisii, the Nubians and the Kikuyu. Each of these communities had its own culture, together with suitable dispute resolution mechanisms and institutions that

¹ Constitution of Kenya, Article 159(2) (c).

² K Muigua, *Resolving conflicts through Mediation* (Glenwood Publishers 2012).

were deeply rooted in those cultures. These traditional mechanisms use local actors and cannot claim universal applicability because they are context specific with approaches varying from one community to another.

Disputes and conflicts in traditional societies between individuals or group of age-sets affected entire families, the clans and the tribe and could only be managed by the wise and knowledgeable men and women in the community known as local elders. These men and women were known by different local names such as the *Vaya* among the Digos at the Kenya Coast, *Naboo* among the Njemps, *Njuri Ncheke* among the Ameru and *Kokwo* among the Tugen and the Pokot sub-Kalenjin communities living in Baringo County.³ In the communities of Baringo County, when the council of elders presided over a dispute, the outcomes or determination made by them became binding to the parties or the communities involved in the dispute. These council of elders were viewed as the custodians of the culture of each community and were drawn from the senior elders' age-set group and were the nerve center of dispute resolution.

TDRM and ADR techniques were extra judicial in character and were used in almost all civil disputes ranging from natural resource disputes, land ownership disputes, family/clan disputes and cattle rustling disputes that threatened the existence of the communities. These techniques were passed from one generation to another with the purpose of resolving disputes as they occurred in order to preserve community peace.⁴ The indigenous dispute resolution mechanism which was to be chosen by the elders to apply to a particular dispute were easily accessible by all members of a community, it was cheap, flexible and used the local language as opposed to the court processes which use foreign languages.⁵ An important aspect of the traditional dispute resolution was the fact that the traditional elders conducted their affairs in the presence of family, clan and community members (in public) which allowed the notion of 'communality or oneness' to thrive, founded on the principle that "everyone was his/her brother's/sister's keeper". This therefore meant that, traditional dispute resolution mechanisms were rooted in

³ K Muruthi, 'A Survey on ADR Strengths, Weaknesses and Policy Gaps: A Case Study of Meru, Isiolo and Nairobi Counties, Kenya' (2016) 4(1) The ADR Journal (CIArb (K)).

⁴ K Muigua, *Settling disputes in Kenya through Alternative Dispute Resolutions* (Glenwood Publishers 2012)

⁵ K Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the constitution of Kenya 2010' (2018) <http://www.kmco.co.ke/attachments/article/111/paper%20Traditional%20Dispute%20Resolution%20Mechanism%20FINAL..PDF> accessed 2 January 2019.

symbolism and rituals which ensured that the whole community participated in those processes. Rituals such as eating, drinking, singing and dancing together as well as exchanging of solemn vows and promises signified unity of the community at large.

The main focus of TDRM and ADR mechanisms was to promote restoration of damaged or dented relationships, promote peace building and parties interests rather than allocate rights between the disputants.⁶ The parties to a dispute would respect the summons which were issued by the elders, failure to which the elders would pronounce some cultural sanctions such as imposition of fines and curses. ADR mechanisms within traditional societies have been there for a long time but were not known by their current names such as mediation or conciliation etc. but had names which were peculiar to the particular society.⁷

Existing literature considers TDRM and ADR as methods of dispute resolution which accommodate all the alternative dispute settling mechanisms other than court litigation. Researchers in this field have vouched for the application of TDRM and ADR methods as a better way of solving disputes and conflicts because it gives a wider range of settlement solutions, saves time and money, promotes confidentiality and party autonomy. In addition, the process results in a win-win outcome; it uses indigenous styles, creates social binding agreements, reconciles disputants and produces positive outcomes.⁸ Fundamentally, TDRM and ADR mechanisms seek to provide effective platforms for conflict management and resolution of disputes with particular emphasis on: prompt resolution of disputes, reduction of legal fees and other litigation expenses, simplicity of the procedures and flexibility of the processes, equality of opportunity and balancing of powers between the parties and satisfaction as it permits parties to fashion their own solutions.

2. Legal Framework of Alternative Dispute Resolution in Kenya

The practice of ADR mechanisms by indigenous communities in Kenya has been in existence from time immemorial and those methods were accepted as legitimate in the resolution of disputes/conflicts by the various communities.⁹ However, those methods

⁶ F Kariuki, *Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case study of Republic v. Mohamed Abdow Mohamed* [2013] eKLR (2015).

⁷ F Shako and C Lichuma. 'Pouring Old Wine into New Wine Skin: The Alternative Dispute Resolution Movement in the Postcolonial State' (2018) 6(2) *The ADR Journal* (CIArb) 37.

⁸ Muigua (n4).

⁹ Shako and Lichuma (n7).

were not codified and the rules that governed those indigenous processes differed from one community to another depending on the customs and traditions of each of the communities.¹⁰

2.1 United Nations (UN) Charter

The legal genesis of the application for the use of alternative dispute resolution mechanisms in most of the UN member states can be traced to its charter which states as follows:¹¹ “*The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.*”

Membership to the United Nations obligates each member state, international and regional organizations to align their laws and rules to the provisions of the Charter. As such, Kenya is bound by this provision commonly known as the *pacifist settlement of disputes*.

2.2 African Charter on Human and Peoples’ Rights

Within the African continent, member states to the African Charter on Human and Peoples’ Rights are bound by the provisions thereof and where disputes or conflicts occur they are obligated to resolve them through bilateral negotiations or any other peaceful means.¹² Further, the Charter also provides that every individual may freely take part in the cultural life of his or her community and that the promotion and protection of morals and traditional values recognized by the community is the duty of the State.¹³ Participation in cultural life can be interpreted to include the freedom to submit oneself to traditional dispute resolution mechanisms.

2.3 The Constitution of Kenya 2010

From the Kenyan perspective, it is evident that there is no stand-alone statute which prescribe which ADR or TDRM mechanisms should be used to settle or to resolve the different kinds of disputes and conflicts. The legal frameworks on ADR in Kenya are scattered in different pieces of legislation which pertain to particular sectors. The

¹⁰ *Ibid.*

¹¹ United Nations Charter, Article 33.

¹² African Charter on Human and Peoples’ Rights, article 47 and 48.

¹³ *Ibid.*, article 17.

foundation of the enabling legislations and any legal frameworks is the Constitution of Kenya 2010.

The recognition of ADR and TDRM in the Constitution of Kenya 2010 elevated its applicability as a viable means for the enhancement and dispensation of access to justice.¹⁴ The fundamental rights and freedoms elaborated in this Constitution in Chapter Four i.e. the Bill of Rights cannot be enjoyed without an enabling framework for its application. To achieve this, the same Constitution provided for access to justice¹⁵ to all the citizens of Kenya without discrimination hence it enjoined all state organs and mandated the courts and other adjudicating authorities to promote and encourage reconciliation, mediation, arbitration and traditional dispute resolution mechanisms as long as they do not contravene the bill of rights or reflect inconsistencies with the Constitution. It should be noted that a lot of disputes in Kenya are resolved outside the court system through the use of traditional dispute resolution and ADR mechanisms and this affirms what was contemplated by the makers of the Constitution who envisaged the provision of justice in many forms.¹⁶ However, the good intentions of Article 159 (2) of the Constitution are slowed by the lack of a legislative framework and institutional support for TDRM and ADR.

2.3.1 ADR and Culture

Culture is recognized in the Constitution as the foundation of the Kenyan nation and as the cumulative civilization of the Kenyan people.¹⁷ It has been argued that the traditions, customs and norms within communities have always played a pivotal role in conflict resolution and were highly valued and adhered to by the members of the said communities.¹⁸ By obligating state organs to promote all forms of national and cultural expressions, the Constitution recognizes the rights of the communities in the counties to manage their own affairs including dispute/conflict management. Some scholars of conflict management have added their voice to this by stating that some rural communities in Kenya live far away from the formal courts and therefore traditional dispute resolution mechanisms would offer better options in the management of

¹⁴ Constitution of Kenya 2010, article 159(2) (c).

¹⁵ *Ibid*, article 48.

¹⁶ M Galanter, 'Justice in Many Rooms, Courts, Private Ordering and Indigenous Law' (1981) 13(19) *Journal of Legal Pluralism and Unofficial Law*.

¹⁷ The Constitution of Kenya 2010, article 11(2).

¹⁸ Muigua (n2).

disputes/conflicts as opposed to the classical method of litigation.¹⁹ Most African countries still hold onto their traditional customary laws because it emphasized social harmony and togetherness as expressed in such terms as *Ubuntu* in South Africa and *Utu* in East Africa. These values contribute significantly to the cohesiveness, harmony and discipline among the African societies. That is one reason why culture has been incorporated into the formal justice system in the resolution of conflicts of most countries regionally.²⁰

2.3.2 Devolution and ADR in Kenya

The scope of the application of ADR was widened by the Kenyan Constitution to include its use in inter-governmental relations. In the first schedule, the Constitution recognizes that there are forty-seven county governments under one national government. The national government shall legislate procedures for settlement of disputes between the two levels of government through the various methods of alternative dispute resolution such as negotiation, mediation and arbitration.²¹

This has been actualized by the enactment of the Inter-Governmental Relations Act 2012 which provides several clauses on elaborate ADR procedure and mechanisms to be used for settlement of disputes that may occur.²² This implicitly means that disputes/conflicts of the two levels of government must be handled in a way that promotes cooperation and consultation. This is thus a clear manifestation of the acceptance of ADR by the Constitution as a means of peaceful resolution of disputes between the national government and the counties or between one county and another.

2.4 Civil Procedure Act

The Civil Procedure Act Cap 21 of the Laws of Kenya embodies the procedural law and practice of civil courts in Kenya. It envisages the development of enabling provisions within which ADR mechanisms are to be operationalized. This Act contains several provisions on the use of ADR mechanisms to resolve conflicts. Section 1A (1) of this Act provides that its overriding objective is to facilitate the just, proportionate and

¹⁹M Adan and R Pkalya, *Conflict Management in Kenya: Towards Policy and Strategy Formulation*. (Practical Action 2006).

²⁰K Mkangi, *Indigenous Social Mechanism of Conflict Resolution in Kenya: A contextualized paradigm for examining conflict in Africa*. (University of Nairobi, 1987).

²¹ Constitution of Kenya 2010, article 189(4).

²² Intergovernmental Relations Act 2012, section 30, 31, 32 and 34.

affordable resolution of disputes.²³ The courts are therefore mandated to employ rules and make orders that provide for the promotion and use of ADR mechanisms in order to expedite access of justice to all.²⁴

Section 59(A) of this Act provides for mediation of cases as an aid to ease the backlog of cases that have plagued the justice system. This has resulted in the establishment of the court-annexed mediation system under the supervision of the mediation accreditation committee.²⁵ Agreements resulting from mediation have been insulated in the Act by providing that once a mediation agreement has been adopted by a court, it shall be enforceable as if it were a judgment of that court and no appeal shall lie against that judgment.²⁶

The Act further gives latitude to the parties and the court to refer a suit to any other method of dispute resolution which is considered to be appropriate and to be governed by the procedures agreed by the parties.²⁷ However, the Act talks about mediation only and leaves out all the other TDRM and ADR mechanisms.

2.5 Civil Procedure Rules

Order 46 Rule 20 of the Civil Procedure Rules explains that the court may at its own discretion or upon the request of a party, refer a suit to an appropriate ADR mechanism. This means that under the rules, ADR mechanisms may be explored and resorted to at the preliminary stages of a case with an aim of facilitating a just, expeditious and proportionate resolution of the case. In this case, courts are empowered to refer to mediation certain cases that they consider appropriate to be resolved through ADR mechanisms and to enforce private mediation agreements which are in writing and were facilitated by a qualified mediator.²⁸ The Civil Procedure Rules provides for the formation of the Rules Committee of the High Court that is empowered to make rules and to adopt them for the administration of mediation and any other appropriate dispute resolution mechanism.²⁹ Resulting from this provision, the Rules Committee has

²³ Civil Procedure Act, Cap 21 Laws of Kenya, section 1A (1) and 81(2) (f f).

²⁴ *Ibid*, section 3A.

²⁵ *Ibid*, section 81(2) (f f).

²⁶ *Ibid*, section 59B (4).

²⁷ *Ibid*, section 59 C (1).

²⁸ *Ibid*, section 81 (f f).

²⁹ *Ibid*, section 81.

facilitated the introduction of a court annexed mediation which is anchored on the Act but left out the rest of the TDRM and ADR mechanisms.

2.6 Other Laws

TDRM and ADR also receive prominence in a number of key legislative instruments. For instance, one of the purposes of the enactment of the Consumer Protection Act 2012 in Kenya was to provide for consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions.³⁰ In the same breadth, to operationalize the provisions of the Constitution of Kenya 2010, all the previous regimes which regulated the administration and the management of land were put under the Land Act,³¹ the Land Registration Act³² and the Community Land Act.³³ These new acts together with the Land Policy provide for use of alternative dispute resolution mechanisms by disputing parties or communities to facilitate expeditious and affordable access to justice. In the process of management and adjudication of public land in Kenya, the Constitution envisaged some land disputes at various stages of the process. In order to address those disputes, the Constitution provided for the enactment of the National Land Commission Act³⁴ with an objective of managing land in accordance with the National Land Policy.³⁵ This commission is mandated to use traditional dispute resolution mechanisms to arrive at a just, equitable and satisfactory solution.³⁶

Other pieces of legislation that envisage the use of ADR mechanisms include the Marriage Act 2014,³⁷ the Employment Act 2007,³⁸ the Labour Institutions Act,³⁹ the National Cohesion and Integration Act,⁴⁰ etc.

³⁰ Consumer Protection Act 2012, section 3(4).

³¹ Land Act No.6 of 2012.

³² Land Registration Act No.3 of 2012.

³³Community land Act No.27 of 2016.

³⁴ Constitution of Kenya 2010, article 67(2) (f).

³⁵ National Land Commission Act 2012, section 3.

³⁶ *Ibid*, section 6 (3).

³⁷ Marriage Act 2014, section 66, 68

³⁸ Employment Act 2007, section 47.

³⁹ Labour Institutions Act 2007, section 12(9).

⁴⁰ National Cohesion and Integration Act, section 51.

3. Baringo County Practices and Challenges in TDRM and ADR

The communities in Baringo County use TDRM and ADR mechanisms through a council of elders known as *kokwo*.⁴¹ The structure of resolution of disputes is divided into three segments namely the family unit (*kap chich*) headed by a father, followed by the age-set (*ibento*) and finally the extended family members popularly known as the clan.⁴² Small family feuds are resolved by fathers in each homestead through negotiation and mediation whereas neighbors and village disputes are resolved by age-sets. If the age-set teams are not able to resolve the dispute at that level, the disputants would approach the clan members who are the members of the *kokwo* council of elders. The *Kokwo* council of elders upholds the principle of fair hearing by conducting their affairs in public and allowing the disputing parties to call witnesses to support their testimonies before they make a final determination of either restitution or reconciliation or both.⁴³

Negotiation

Negotiation is one of the methods which is widely used by the parties in everyday life in Baringo County to resolve disputes and conflicts. It is a process in which parties engage directly with one another by way of dialogue with an aim of resolving a dispute or conflict. The engagement may be between two or more opposing parties where each party adopts a position that maximizes their benefit at first, then narrows down to reach a mutually acceptable outcome without involving a third party.⁴⁴ Negotiation methods are the first port of call whenever conflicts occur as a result of family feuds, land boundaries and ownership, competition for pasture, water, salt licks sites and other minor disputes within the communities in Baringo County. However, the decisions of negotiations by disputants in Baringo County are undermined by various challenges which include: exploitation of some parties by others due to power and skill imbalance, negotiations are prone to deadlocks. Further, it does not have a time limit and may degenerate into a confrontation.

Mediation

Mediation finds its strengths through its privacy and confidential mode of operation, its voluntary and consensual obligations, its flexibility with rules and regulations and its

⁴¹K Muigua, 'Traditional Conflict Resolution Mechanisms and Institutions' (2017) <http://kmco.co.ke/wp-content/uploads/2018/08/Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf> accessed 18 December 2019.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Muigua (n4).

focus on interests and needs of the parties.⁴⁵ In Baringo County, when parties failed to resolve their disputes as individuals or groups, they used to approach community elders or peace committees to mediate over failed negotiated disputes. The elders who mediate in Baringo County are carefully chosen by respective disputants with consideration for their accumulated experience, trust, respect and wisdom.⁴⁶ Mediation is used not only to settle a dispute but also to improve the relationship of the parties or communities in conflict.

Conciliation

This process is often used when parties are unwilling or unprepared to sit in a bargaining table.⁴⁷ A third party called a conciliator is appointed to restore the damaged relationships by bringing together the disputing parties to talk. The aim of conciliation is to reduce tension and to open up the various channels of communication so that the parties go back to their pre-disputing status. This process is commonly used in Baringo County to conciliate family disputes especially in disagreements between spouses. The conciliator caucuses with each of the parties by making each party to understand their misconceptions about the others' position. Unlike a mediator who is supposed to be neutral, a conciliator may or may not be totally neutral to the interests of the parties.

Reconciliation

Reconciliation is one of the major alternative dispute resolution methods that is used in Baringo County by community elders to restore relationships when family feuds or neighbor disagreements disintegrate into conflicts. The process involves a dialogue which provides for an opportunity for the parties in conflict to disclose facts that caused the conflict and move towards forgiveness.⁴⁸

Restitution

The process of restitution or reparation goes hand in hand with acknowledgement of fault and remorsefulness. Reparation is the recognition and atonement by the perpetrator and redress to restore the aggrieved individual to the state that he/she was in before the infliction of the harm. Reparation may be either material in form of compensation,

⁴⁵ C Moore, *The Mediation Process. Practical Strategies for Resolving Conflicts* (3rd edn, San Francisco Jossy-Bass Publishers 2004).

⁴⁶ B Brock-Utne. *Indigenous Conflict Resolution in Africa* (University of Oslo, Institute of Educational Research 2001).

⁴⁷ Muigua (n5).

⁴⁸ *Ibid.*

restitution and rehabilitation or it can be moral which may include non-material measures such as the victim's need to be heard for justice and measures to avoid repetition of the violations. Restitution plays a critical role in bringing social harmony in society because the element of public participation calls for high levels of compliance failure to which it is tantamount to disobeying the whole community.⁴⁹

Be it as it may, the application of TDRM and ADR mechanisms in Baringo County is faced with a myriad of challenges as stated below:

3.1 Community elders are nominated by the communities based on their decent standing or their dynastic roots

Within some villages/communities in Baringo County elders are nominated from close family relatives by a few members instead of being elected by the entire community.⁵⁰ This has created a problem of nepotism. This results from the absence of checks and balances at the time of nomination causing the process to be riddled with favoritism on the basis of whom one knows or is related to. The weaknesses in this method of nomination of village or community elders provides fertile ground for politicians to interfere. At the time of nominations, politicians favour certain elders depending on their allegiance or power of wealth, education and status. On assumption of their roles in society, such elders make biased decision while adjudicating over family, clan or community matters which sparks more disputes/conflicts. In this way, instead of the elders being peace carriers, they themselves become another source of dispute/conflict which could go on endlessly.

3.2 Lack of enforcement of the decisions

When the parties to a dispute/conflict agree to resolve their matters through TDRM or ADR mechanisms, the resultant outcome often lacks enforcement.⁵¹ Because of this, some of the decisions made through negotiations, mediation, conciliation and reconciliation are not honored or implemented by the offenders because there is nothing that the elders can do except to rely on the society for support. When the elders pass a verdict that the victim must be compensated by the offender, it was meant to bring social

⁴⁹ Penal Reform International, *Access to Justice in Sub-Saharan. The Role of Traditional and Informal Justice System* (2001).

⁵⁰ J Apiyo, 'Indigenous Conflict Resolution Mechanisms Among Communities in the Karamoja Cluster: A Case Study of the Turkana' (University of Nairobi 2012).

⁵¹ F Kariuki, *Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities*. Paper delivered at the Chartered Institute of Arbitrators Centenary Conference at the Victoria Falls Convention Centre in 2015.

harmony to the society. A convict who disobeys the elders' ruling is considered to have disobeyed the entire community and nothing more is available to force the offender to perform. That lack of enforcement mechanisms for decisions that are made by the elders proves to be a challenge to those who use TDRM or ADR methods as a means to access justice in Baringo County.

3.3 Abuse of power

Most often, those who preside over disputes or conflicts are not paid or salaried. In some instances, the elders depend on gifts or bribes from the parties. Certainly, the decisions made by such compromised elders are skewed resulting to abuse of power and discriminatory verdicts.

3.4 System not inclusive of women and youth⁵²

The culture and traditions of the communities in Baringo County are patriarchal which means that women and children/youth are excluded from fundamental decision-making processes. This discrimination of women and youth causes a huge constituency of participants to be locked out of community affairs which directly impact them.

3.5 Lack of standards

Because there is no record of documentation on customary laws, norms or taboos of the communities, equally, decisions on the matters handled through TDRM/ADR methods are not recorded and the verdict depends on the wisdom, knowledge and the morality of the elders. That poses a challenge because different rulings made over the same matters occurring at different times or even at the same time could be contradictory causing confusion and uncertainty.

3.6 Contradiction with universal standards of human rights

Some of the decisions/rulings made by the elders using the TDRM methods to resolve disputes/conflicts contradict the universal standards of human rights. For instance, in times past, there have been reports of young girls being given out to victims of crimes as a form of compensation, which crimes were committed by the girls' family members.⁵³ There were also reports of married women being swapped between conflicting parties in order to force a satisfactory equilibrium of the pain of the offence.⁵⁴

⁵² Apiyo (n 50).

⁵³ Based on an interview the author had with Simbolei Lachumba, an 80 years old man from Kinyach Division of Baringo North, interviewed on 22nd march 2019.

⁵⁴ *Ibid.*

These traditional forms of restorative justice have since been discarded in Baringo County but some lesser abuses have emerged. For example, when livestock are suspected to have been stolen by members from the neighboring community, the entire community becomes responsible in that all their livestock are rounded up and handed over to the claimants.⁵⁵ This goes against the individual human right presumption of innocence until proven guilty and the principle of fair hearing.

3.7 Politics

In recent years politics have infiltrated into every matter that involves a sizable number of people. Matters of land, natural resources, minerals/salt licks/gas deposits and boundary disputes in Baringo County are no longer left to elders to adjudicate freely. The local politicians throw in their weight to swing or to influence the decisions of the elders to their advantage and that of his/her community.⁵⁶ This politicization of community affairs has watered down the efficacy of TDRM and ADR methods as a means to access justice by the marginalized and the poor in the County.

3.8 Corruption

In an interview with the County administrators of Baringo North, South and Tiaty constituencies on corruption practices, it was reported that sometimes they noted hard line positions taken by some elders during negotiation or mediation meetings because they had met earlier with local politicians or some of the wealthy members who bribed them with gifts or promises.⁵⁷ Corruption has proved to be a big challenge to the use of TDRM and ADR mechanisms to resolve disputes/conflicts in the County.

4. Lessons from TDRM and ADR Practice in Other Jurisdictions

Many indigenous communities around the world had their preferred methods of resolving their disputes/conflicts which applied their customary laws. The methods such as negotiation, mediation, conciliation, reconciliation, arbitration and others were accepted as effective and legitimate. The discussion below seeks to look into how different indigenous communities in select African countries comparatively resolve/resolved their disputes/conflicts and pick some of the best practices for recommendations on implementation of reforms in Kenya's legal framework.

⁵⁵ *Ibid.*

⁵⁶ Apiyo (n 50) 60.

⁵⁷ *Supra* (n53).

4.1 Nigeria

While examining the patterns of conflict resolution in Yoruba and Igbo societies in Nigeria and Pondo tribe in South Africa, Ajayi and Buhari⁵⁸ noted that conflict resolution in indigenous African societies provided opportunity for parties to interact, promote consensus building, social bridge reconstruction and social order. The authors pointed out that dispute settlement and conflict resolution were intended to remove the root-cause of a conflict, to reconcile the conflicting parties genuinely and to preserve and ensure harmony. Like the communities in Baringo County, the indigenous communities in Nigeria had unwritten traditional justice methods and institutions which were embedded in their customs and traditions. These indigenous methods had been in use from time immemorial and helped to maintain social coherence among the communities.⁵⁹ For instance the Yoruba community in Nigeria had rich culture and traditions that had been passed down from one generation to another through organized annual drama festivals and any inconsistencies that were noticed during the subsequent dramas were pointed out and rectified.⁶⁰

On remedies, the Yoruba council of elders rarely awarded damages except in some cases where there is a particular anti-social behavior which needed to be discouraged. Like other African communities, the Yoruba council of elders value the restoration of peace and harmony more than the awarding of damages.⁶¹ To affirm the above statement, a research which was carried out at the Niger Delta Region of Nigeria on the influence of cultural practices in peace building found out that oath taking, taboo system, use of festivals and oracles played a significant influence in peace building as opposed to the award of remedies.⁶²

⁵⁸A Ajayi and L Buhari, 'Methods of Conflict Resolution in African Traditional Society' (2014) 8(2) *African Research Review Journal*.

⁵⁹W Idowu, 'Law, Morality and African Cultural Heritage: The Jurisprudential Significance of The Ogboni Institutions' (2005) 14(2) *Nordic Journal of African Studies*.

⁶⁰S Biobaku, 'The Problem of Traditional History with Special Reference to Yoruba Traditions' (1956) 1(1) *Journal of the History of Nigeria*.

⁶¹E O Oko and others, 'Restoring Justice (Ubuntu): An African Perspective' (2010) 20(1) *International Criminal Justice Review*.

⁶²Oyitso and others, 'The Influence of Cultural Practices in Peace Building Process in Niger Delta Region' (2013) 4(3) *Academic Research International*.

4.2 Ghana

Osei-Hwedie and Rankopo⁶³ in their study on indigenous conflict resolution in Ghana found out that elders played a central role in African indigenous cultural practices which include mediation, oath taking, festivals and taboo systems among others. Elders in their role as mediators are considered creators of peace because of their status, recognition, integrity and experience. In the traditional societies of Ghana, disputes and conflicts on land matters, inheritance, natural resources and others were referred to clan heads. Those matters that disputants failed to agree on were referred to the chief who would issue a final and binding determination. The institution of traditional chieftaincy in Ghana is provided under the Constitution,⁶⁴ and other enabling Acts of Parliament.⁶⁵

As a practical example the efficacy of the mediation committee was witnessed in the peaceful resolution and settlement of the long –standing conflict between the community of *Alavanyo* and those of the *Nkonya* community who occupy the Volta region of Ghana.⁶⁶ The two communities had lived as neighbors for a long time but with perpetual disagreements/conflicts on land, natural resources, cultural clashes and power struggles among others. In 2006, a peace initiative was started by the mediation committee which ended the decade long conflicts.⁶⁷

On the strength of the High Court Act,⁶⁸ the Judicial Commission of Ghana established a national ADR programme akin to Kenya’s court annexed mediation whose duty was to mainstream TDRM and ADR processes in the judicial system in order to resolve pending court cases. This mandated magistrates in all Ghanaian courts to educate the parties to a dispute on the benefits of ADR and to seek their consent to refer their dispute to be resolved through the ADR processes. Through this programme it has been reported that an average settlement rate of 60% of all cases referred to ADR have been recorded.⁶⁹

⁶³K Osei-Hwedie and J Morena, *Indigenous Conflict Resolution in Africa: The Case of Ghana and Botswana* (2010).

⁶⁴Constitution of Ghana 1992, article 270.

⁶⁵ Chieftaincy Act of 1970.

⁶⁶ F Perpertia and R Imoro, *Assessing the Effectiveness of ADR Mechanisms in The Alavanyo-Nkonya Conflict in the Volta Region of Ghana*. (Institute of Development Studies, Department of Sociology of Cape Coast, Ghana 2011).

⁶⁷*Ibid.*

⁶⁸ High Court Act 1993 Cap 459 Laws of Ghana, section 72 and 73.

⁶⁹ UNDP 2007-Ghana Legal Statistics Report.

4.3 Rwanda

In many African countries, traditional institutions such as the “*dare*” in Zimbabwe, the “*Bashingantane*” of Burundi and the “*Ubunzi*” and the “*gacaca*” courts of Rwanda continue to play tremendous roles in conflict resolution.⁷⁰ These traditional institutions existed before colonialism and they were considered legitimate by the communities. In Rwanda, these institutions have been incorporated and recognized by the law in order to fill the vacuum in the justice system especially in the rural communities where access to formal courts proves particularly difficult. In 2006, the Rwandan parliament enacted a law which recognized the role of a group of mediators called “*Abunzi*” in conflict resolution.⁷¹ The word “*Abunzi*” means “those who reconcile” and they are chosen by the communities on the basis of their integrity to handle cases of civil and criminal nature.

Abunzi mediators exist alongside the *gacaca* courts which are in variance with the court annexed mediation in Kenya. Before a party seeks justice in local courts in Rwanda, mediation by the Abunzis is obligatory. This arrangement has decentralized the Rwandese justice system and made it accessible and affordable. Further it has opened up spaces for groups like women to participate in decisions which render justice to the ordinary population. Like the successful counterpart institution of *gacaca* court which is a traditional court set up to try the genocide massacre based on Rwandan customs and values, Abunzi system of mediation has succeeded to address the question of access to justice by the ordinary Rwandans who might not have been able to participate in the judicial system.⁷²

In comparison, Kenya lacks formal traditional courts system and traditional community mediators that are recognized and facilitated by a legal framework to operationalize the TDRM and ADR mechanisms. This practice in Rwanda is considered a good practice to be replicated in Kenya.

4.4 Botswana

The Botswana justice system is dualist and comprises of formal courts as well as customary courts. The customary court structure comprises of a customary court

⁷⁰ Kariuki (n 51).

⁷¹ S Njuguna, ‘The Suitability of Traditional Dispute Resolution Mechanisms in Criminal Matters in Kenya’ (LL.B Thesis, Strathmore University 2018).

⁷² *Ibid.*

commissioner and a customary court of appeal.⁷³ In Botswana, a dispute resolution process starts at the family level where a father is the head of the family unit and presides over disputes within that primary level. The next hierarchy is the extended family units whose disputes or conflicts are presided by the communities appointed elders. The third hierarchy of dispute and conflict resolution is composed of many family groups called a *ward* akin to a clan in the Kenyan context which is headed by a headman and sub-chief in some tribes of Botswana.⁷⁴ When a dispute/conflict is not resolved at the family level, extended family and at a ward level it is escalated to the customary courts which are headed by presidents appointed by a minister. Customary courts handle minor disputes such as those which involve: land, marriages, child care, properties, and boundaries among others.

The jurisdiction of the customary courts is provided under the Customary Courts Act which also prescribes the composition of the court, the order of precedence among its members, the powers and duties of any person who is appointed to act in the court etc.⁷⁵ There is no legal representation in the customary courts and the rules of evidence are relaxed. Any appeal from these customary courts is submitted to the formal court system. Botswana offers effective and workable conflict resolution mechanisms. Kenya lacks a legislative provision creating the jurisdiction of a customary court system with definite appellate hierarchy.

5. Recommendations for Reforms

5.1 Promotion of public *training and awareness programs*

The Kenyan Judiciary in collaboration with partners such as IDLO, Chartered Institute of Arbitrators (Kenya) and the Nairobi Centre for International Arbitration etc. should formulate programs for the training and awareness among the Kenyan public on the use of TDRM and ADR to access justice. Lack of funding has been cited as one reason for failure to disseminate information to the public. This can be remedied by the use of technology such as social media which is now more easily accessible than the traditional forms of media. Without a doubt, social media has become a tool that offers a new way of communicating to a large group of people and has proved to be an effective medium

⁷³ C Fombad, 'Customary Courts and Traditional Justice in Botswana: Present Challenges and Future Perspective' (2004) 15(1) Stellenbosch Law Review Journal.

⁷⁴ L Nyati-Ramahobo, *Minority Tribes in Botswana: The Politics of Recognition* (Minority Rights Group International 2008); see also: J Proctor, *The House of Chiefs and the Political Development of Botswana* (1968) 6(1) Journal of Modern African Studies.

⁷⁵ Customary Courts Act, Cap 04.05.

of communication in Kenya. Through this medium, citizens can keep themselves informed by subscribing to newsfeeds, blogs and alerts. Further, those who are involved in ADR processes especially the community elders and other stakeholders should be sufficiently trained to understand that the decisions that they make should at all times be in conformity with the Constitution especially in regards to the respect for fundamental rights and freedoms. Members of the public in the respective communities should be encouraged to abandon customary practices that promote gender discrimination and violate the Bill of Rights. Communities such as those in Baringo County should be sensitized through public participation forums such as the chief's barazas and religious gatherings to use TDRM and ADR mechanisms to address disputes and conflicts whether domestic or relating to control and management of natural resources. This will encourage them to avoid unnecessary conflicts, loss of life and property.

5.2 Promotion of peace building initiatives

The national government should formulate a peace building policy that encourages the use of TDRM and ADR within and amongst communities. To make this effective, the county governments should be mandated to organize and encourage inter-community peace activities such as cultural music festivals, dances, dress codes and sports amongst the communities. Awards of official recognition of the winners during national celebration days should be encouraged in order to lure public participation in these activities and strengthen the goal of peace building. In addition, the national and county governments should ensure that TDRM and ADR are promoted in the counties as appropriate conflict resolution mechanisms and ensure that all persons have the necessary knowledge and access to these mechanisms.

5.3 Amendment of some legislative provisions to enhance TDRM and ADR practice

TDRM and ADR rules and procedures are at variance with the formal court rules and procedures. Therefore, in order to ensure that there is smooth interaction between the two systems, some laws within the formal court system should be reviewed to accommodate TDRM and ADR procedures. For instance, the Civil Procedure Rules⁷⁶ and Civil Procedure Act should be amended to ensure they are in conformity with Article 159 of the Constitution which provides for the application of TDRM in certain cases. The Land Act 2012 should also be amended to allow active use of TDRM and ADR in

⁷⁶ Civil Procedure Rules, order 46 rule 20.

land issues. The National Land Commission Act 2012,⁷⁷ should be amended to accommodate the appointment of community leaders to assist in resolution of land issues and also for the establishment of County Land Management Boards. Rule 54 of the Supreme Court Rules 2012 which provides for the attendance of amicus curiae, experts and advocates to assist the court to determine technical matters should be expanded to include community elders who can assist the court in deciding on customary matters.

5.4 Creation of a national TDRM and ADR policy framework

While it is true that the use of TDRM and ADR can go a long way in resolving long standing individual, familial and community conflicts, their usefulness may be slowed down due to lack of a specific, clear legal framework or guidelines on their operations. There is no comprehensive policy framework on traditional dispute resolution methods and other community-based justice systems in Kenya. It is recommended that a national traditional dispute resolution and ADR policy be formulated to provide general guidelines of on the applicability of TDRM and ADR mechanisms. The objective of the policy should be as follows: -⁷⁸

- i) To promote and inculcate the culture of TDRM and ADR among Kenyans;
- ii) To strengthen the legal and the institutional framework of TDRM and ADR mechanisms in order to leverage its advantages over mainstream systems of dispute resolution;
- iii) To enhance coordination, collaboration and linkages within all sectors on the use of TDRM and ADR mechanisms;
- iv) To build TDRM and ADR capacity for efficient, quality, fair, affordable and easy access to justice for all; and
- v) To strengthen these mechanisms through research and promotion of awareness among practitioners, communities, government agencies and other sectors.

It is within the context of Article 159(2) of the Constitution of Kenya 2010 that the importance of the development of this policy is affirmed in order to enhance the apparatus of justice to increase its availability and accessibility.

⁷⁷ National Land Commission Act, section 17 and 18.

⁷⁸ Nairobi Centre for International Arbitration, *Alternative Dispute Resolution Policy* (2019)

5.5 Set-up a national TDRM and ADR advisory council

A TDRM and ADR Advisory Council should be established as the body which promotes the establishment of traditional courts and that will also supervise such courts and other ADR institutions that dispense justice without the formalisms of the court process. At the local level, the council members should be composed of local men, women and youth of integrity who will be chosen by their local communities. Their role shall be to regulate the TDRM/ADR standards to fit into a particular community customs and traditions. It should be noted that regulation should not result in the locking out of viable mechanisms like is currently the case whereby the Mediation Accreditation Committee is confined to court annexed mediation only. This is contrary to the intention of the Constitution which recognizes TDRM and other forms of ADR as viable mechanisms for the promotion of access to justice. In this regard it is recommended that the National Advisory Council to be set-up should work towards the expansion of the Mediation Accreditation Committee's mandate to include the other processes of ADR.

5.6 Set-up of traditional courts

Many of the disputes at the community level are very simple and straightforward and should not be sucked into the vortex of the large and complex judicial system. Therefore, the Kenyan National Policy on TDRM and ADR should advocate for the creation of traditional courts where local councils of elders or community leaders would sit and play the role of dispensing justice. The traditional court should have jurisdiction over the same local matters that the council of elders could handle such as land issues, marriage, inheritance, succession, property matters, trespass, and petty thefts among others. Among other provisions, the policy on the establishment of the courts should provide for the qualification of the council of elders or practitioners, rules for conducting a session, record keeping, trainings, appeals/reviews and the remedies to be imposed. Borrowing from section 59A and 59C of the civil procedure Act cap 21, the traditional court should be annexed to the formal court system so that its decisions shall be enforced much like judgments of formal courts. The high court decision of *R. vs. Mohammed Abdow Mohammed* (2013) highlighted the possibility of incorporating reconciliation into the outcomes of the formal justice processes provided they can respond to the lived realities of the people.⁷⁹

⁷⁹ Kariuki (n6).

5.7 Enactment of a new TDRM and ADR Act

There is inadequate legal framework to operationalize the provisions of Article 159(2) (c) and (3) (a)-(c) of the Constitution. The key challenges that are currently encountered in the use of TDRM and ADR mechanisms include: the lack of a framework to govern the practice of TDRM and ADR mechanisms; lack of an oversight institution to manage governance and set and enforce the standards required in TDRM and ADR practice; lack of uniformity of procedures; lack of a code of conduct for practitioners which will make them to adhere to the principles of justice; and inadequate enforcement mechanisms.

In order to streamline the above inadequacies, it is recommended that there should be an enactment of a new Act of Parliament i.e. the TDRM and ADR Act. This will ensure that there is uniformity of TDRM and ADR regarding the conduct of the process and to ensure that their outcomes are fair. However, it should not be lost that currently, TDRM and ADR mechanisms are supplementing the mandate of the judiciary through their informal methods hence caution should be taken not to co-opt these mechanisms into the formal justice system because that would rob them of their core characteristics and advantages. Instead the new Act shall map out the points of collaboration and coordination in the opportunities that exist between the courts and the informal TDRM and ADR mechanisms.

6. Conclusion

Despite the extended use of TDRM and ADR mechanisms among traditional societies in Kenya such as among communities in present day Baringo County, it is only after the promulgation of the Constitution of Kenya 2010 that the use of TDRM and ADR mechanisms was elevated as a viable alternative among all the state organs and individuals in Kenya who desire to access justice other than through the court system. This means that TDRM and ADR mechanisms are recognized by the supreme law of Kenya as alternative avenues which disputants can use to resolve their differences. It is hoped that progressively this will transpose the colonized mentality that has been ingrained in our psyche that the court system is superior to TDRM and ADR mechanisms.

Overtime, the court system in Kenya has made some positive contributions but it has equally suffered a myriad of flaws such as case backlogs, lengthy periods, high costs, corruption among others. To complement the court system and ease the backlog of cases, the Constitution of Kenya 2010 expanded the avenues under which justice can be

dispensed to include TDRM and ADR mechanisms. This means that the court system and the TDRM and ADR mechanisms are equal in importance.

TDRM and ADR mechanisms are widely used and applied in the rural communities of Baringo County although this has not been without problems. For instance, there are no legal and policy mechanisms for enforcement, the mechanisms are exclusionary against women and the youth, the processes are highly politicized and laden with corrupt practice, often leading to biased determinations. Despite these challenges, TDRM and ADR are complimentary mechanisms to the court systems which are deeply rooted in the cultural practices of the communities and have become part of their way of life. The outcome of the application of these mechanisms to resolve disputes and conflicts are accepted by the disputants with insignificant incidences of disobedience. Lessons from other jurisdictions such as Nigeria, Ghana, Rwanda and Botswana have shown the possibility of these mechanisms working hand in hand with formal judicial systems to provide viable options for individuals who are not keen on subjecting themselves to the tedious processes of the court system.

Despite its potential, currently there is no legal or policy framework for the effective implementation of the TDRM and ADR mechanisms in the country. There is therefore an urgent need for enactment of a new legal and policy framework to operationalize these mechanisms to ensure their full utilization as a method to access justice. Even though the Judiciary has rolled out court annexed mediation, this policy is too narrow and it left out the other mechanisms such as arbitration, negotiation, conciliation, reconciliation and restitution etc.

There is need for accommodating all the TDRM and ADR mechanisms but care should be taken not to include some of the indigenous practices whose time has passed and that go against the respect for human rights and fundamental freedoms. Those aspects of indigenous practices which are relevant can be harmonized and integrated for use by all persons within a cultural setup irrespective of their social differences. In the end, it is envisaged that the TDRM and ADR legal and policy framework if enacted would facilitate access to justice to all hence create a peaceful environment for everybody. Once the legal and the policy framework measures, as recommended, are put in place and set in motion, these mechanisms will wholesomely and easily be embraced by the judiciary, government agencies, communities and individuals as perfect substitutes to the court systems in place.

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Promoting Peaceful and Inclusive Societies for Sustainable Development in Kenya

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Abstract

Peace is considered an important element of sustainable development and has even been given attention under the 2030 Agenda on Sustainable Development Goals. Kenya seeks to become a middle-income country by 2030 and this, arguably, cannot be achieved if the factors that threaten the peaceful coexistence of all communities are not adequately addressed. This paper, largely informed by the Sustainable Development Goal 16, focuses on Kenya and offers some recommendations on how the country can successfully move towards the realization of peaceful and inclusive societies.

1. Introduction

Sustainable Development Goal (SDG) 16 requires all countries to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’.¹

The UN explains: “Goal 16 of the Sustainable Development Goals is dedicated to the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and building effective, accountable institutions at all levels. This aims to promote peaceful societies at national levels, as well as the role of cooperation at the international level”.² This is also captured in the Addis Ababa Action Agenda³ which commits to promote peaceful and inclusive societies and to build

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¹ SDG 16, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

² ‘Goal 16: Peace, Justice and Strong Institutions - SDG Tracker’ (*Our World in Data*) <<https://sdg-tracker.org/peace-justice>> accessed 26 November 2020

³ United Nations, Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), adopted at the Third International Conference on Financing for Development (Addis Ababa, Ethiopia, 13–16 July 2015) and endorsed by the General Assembly in its resolution 69/313 of 27 July 2015.

effective, accountable and inclusive institutions at all levels to enable the effective, efficient and transparent mobilization and use of resources.⁴

It has rightly been pointed out that we cannot hope for sustainable development without peace, stability, human rights and effective governance, based on the rule of law.⁵

2. Peace: meaning and Scope

While it is difficult to define the term ‘peace’ using particular words or phrases, many societies often link it to harmony, tranquillity, cooperation, alliance, well-being, and agreement.⁶ It is however worth pointing out that ‘peace is not just the absence of violence, it is much more.⁷ Thus, every culture may have a unique but related understanding of what peace entails. Besides, peace may be classified into positive peace or negative peace, where negative peace is defined as the absence of violence or the fear of violence while positive peace is the attitudes, institutions and structures, that when strengthened, lead to peaceful societies.⁸

In this respect, positive peace is often seen as a true, lasting, and sustainable peace built on justice for all peoples, a concept that may have informed the drafting of SDG 16. The concept of positive peace is frequently associated with the elimination of the root causes of war, violence, and injustice and the conscious attempt to build a society that reflects these commitments. Positive peace assumes an interconnectedness of all life.⁹ On the other hand, in a negative peace situation, while there may not be witnessed conflict out in the open, the tension is usually boiling just beneath the surface because the conflict

⁴ United Nations Inter-Agency Task Force on Financing for Development, ‘Promoting peaceful and inclusive societies’ <<https://developmentfinance.un.org/promoting-peaceful-and-inclusive-societies>> accessed 26 November 2020.

⁵ ‘Goal 16: Peace, Justice and Strong Institutions | UNDP’ <<https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-16-peace-justice-and-strong-institutions.html>> accessed 26 November 2020.

⁶ Spring Ú.O. (2008) Peace and Environment: Towards a Sustainable Peace as Seen From the South. In: Brauch H.G. et al. (eds) *Globalization and Environmental Challenges. Hexagon Series on Human and Environmental Security and Peace*, vol 3. Springer, Berlin, Heidelberg, 113-126 <https://link.springer.com/chapter/10.1007/978-3-540-75977-5_5> accessed 26 November 2020.

⁷ Galtung, J., "Violence, peace, and peace research," *Journal of peace research*, Vol. 6, no. 3 (1969): 167-191.

⁸ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106. Available at <http://repository.kln.ac.lk/bitstream/handle/123456789/12056/journal1%20%281%29.104-107.pdf?sequence=1&isAllowed=y> accessed 26 November 2020.

⁹ Herath, O., "A critical analysis of Positive and Negative Peace," (2016), p.106.

was never reconciled and thus negative peace seeks to address immediate symptoms, the conditions of war, and the use and effects of force and weapons.’¹⁰ In Kenya, both situations may be existing in different parts of the country, depending on the political and socio-economic conditions of the group of people in question. This is because conflict is grounded in social, structural, cultural, political and economic factors since depreciation in one increases the chances of conflict in a particular society.¹¹ This paper mainly focuses on the ways through which Kenya can promote peacebuilding measures that will ensure the realization of the dream of a peaceful and inclusive society. Peacebuilding approaches and methods are geared towards ensuring people are safe from harm, have access to law and justice, are included in the political decisions that affect them, have access to better economic opportunities, and enjoy better livelihoods.¹²

3. Peace efforts in Kenya: Challenges and Prospects

The Government of Kenya has undertaken various measures to foster national unity and patriotism. For instance, it adopted Sessional Paper No. 9 of 2013 on National Cohesion and Integration (NCI), Sessional Paper No. 3 of 2014 on National Policy and Action Plan on Human Rights and the Sessional Paper No. 5 of 2014 on Peacebuilding and Conflict Management.¹³

These efforts have been informed by the fact that Kenya has grappled with historical land injustices that not only violate a raft of economic, social and cultural rights but also

¹⁰ *Ibid*, pp.106-107.

¹¹ Maiese, M., ‘Social Structural Change,’ in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, July 2003), available at <http://www.beyondintractability.org/essay/social-structural-changes> accessed 26 November 2020; See also Maiese, M., ‘Causes of Disputes and Conflicts,’ in G. Burgess & H. Burgess (eds), *Beyond Intractability*, (Conflict Information Consortium, University of Colorado, Boulder, October, 2003), available at <http://www.beyondintractability.org/essay/underlying-causes> accessed 26 November 2020.

¹² The Institute for Economics and Peace (IEP), ‘Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)’, p. 2 <<https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies>> accessed 26 November 2020.

¹³ *Realisation of the National Values and Principles of Governance and Fulfilment of Kenya’s International Obligations for the Period 2013-2017: Jubilee Government Score Card* (Kenya National Commission on Human Rights 2017), 10 <<https://www.knchr.org/Portals/0/GeneralReports/Jubilee%20Government%20Scorecard.pdf?v=2018-06-06-193327-647>> accessed 26 November 2020.

posed a threat to national unity due to marginalisation and dispossession of community land.¹⁴

Despite these efforts, Kenya is far from boasting of a peaceful and inclusive society as it still experiences widespread poverty, huge gaps between the rich and the poor and conflicts among and between communities. Indeed, this state of affairs may have informed the National ‘Building Bridges Initiative’¹⁵ which has been pushed by the Jubilee Government and its allies and hailed as capable of promoting peace, security and unity in Kenya. The resultant report is still undergoing political deliberations.

The bottom line is that Kenya is still experiencing social, economic and political injustices which in turn lead to conflicts and marginalization of various communities and groups of people. This is despite the constitutional and statutory provisions which seek to promote equality, peace and inclusive development in the country.

4. Promoting Sustainable Peace and Inclusive Societies for Sustainable Development in Kenya

Kenya has been making efforts geared towards peacebuilding as opposed to peacemaking only.¹⁶ Peacebuilding efforts aim at addressing the reasons that lead to fights and/or conflicts and seek to support societies to manage their differences and conflicts without resorting to violence.¹⁷ It, therefore, involves a broad range of

¹⁴ *Realisation of the National Values and Principles of Governance and Fulfilment of Kenya’s International Obligations for the Period 2013-2017: Jubilee Government Score Card* (Kenya National Commission on Human Rights 2017), 11.

¹⁵ Republic of Kenya, ‘Report of the Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report,’ *Building Bridges to a United Kenya: from a nation of blood ties to a nation of ideals*, October, 2020 < https://e4abc214-6079-4128-bc62-d6e0d196f772.filesusr.com/ugd/00daf8_bedbb584077f4a9586a25c60e4ebd68a.pdf > accessed 26 November 2020.

¹⁶ ‘Sustainable Peacebuilding Strategies : Peacebuilding Operations in Nakuru County, Kenya : Contribution to the Catholic Justice and Peace Commission (CJPC)’ <<https://repository.globethics.net/handle/20.500.12424/3863583>> accessed 26 November 2020; ‘Peacebuilding Networks and Alliances in Kenya: A Retrospective Look at Collective Peacebuilding Effectiveness - Kenya’ (*ReliefWeb*) <<https://reliefweb.int/report/kenya/peacebuilding-networks-and-alliances-kenya-retrospective-look-collective-peacebuilding>> accessed 26 November 2020; Rono EC, ‘The Role of Women in Post Violence Peace Building in Kenya: A Case Study of Nakuru County in 2007-2008 Post Election Violence’ (PhD Thesis, University of Nairobi 2013); Mutahi P and Ruteere M, ‘Violence, Security and the Policing of Kenya’s 2017 Elections’ (2019) 13 *Journal of Eastern African Studies* 253.

¹⁷ Muigua, K., *Nurturing Our Environment for Sustainable Development*, Glenwood Publishers, Nairobi – 2016),

measures, either focusing on before, during and/or after conflict. These are meant to prevent the outbreak, escalation, continuation and recurrence of conflict.¹⁸ These efforts can also be geared towards either ‘positive’ or ‘negative’ peace.¹⁹ This section offers some diverse recommendations that, if explored, may assist the country in moving closer to achieving sustainable peace and building an inclusive society as part of efforts geared towards realizing the sustainable development agenda in Kenya.

5. Securing Sustainable Community Livelihoods for Peace: Sustainable Development Planning and Capacity Development

It has been suggested that food security and a healthy agricultural sector can play a critical role in preventing conflict and distress migration, and in building peace. This is because, in many countries, disasters or political instability have resulted in protracted crises and food shortages.²⁰ Also, rural populations continue to be the most affected in conflicts; attacks on farming communities undermine livelihoods and may result in forced migration. As such, any peacebuilding efforts should include ensuring food security as part of addressing the root causes of conflict since peace and food security are often mutually reinforcing.²¹ Economically and socially empowered people are likely to participate more in governance matters and less likely to be influenced politically as they may not follow their political leaders blindly.²² This is because politicians often exploit the people’s social vulnerability, marginalization and poverty to cause conflicts and divisions for their selfish interests.²³

¹⁸ International Alert, “What is Peace Building?” Available at <https://www.international-alert.org/what-we-do/what-is-peacebuilding> accessed 26 November 2020.

¹⁹ *Ibid.*

²⁰ ‘SDG 16. Peace, Justice and Strong Institution | Sustainable Development Goals | Food and Agriculture Organization of the United Nations’ <<http://www.fao.org/sustainable-development-goals/goals/goal-16/en/>> accessed 26 November 2020.

²¹ *Ibid.*

²² ‘Promoting Empowerment of People in Achieving Poverty Eradication, Social Integration and Full Employment and Decent Work for All’: <<https://digitallibrary.un.org/record/777727?ln=en>> accessed 26 November 2020; ‘Political Empowerment’ (GSDRC) <<https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/political-empowerment/>> accessed 26 November 2020; ‘Social and Economic Empowerment’ (GSDRC) <<https://gsdrc.org/topic-guides/voice-empowerment-and-accountability/supplements/social-and-economic-empowerment/>> accessed 26 November 2020.

²³ ‘Exclusion as a Cause and Consequence of Violent Conflict’ (GSDRC) <<https://gsdrc.org/topic-guides/social-exclusion/dynamics/exclusion-as-a-cause-and-consequence-of-violent-conflict/>> accessed 26 November 2020; Nantulya, Paul. "Exclusion, Identity and Armed Conflict: A historical survey of the politics of confrontation in Uganda with Specific Reference to the Independence Era." In *Politics of Identity and Exclusion in Africa: From Violent Confrontation to Peaceful Cooperation*, conference proceedings, Senate Hall,

5.1. Addressing Gender Equality and Equity for Sustainable Peace and Inclusive Society

Notably, inequalities in wealth and income lead to a cascade of consequential social inequalities in a range of areas such as housing, work, energy, connectivity, health care, education, and related social benefits.²⁴

It has been acknowledged that where conflict strikes, men are more likely to die on battlefields, but a disproportionate share of women will be targeted for sexual violence, among other violations, and homicide rates among women typically rise.²⁵ It has also been documented that more broadly, whether in global, regional or national governance, women tend to be underrepresented in the governance of institutions. This is discriminatory, but it also entrenches gender disparities, during times of war and peace, as women's voices go unheard in decision-making.²⁶

Some of the recommendations from the United Nations work on gender equality and equity focus on strengthening good governance, inclusive rule of law, and access to justice; removing structural barriers to women's participation in decision-making and promoting inclusive and sustainable economic growth and social development that achieves gender equality and empowers all women and girls; investing in national statistical capacities to promote evidence-based policy-making, planning, and budgeting, and ensure better monitoring of progress and accountability for results; and increasing financing for the gender-responsive implementation of the 2030 Agenda through domestic resource mobilization policies and global action to address the systemic imbalances in domestic and international tax, trade, and investment arrangements.²⁷

University of Pretoria, pp. 81-92. 2001; Nduku E, *Corruption in Africa: A Threat to Justice and Sustainable Peace* (Globethics net 2015).

²⁴ 'Expert Group Meeting on "Tackling Global Challenges to Equality and Inclusion through the Gender-Responsive Implementation of the 2030 Agenda for Sustainable Development: Spotlight on SDGs 10, 13 and 16": Report and Recommendations | UN Women – Headquarters', 7 <<https://www.unwomen.org/en/digital-library/publications/2019/06/egm-tackling-global-challenges-to-equality-and-inclusion>> accessed 26 November 2020.

²⁵ 'Sustainable Development Goal 16: Peace, Justice and Strong Institutions' (*UN Women / Europe and Central Asia*) <<https://eca.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-16-peace-justice-strong-institutions>> accessed 26 November 2020.

²⁶ *Ibid.*

²⁷ 'Expert Group Meeting on "Tackling Global Challenges to Equality and Inclusion through the Gender-Responsive Implementation of the 2030 Agenda for Sustainable Development: Spotlight

It has been asserted that *realizing SDG 16 on peaceful, just, and inclusive societies requires a power shift that re-centres work on equality, development and peace around the voices, human security and rights of women and those most marginalized. This requires not just technical fixes, but the structural transformation that moves from institutionalizing a form of governance that enables domination and violence to institutionalize a form of governance that enables equality and peace for people and planet (emphasis added).*²⁸

*In some countries such as Colombia, women have been at the forefront of peacebuilding efforts.*²⁹ There is thus a need to promote gender equality and equity as a way of promoting peaceful and inclusive societies for sustainable development. The human rights of both men and women and indeed all groups in society should be respected, protected and implemented for the realization of just, inclusive and peaceful societies. The *UN Conference on Environment and Development, Agenda 21*³⁰ under section 23 calls for full public participation by all social groups, including women, youth, indigenous people and local communities in policy-making and decision-making.³¹

5.2. Streamlining Environmental and Natural Resources Governance and Climate Change Mitigation

The 2030 SDGs Agenda acknowledges that while the causes of conflict vary widely, the effects of climate change only aggravate them.³² Climate-related events such as drought threaten food and water supplies, increase competition for these and other natural resources and create civil unrest, potentially adding fuel to the already-disastrous

on SDGs 10, 13 and 16”: Report and Recommendations | UN Women – Headquarters’, 7 <<https://www.unwomen.org/en/digital-library/publications/2019/06/egm-tackling-global-challenges-to-equality-and-inclusion>> accessed 26 November 2020.

²⁸ By Abigail Ruane, *Women’s International League for Peace and Freedom (WILPF) (as quoted in ‘SDG 16 – Governing for Gender Equality and Peace? Or Perpetual Violence and Conflict?’* <<https://www.2030spotlight.org/en/book/1883/chapter/sdg-16-governing-gender-equality-and-peace-or-perpetual-violence-and-conflict>> accessed 26 November 2020).

²⁹ Newsroom, ‘Women the “Driving Force” for Peacebuilding in Colombia’ (*Modern Diplomacy*, 31 October 2020) <<https://moderndiplomacy.eu/2020/10/31/women-the-driving-force-for-peacebuilding-in-colombia/>> accessed 26 November 2020.

³⁰ United Nations Conference on Environment & Development Rio de Janeiro, Brazil, 3 to 14 June 1992.

³¹ See also Article 10, Constitution of Kenya 2010 on national values and principles of governance.

³² SDG Goal 13.

consequences of conflict.³³ Thus, investing in good governance, improving the living conditions of people, reducing inequality and strengthening the capacities of communities can help build resilience to the threat of conflict and maintain peace in the event of a violent shock or long-term stressor.³⁴

Article 69(1) of the Constitution of Kenya outlines the obligations of State in respect of the environment as follows: The State should: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment, and utilise the environment and natural resources for the benefit of the people of Kenya. Besides, every person must cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.³⁵

The Government should work closely with all the relevant stakeholders to meet these obligations as a way of ensuring that communities benefit from such resources for empowerment as this will go a long way in promoting peaceful and inclusive societies for sustainable development. This is due to the likely effect of reduced poverty levels.

5.3. Building Accountable and Inclusive Institutions for Peaceful and Inclusive Society

Putting in place accountable and inclusive institutions governed by the rule of law may promote and ensure participatory decision-making and responsive public policies that

³³ Muigua, K., Securing Our Destiny Through Effective Management of the Environment, *Journal of Conflict Management and Sustainable Development*, Volume 4, No 3, (May, 2020).

³⁴ United Nations, *The Sustainable Development Goals Report, 2018*, p.15. Available at <https://unstats.un.org/sdgs/files/report/2018/TheSustainableDevelopmentGoalsReport2018-EN.pdf> [Accessed on 22/01/2020]; Muigua, K., Securing Our Destiny Through Effective Management of the Environment, *Journal of Conflict Management and Sustainable Development*, Volume 4, No 3, (May, 2020).

³⁵ Article 69(2), Constitution of Kenya, 2010.

leave no one behind, ensuring citizens have unfettered justice and rule of law, without which there can be no sustainable development.³⁶

The law can be useful in contributing to the change in institutional norms as well as shaping the changes in attitudes and behaviour.³⁷ The rule of law provides a viable framework for the peaceful management of conflicts due to its defining features: establishing the operating rules of society and therefore providing reliability, justice and stability in the society; norms defining appropriate societal behaviour; institutions able to resolve conflicts, enforce laws, and regulate the political and judicial system; laws and mechanisms protecting citizens' rights.³⁸

The role of law and the above features are exemplified in the Constitution which provides that 'the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets this Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.³⁹ The national values and principles of governance include- patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.⁴⁰ All these values and principles are not only meant to promote good governance but also build a peaceful and inclusive society for the people of Kenya. There is a need for active promotion and implementation of these national values and principles of governance as part of the peacebuilding efforts in Kenya. Ensuring that all governance institutions abide by these values and principles will also strengthen these institutions and ensure that they discharge their constitutional and statutory mandates effectively for the eventual realization of the sustainable development agenda in Kenya.

³⁶ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 November 2020.

³⁷ Muigua, K., Securing Our Destiny Through Effective Management of the Environment, *Journal of Conflict Management and Sustainable Development*, Volume 4, No 3, (May, 2020).

³⁸ Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009" <<http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844>> accessed 26 November 2020.

³⁹ Article 10(1), Constitution of Kenya 2010.

⁴⁰ Article 10(2), Constitution of Kenya 2010.

6. Conclusion

Some commentators have asserted that achieving SDG 16 — and the SDGs in general — requires partnerships, integrated solutions, and for countries and member states to take charge and lead in reshaping the institutional and social landscape, preparing grounds for important reforms that help build sustainable peace.⁴¹ This is because it is crucial to have an inclusive and participatory approach to development to counteract the potentially destabilizing impact of marginalization and exclusion.⁴²

Peaceful societies have enjoyed better business environments, higher per capita income, higher educational attainment and stronger social cohesion.⁴³ Better community relationships tend to encourage greater levels of peace, by discouraging the formation of tensions and reducing chances of tensions devolving into conflict.⁴⁴

Peacebuilding is done collaboratively, at local, national, regional and international levels. Individuals, communities, civil society organisations, governments, regional bodies and the private sector all play a role in building peace. Peacebuilding is also a long-term process, as it involves changes in attitudes and behaviour and institutional norms.⁴⁵

Kenya cannot achieve peaceful and inclusive societies through investing in security alone; it must address the various underlying factors such as poverty, marginalization, environmental degradation and corruption, among others. In the absence of measures to deal with these, peace will only be short-lived or even impossible to achieve. Peace is

⁴¹ ‘SDG 16 as an Accelerator for the 2030 Agenda’ (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 November 2020.

⁴² ‘SDG 16 as an Accelerator for the 2030 Agenda’ (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 November 2020.

⁴³ The Institute for Economics and Peace (IEP), ‘Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)’, p. 2 <<https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies>> accessed 26 November 2020.

⁴⁴The Institute for Economics and Peace (IEP), ‘Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)’, p. 6.

⁴⁵ International Alert, “What is Peace Building?” <<https://www.international-alert.org/what-we-do/what-is-peacebuilding>> Accessed 26 November 2020.

the outcome of concerted efforts geared towards building self-sustaining societies where all people can meet their socio-economic needs. Promoting peaceful and inclusive societies for sustainable development in Kenya is a goal that is clearly attainable, in the fullness of time.

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Promoting Peaceful and Inclusive Societies for Sustainable Development in Kenya: Kariuki Muigua **(2021)9(2) Alternative Dispute Resolution**

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Arbitral Award Setting Aside – 3 Months from When?

By: *Paul Ngotho* *

Background

The first part of the Article 34.(3) of UNCITRAL¹ Model Arbitration Law (MAL) reads as follows:

“An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award...” (Emphases added.)

It is reproduced word for word in s. 35. (3) of Kenya Arbitration Act 1995 and in many MAL jurisdictions worldwide. Unsurprisingly, it has attracted little or passing attention in international case law and scholarly works, most of which address the possibility of extension of the 3-month statutory period by courts, as the rest of the text is as clear as can be. However, Kenyans have peculiar habits.

The recent High Court of Kenya judgment in *UoN v. Multiscope*² brings up, once more, Kenyan courts’ divergent interpretations of when the 3-month period for setting aside an arbitral award starts running. The court ruled that the time starts running when the tribunal notifies the parties that the award is available for collection upon the payment of the outstanding fees and not when a party receives the award itself physically.

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¹ United Nations Commission on International Trade Law.

² *University of Nairobi (Applicant) v. Multiscope Consultancy Engineers Ltd (Defendant)*. High Court Milimani (Commercial & Tax Division) Miscellaneous Cause No. E 083 of 2019 available at <http://kenyalaw.org/caselaw/cases/view/195710/> last accessed on 14th June 2020

The case is now in the Court of Appeal and could easily end up in the Supreme Court of Kenya. Decisions by the higher courts one way or another are matters of national jurisprudence. However, one must search elsewhere for the true meaning of Art. 34. (3) of MAL. Could the mainstream view of the High Court of Kenya be fatally flawed in law and logic? Could it be that this view is the minority view elsewhere or completely unheard of and incomprehensible outside Kenya? Is there any chance of the minority view being the widely held view worldwide?

Fortunately, the interpretation or misinterpretation of the subject text by Kenyan courts can be benchmarked against other jurisdictions. Indeed, Article 2A, which was introduced to MAL in 2006, states that,

“in the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith”.

According to notes attached to MAL, UNCITRAL has, as one of its primary objectives, the harmonization and improvement of national arbitration laws. It acknowledges that,

“unexpected and restrictions found in national laws may prevent parties, for example, from submitting future disputes to arbitration.” The notes also believe that MAL has “clear period of time within which recourse against an arbitral award may be made”.

The Letter

The context is that many (my guess is over 90%) of domestic arbitrations which are seated in Kenya are *ad hoc*. Without an administering institution, the tribunal is responsible for demanding fees from the parties. The business culture in Kenya is that some people and institutions, including the national government, rarely perform their financial obligations in domestic arbitration on time.

The subject notification letter in the arbitration between *UoN v. Multiscope* is dated 24th November 2017. It is from the tribunal to the parties and it states as follows:

“We have now published our Final Award in this arbitration which may be taken up upon payment of the balance of Ksh.....”

Upon receipt of the sum from either Party, we will deliver the Award to that party together with our formal receipt.

If our final costs as contained in this notification are not paid in full within fourteen (14) days from the date of this notification, any such outstanding sum shall attract compound interest at Commercial Bank lending rates as shall be determined by us”.

That letter informed the parties that the award was complete and ready for dispatch upon payment of the outstanding fees. It is worth noting that the letter is conditional.

Both parties defaulted in the payment and so the tribunal withheld the award for a considerable period of time. The Respondent eventually paid. The Applicant’s advocates received the award on 5th March 2019 and filed an application to set aside the award in court within a month from 3rd April 2019.

Apparently, the Applicant obtained a copy of the award barely a month after the Respondent. The date when the Respondent received the award and the face of the award were not relevant in the case. The Applicant filed its set-aside application well within 3 months from the date of physical receipt of the award but over 15 months after receiving the letter.

Firstly, the question which arises is, what does the Tribunal mean when it says it has “now published” the award? The concept of publishing arbitral awards is alien to both the Kenyan and MAL laws. It is a relic of the English arbitration law, which is, of course, not applicable either in arbitral or court proceedings. The difference between a tribunal publishing an award and a party receiving an award is very well explained in the Irish case of *Moohan v. S.&R. Motors [Donegal] Ltd*³

³ Neutral Citation: [2009] IEHC 391 High Court of Ireland Record Number:2009 139 MCA Date of Delivery:31 July 2009 Court: High Court Composition of Court, accessible at http://www.uncitral.org/docs/clout/IRL/IRL_310709_FT-1.pdf#

The Judgment – High Court’s “Mainstream View”

UoN v. Multiscope, at paragraph 25, makes it clear that once an arbitral tribunal notifies the parties that the award is ready for collection upon payment of the fees and expense,

“Delivery will have happened as it is up to the parties to pay the fees and expenses... because any delay in actual collection can only be blamed on the parties”.

The Mainstream View’s Unintended Consequences

The mainstream view is primarily on set-aside applications. However, it has considerable and probably unconsidered knock-on effects on other aspects of arbitration and of arbitral awards.

The mainstream view encourages parties to pay the arbitrators on demand. Timely payment of arbitration fees and other costs is one of the parties’ implied obligations or statutory requirements to “do all things necessary for the proper and expeditious conduct of the arbitral proceedings”, for example, under s. 19A of the Arbitration Act of Kenya.

It is quite clear, from the Kenyan court rulings involving Article 34.3 of MAL that the judges have not considered how their elastic definition of the word “received” in s. 35. (3) of the Kenyan Act affects the same word as used elsewhere in the same Act.

The first casualty is the parties’ statutory right to apply to the tribunal for the correction of “computation errors, any clerical or typographical errors or any other errors of a similar nature” under s. 34 of the Act. A party must apply to the tribunal for such corrections “(W)ithin 30 days after receipt of the arbitral award, unless a different period of time has been agreed upon by the parties”. To err is human. One finds typographical errors even in professionally peer-reviewed articles. To deny parties the sole opportunity to have errors in the award corrected is draconian.

The second casualty is the tribunal’s right to make the corrections or give clarifications “on its own initiative within 30 days after the date of the arbitral award” under s. 34. (3) of the Act. The “date of the arbitral award” is not expressly addressed in the mainstream view but it is inconceivable that courts which have adopted the mainstream view would consider the date when a party physically received the award as the date of the award.

The above judicial extinguishing of the parties' and tribunals' statutory rights is amplified by the finality of awards. In addition, MAL and national arbitration statutes do not, otherwise, allow arbitral tribunals to review their awards the way courts have under the civil procedure rules.

The third casualty of the mainstream view is a party's right to an additional award under s. 34. (4), (5) and (6) of the Arbitration Act of Kenya. They are worth reciting in full:

“(4) Unless otherwise agreed by the parties, a party may upon notice in writing to the other party, within 30 days after receipt of the arbitral award, request the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

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

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

The default in fees is usually for an extended period of time, beyond 30-day period for a party to apply to the tribunal and the 30 or 60 days for the tribunal to take the required action. Therefore, whether the tribunal can lawfully receive the application and/or act on it acquires obvious jurisdictional trajectory.

Tribunals might be able to cure the anomaly by extending the time for correction and making of additional awards by invoking s. 34. (6) of the arbitration Act above. This is nevertheless speculative as the clause is probably meant to allow the parties and the tribunal more time to deal with applications which have been filed within 30 days of the award and not for applications filed months or years past what the mainstream view has determined to be the receipt date.

The fourth and most unfortunate casualty of the mainstream view is the consent award, which is stipulated under s. 31 of the Act in the following terms:

“31. (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An arbitral award on agreed terms shall be made in accordance with section 32 and shall state that it is an arbitral award.

(3) An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.” (Emphases added.)

The long and short of it is that the parties’ right to enter a consent award subsists throughout the arbitral proceedings, which according to s. 33. (1) of the Arbitration Act of Kenya “shall be terminated by the final arbitral award”. Given the mainstream view, the implication is that the proceedings are terminated by the conditional notification letter and as such the parties cannot enter consent after the receipt of this letter even though they may not have seen the award and might not see it for years depending on when they pay the tribunal’s outstanding fees.

The fifth consequence is, of course, the enforcement of the award could be time-barred if the parties do not pay up and collect the award within the limitations of actions period after receiving the notification letter. It is not unheard of for arbitrators to hold awards for 10 years pending settlement of their fees.

The sixth consequence is that the mainstream view reduces Article 34. (4) of MAL to a bargaining chip for the timely payment of arbitrators’ fees. This was not it’s intended purpose of this statutory provision.

The seventh consequence is that the mainstream view, in my view, vilifies Kenya as a seat of arbitration.

Kenyan Arbitrators’ Views

If this view is mainstream in the High Court, it has attracted near unanimity among Kenyan arbitrators. A colleague, who is a respected lawyer and Chartered Arbitrator, responded as follows when I sought his comment:

“Interesting...I think the judge got it right. Even when filing an appeal, time starts

running from the date the registry confirms that, the proceedings are ready for collection. Inaction on the part of parties who are aware an award is ready for collection cannot stop time running... and I agree to decide would rob arbitration of finality.”

The Chartered Institute of Arbitrators Kenya Branch (CIArb) K is considering preparing a position paper on the court interpretation of s. 35. (3) of the Act, i.e. Article 34.4 of MAL. I have reason to expect that the position will be aligned to the court’s mainstream view. The most I can hope for is acknowledgement that the CIArb) K position, whatever it will be, is not unanimous among the membership. That is important not only for the arbitrators who hold a contrary view but also because some judges, whatever their views on this subject, are members of CIArb.

Tribunal’s Duty to “Deliver” An Award

I have, as a former member of the Public Procurement Administrative Review Board (PPARB) where I was a member for 6 years up to October 2019, encountered the statutory duty to notify a party the outcome of a process. The Public Procurement and Asset Disposal Act 2015 s. 87. (1) requires a procuring entity (PE) to notify the successful bidder the outcome of the tender.

Some PEs, to frustrate certain bidders and stop them either from accepting the notification letter or to stop them from filing a complaint at PPARB within the stipulated period, “sat” on the notification letters. PPARB held on numerous occasions that the effective date of the notification letter for the purpose of reckoning of the period within which a party must approach PPARB starts running from the date the party received the notification letter. The rationale is simple: a party cannot act on a document it has not received. Since there is a statutory duty on a PE to notify, calling or writing to a bidder informing it that it’s notification letter is available for collection does not discharge this statutory obligation.

A PE’s mischief is evident in *Lordship Africa Limited v Public Procurement Administrative Review Board & 2 others* [2018]⁴. The PPARB panel, in which I did not seat, declined jurisdiction on the basis that Lordship Africa had filed the complaint out of time and that in any case the contract had been signed, which ousted the jurisdiction of PPARB under the Act. The High Court judgement quashing the Board’s

⁴ <http://kenyalaw.org/caselaw/cases/view/149362>

decision was upheld by the Court of Appeal in *Ederman v. Lordship*⁵

s. 32. (5) of The Arbitration Act of Kenya stipulates that “... after the arbitral award is made, a signed copy shall be delivered to each party.” What is contemplated here is a delivery of the award physically or by email, and not a reading of the signed award. In other words, even if a tribunal called the parties and read the award to them, it would still not, in my humble view, have met its obligation to deliver the award to the parties. Incidentally, arbitration under Order

46 of the Civil Procedure Rules of Kenya has an elaborate mechanism under which the tribunal files the award in court, and then the Registrar of the A.C reads the award to the parties. That is not the case for arbitration under the Arbitration Act of Kenya.

As in arbitration, I will frame the controversy into a list of issues for determination and invite the reader to consider the various arguments and contentions.

First and foremost: Is there any ambiguity in the statute?

At the risk of being repetitive, I will recite the subject text below for ease of reference. Article 34. (3) of MAL and s.35. (3) of Kenya Arbitration Act provide that:

“An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award...” (Emphases added.)

The text is simple and clear. There is absolutely no ambiguity, real or imagined, in what it says. In addition, what it says is not impractical, absurd or insensible. There is no justifiable reason to consider any other interpretation of the text.

Second: What is the plain meaning of the word “received”?

Words have no meaning other than the one ascribed to them. It is the “agreed meaning” of a word which matters. So, what is the agreed meaning of the word “received”?

⁵ <http://kenyalaw.org/caselaw/cases/view/175507>

According to the Cambridge English Dictionary⁶, “receive” means “to get or be given something”, for example, “Did you receive my letter?” “She died after receiving a blow to the head.” “Members of Parliament received a 4.2 percent pay increase this year.” Other dictionaries say to receive is “to come into possession⁷ of” or to “take delivery of (something sent or communicated), as in ‘he received fifty enquiries after advertising the job’”⁸ Take your pick from Cambridge, Webster or Oxford. The meaning is even clearer when one considers that receipt is “the action of receiving something or the fact of its being received.”⁹

None of the dictionaries suggest that you have received something just because you know where to buy it from and the price you have to pay to get possession of the said item.

Any attempt to give a new meaning to words whose meaning are not in doubt must be treated with suspicion. A person proposing a new meaning to words has the burden of proof, which is an uphill task in this case.

Third: Does the word “received” have a special meaning in law or in arbitration law?

Non-lawyers get sicknesses and illnesses. Not lawyers and judges, who get “indisposed”. Therefore, it is necessary to enquire if the word “received” has a special meaning in law generally or in arbitration law particularly.

The court and the proponents of the mainstream view have not suggested that the word “received” as used in Article 34. (3) of MAL has a special or different legal meaning in law or in arbitration. The word is widely used in law and always with the simple universal meaning. For example, the Constitution of Kenya 2010 stipulates at Article 145. (3)(a) that:

⁶ <https://dictionary.cambridge.org/dictionary/English/receive> accessed on 7th October 2020.

⁷ <https://www.merriam-webster.com/dictionary/receive> accessed on 7th October 2020

⁸ <https://www.lexico.com/definition/receive>

⁹ <https://www.google.com/search?client=firefox-b-d&q=receipt+meaning>

“Within seven days after receiving notice of a resolution from the Speaker of the National Assembly the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the President...” (Emphasis added.)

The Senate Speaker is required to take certain action within seven days “after receiving” the notice of resolution.

The Speaker must first receive the notice. The Speaker of the National Assembly (SNA) must make sure that the Senate Speaker has received the notice. Supposing the SNA sent a letter telling the Senate Speaker that the notice is ready for collection, even without any conditions being attached? Would the date the Senate Speaker received that letter serve, in your wildest imagination, as the date when the Senate Speaker received the notice? Would it not be preposterous to require the Senate Speaker to act within 7 days of receiving such a letter even though he has not received the notice itself?

The University of Missouri and the National Academy of Arbitrators published a glossary of arbitration terms, “Glossary (Complete Listing)”¹⁰, to assist the reader understand arbitration practice, which “involves the use of some specialized vocabulary”. The glossary is in the context of labour dispute arbitrations, where the claimants are generally lay people and appearance in person is common as opposed to legal representation. The words explained in this glossary include the most obvious like advocate, pay back, grievance and shop steward. You guessed it: the words “receive” and “received” are not there. Neither are they in the index of Russell on Arbitration¹¹, which has been the guide and monitor of arbitration law in England for over 150 years according to the foreword by Julian Lew, QC.

The word “received” does not have a special meaning in law or in arbitration law. Therefore, the courts would require an overwhelming reason not to adopt the ordinary meaning of the word.

Fourth: What was the intention of the drafters of the original text in MAL?

The drafters of Article 34. (3) MAL are, of course, not the Kenyan legislature, which merely and wisely copied and pasted the MAL article verbatim. I have perused the

¹⁰ <https://law.missouri.edu/arbitrationinfo/2016/01/27/2030/>

¹¹ Sweet & Maxwell, 22nd Edition 2003

travaux préparatoires¹² and there is nothing on record to imply that the drafters applied their minds to the meaning of the word “receive” or “received”. They did not need to, since the meaning of the word was clear.

They did, however, consider three things, whether the period should be 90 days, whether the parties should be allowed to extend the period by consent and whether the courts should have the power to extend the period in some circumstances. This is recorded in the proceedings of Meeting No. 318¹³, which was chaired by Mr Loewe of Austria on 11th June 1985. The contributions of Mr. Nemoto from the Asian-African Legal Consultative Committee, Mr Mtango of Tanzania and the chair are on record. Mr Mathanjuhi of Kenya did not comment on this particular article but his contribution on a different article is on record. He contributed in what appears to be a robust negotiation on whether or not to include “public policy” as one of the grounds in article 34. (2)(b)(ii) MAL.

The MAL drafters applied their minds to important legal issues and did not address semantics like the meaning of the word “receive” or “received”. The mischief of the High Court of Kenya’s mainstream view was not conceivable or reasonably foreseeable.

Fifth: Did the Court Apply the Lowe Case Correctly?

Paragraph 24 of the high court judgment in UoN v. Multiscope states as follows:

“This has to be contrasted with the Kenyan situation where statute does not require the arbitral tribunal to dispatch or send a signed copy to each party. For that reason, delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties” (Emphases added).

The paragraph is very revealing. Firstly, it says that the Kenyan law does not require the tribunal to dispatch or send a signed copy to each party. Notably s.32. (5) of the Arbitration Act of Kenya 1995 reads as follows:

¹² Record of the preliminary or preparatory documents of the negotiations and deliberations in the preparation of legal text

¹³ <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/318meeting-e.pdf> last accessed on 9th October 2020

“... after the arbitral award is made, a signed copy shall be delivered to each party.” (Emphases added.)

Secondly, the High Court itself cites that section of the Act in Paragraph. 8 of the same judgment. Why then does the court say the opposite in paragraph 24 of the judgement?

Thirdly, the High Court was alluding to the Matter of Lowe (Erie insurance Co.)¹⁴, a New York appeal court case reversing the decision of a lower court, which had decided that the statutory 90-day period started running from the date the arbitrator posted the award. The New York Appeal court had no difficulty holding that the period started running from the date when the award was received.

The subject legal text is found in the Civil Practice Laws and Rules (CPLR) at Article 7511[a], which provides that an application to vacate or modify an arbitration award “may be made by a party within ninety days after its delivery to him...”. CPLR 7507 provides that the arbitrator “shall deliver a copy of the award to each party in the manner provided in the agreement, or, if no provision is so made, personally or by registered or certified mail, return receipt requested.” An Insurance Department regulation concerning master arbitration procedures provides that “[t]he parties shall accept as delivery of the award the placing of the award or a true copy thereof in the mail, addressed to the parties or their designated representatives at their last known addresses, or by any other form of service permitted by law” (11 NYCRR 65-4.10 [e] [3]).

The New York bench of five, having considered numerous judicial authorities, unanimously ruled that delivery must be interpreted as the date on which the award was received. It is really strange that the Kenyan court cited this particular case and then reached the opposite conclusion.

This authority is merely about the arbitrator’s obligation to deliver the award. In other words, even without considering the requirement that the period should start running from the date of “receipt” as per the MAL, the period should still run from the date of

¹⁴ Matter of Lowe (Erie Ins. Co.) 2008 NY Slip Op 07735 [56 AD3d 130] October 10, 2008 Centra, J. Appellate Division, Fourth Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. As corrected through Wednesday, December 24, 2008 accessible at <https://law.justia.com/cases/new-york/appellate-division-fourth-department/2008/2008-07735.html>

receipt and not the date of postage. Of course, in UoN case the award was not even posted.

How can an award which is still being held by the Tribunal be said to have been both “delivered” by the Tribunal to the parties and also “received” by the aggrieved party? Only in Kenya!

The reason why this is wrong is simple. Firstly, the tribunal has a statutory obligation to deliver the award. Secondly, the applicant’s date of receipt is the critical because the applicant cannot make a decision on whether to comply with the award or to apply for setting aside before it is aware of the decision of the tribunal.

Sixth: Was it necessary for the Court to rely on English authorities when interpreting manifestly different MAL text in UoN v. Multiscope?

The Kenyan court relied on Ransley J’s and Nyamu J’s decisions by quoting Parker J in Bulk Transport Corporation v Sissy Steamship Co. Ltd Lloyd’s Law Report 1979 Vol. 2 p. 289, which states: -

“The submission that item should be calculated from the date of receipt of the copies of the award would be rejected in that it had been accepted as good law for 140 years that time ran from the date upon which the award was made and published to the parties and publications to the parties was completed by notice”.

This case is premised on an earlier version of arbitration law. S. 55 of the English Arbitration Act 1996 states that parties are free to agree on the requirements as to notification of the award to the parties but in default the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made. This means that the tribunal is required to “serve” the award on the parties. This unnecessary and misleading reliance on outdated English arbitration legislation is most unfortunate.

Seventh: Supposing the notification letter had come from a tribunal secretary or from an administering institution, would the court still have considered receipt of that letter as the date the parties received the award?

I have no idea. Tribunal secretaries are rare in Kenya, where most arbitrations are ad hoc, not administered.

Eighth: Did the Tribunal Intend the date on the Notification Letter to be the date of the receipt of the arbitral Award?

No.

The tribunal stated clearly in the letter that it would deliver the award to the parties upon receipt of the outstanding payments.

Was it the intention of the Tribunal that the date of the letter would serve as the date of the delivery of the award? Definitely not. The Tribunal itself did not consider that its letter amounted to delivery of the award. Its letter states clearly that it will deliver the award upon payment of the outstanding fees. Why would the court then deem the parties to have received the award when they received that letter?

Ninth: Does it Matter that the Notification Letter was Conditional?

Yes!

The letter is conditional. It is not simply a letter to pick the award. It requires one party to pay its share and the other party's share in default in order to pick the award. It is not the same as a court telling the parties, without any condition attached, come on such and such a date for the reading of their judgement.

Tenth: Is the Kenya High Court's ostensibly good intentions to expedite arbitral proceedings through its mainstream view lawful?

No. The law is made by national legislature, which in this case merely, and rightfully, copied and pasted an internationally negotiated text. The international and national legislators built into the text the devices they considered necessary to expedite arbitral proceedings.

It is not only unlawful but also patronising for the High Court to create new ones.

Parties, tribunals and courts have an obligation to expedite arbitral proceedings. However, the highest obligation to do so falls on the parties because of the party autonomy. Each party is at liberty to expedite the release of the award by paying its own and the defaulting party's share of the fees. When the parties delay the release of the award or any stage of the proceedings by consent or conduct, the Tribunal has

options like resignation, termination of proceedings or suing the parties for payment.

Whatever the case, courts should not be seen to be more eager than the parties to expedite arbitral proceedings. Otherwise, they could be viewed as crying louder than the bereaved.

Lest we forget, the full name of courts is “courts of law”, atrium autem legis. They are the courts in which the law or the rule of law reign supreme.

Some disputes are not arbitrable. For example, Kenyan presidential election petitions cannot be resolved by an arbitral tribunal. It would be ridiculous, bordering legal fiction, for a court of law to refer such a dispute to arbitration under the guise of “promotion” of arbitration.

It is not like courts are short of opportunities to “promote” arbitration lawfully - for example when faced with pathological arbitration clauses, which are capable of being cured by purposeful interpretation.

Eleventh: What of the Rule of Law?

In *Breen v Williams*¹⁵, Gaudron and McHugh JJ said,

“(A)dvances in the common law must begin from a baseline of accepted principles and proceed by conventional methods of legal reasoning Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles.”

According to Murray Gleeson¹⁶, then Chief Justice of Australia, judgments in the High Court of Australia contain numerous assertions of practical conclusions said to be required by the principle of the rule of law. They include

¹⁵ (1996) 186 CLR 71 at 115

¹⁶ *Courts and the Rule of Law*, The Rule of Law Series, Melbourne University, 7 November, 2001 available at https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm#_edn14 last accessed on 7th October 2020.

“that judicial decisions are to be made according to legal standards rather than undirected considerations of fairness”¹⁷

The requirement for courts to comply with the rule of law is greater than the rather amorphous requirement to “promote” arbitration and other ADR procedures.

Twelfth: Is the Penalty Imposed on a Party by the Mainstream View Lawful?

Penalising a party by curtailing its right to set aside puts pressure on it to settle the tribunals fees sooner than later. However, this is an extraneous consideration. The statute is not meant to assist the tribunal’s debt collection initiatives. Remedies are found elsewhere – lien, adequate deposits, etc.

Admittedly, parties have an obligation to facilitate the early payment and release of fees. This notwithstanding, penalties must be prescribed in the law and not created by judges.

Thirteenth: Consider Party Autonomy Party autonomy is parties’ right to decide how their dispute ought to be resolved. Public policy favours expeditious resolution of disputes generally and particularly so in arbitration. However, party autonomy allows parties to decide the pace of proceedings.

Parties may take 10 years if they so wish. It is their dispute. An arbitrator who does not like the pace adopted by the parties through consent or conduct should alight the bus at the next stop. Courts should certainly not get involved except as expressly stipulated in statute.

Fourteen: What of the Court’s Constitutional Obligation to “promote” arbitration?

Article 159.2. (c) of The Constitution of 2010 of Kenya follows:

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

¹⁷ Federal Commissioner of Taxation v Westraders Pty Ltd (1980) 144 CLR 55 at 60 per Barwick CJ

- (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...
- (3) 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 this Constitution or any written law.” (Emphases added.)

While clause 3 speaks to traditional dispute resolution, it is inconceivable that courts could interpret a statute in a matter which is inconsistent with the same statute. To me, the duty on courts to promote arbitration means that they should be predisposed towards arbitration in the lawful exercise of their discretion and in all borderline cases. It does not allow courts to get out of their way into the alleys and byways of illegality or to break the law to promote arbitration.

Kenyan courts are clogged with cases some of which are decades old. This is delayed justice, which courts must deal with in compliance with the law and not by breaking the law. Similarly, expedition in arbitration must be achieved by complying with, not by breaching, the law.

Incidentally, Order 65 of CPR permits court of law to refer disputes in court to arbitration. It is rarely invoked either to unclog their system or to “promote” arbitration.

The constitutional obligation imposed on Kenyan courts to “promote” arbitration and the public interest considerations to expedite arbitral proceedings must be exercised within the confines of what is lawful. That is what the rule of law requires.

There is no greater prejudice than the breach of a statutory provision. My humble but considered view is that the mainstream view is an example of legal fiction and judicial overreach at their worst.

Fifteenth: Does delay in paying the tribunal's fees mean that parties are not interested in the award?

No.

This is proven in the following ways. Firstly, some parties still eventually pay the fees in order to get the award. It is acknowledged that arbitration is expensive and that it usually costs more than what the parties contemplated when they initially consented to or commenced the arbitration. Therefore, it should not surprise anyone if the parties delay payment.

Secondly, there is another aspect which is usually ignored. When the proceedings take very long either due to the conduct of the parties or to poor case management, one or both parties lose confidence in the process and direct their funds elsewhere until further notice. The bottom line is that they are still interested – if in doubt, just ask them!

Sixteenth: Are Court Procedures for delivery of judgments applicable to Arbitration carried out under the Arbitration Act of Kenya?

Of course not.

The court relied, in the UoN and similar cases, on the analogy about courts informing parties that the judgment of a court of law is equivalent to a tribunal's conditional notification letter. This approach is not convincing.

The delivery of court judgments is prescribed in the Civil Procedure Rules, which obviously does not apply in arbitration. A court delivers its judgement by reading it out. The production of a signed copy to the parties may be subject to payment of court fees but this notwithstanding the court has "delivered" the judgment whether the parties obtain the signed copy or not. This is how courts operate. Furthermore, the receipt of a court judgment is a non-issue. Any wonder why some people prefer arbitration? One of the complaints about arbitration is that it has become increasingly court-like contrary to the intention of the parties. The mainstream view entrenches the conversion of arbitration to "litigation without wigs" by imposing court procedures on arbitration.

Even in arbitrations carried out under Order 46 of the Civil Procedure Rules a mode of delivery is prescribed which differs from that prescribed under the Arbitration Act of Kenya but which is still decent. Once the award is complete, the arbitral tribunal is

required by Rule 10 to file the award in court of law within fourteen days. The Registrar then notifies the parties, within 14 days of filing, that the award has been filed and notifies the parties of the date, within 30 days, when the Registrar will read the award “to such of the parties as are present”.

In courts systems, delivery is deemed to occur at reading of the judgment. A party’s appeal is safeguarded through various mechanisms until the signed judgment and court proceedings are ready. You cannot be denied the right of appeal when you do not have a copy of the signed document even if it takes years.

The reading of court judgments is not conditional on any payment or action by a party. A judgment can even be read in the absence of one, or both or all parties. It is a different ball game. The singular reading of a court judgment and the statutory triple requirement (signed copy/delivery/ receipt) are like chalk and cheese.

Seventeenth: Is a notification letter (whether conditional or not) that the award is available for collection an “award”?

No. It is not possible for such a letter to be deemed as an arbitration award by any stretch of imagination. The letter belongs to the same class of administrative documents or procedural directions etc. which are commonly used in arbitration but which are not necessary to legislate about.

Eighteenth: Is the Notification Letter what is prescribed or contemplated by MAL and the Kenyan Arbitration Act for the tribunal to “deliver” and what should be “received” by the parties?

The law does not leave it to our imagination what should be both delivered by the tribunal and received by the parties at the end of arbitral proceedings.

Date of delivery is of no legal significance. Only the date of receipt and the setting aside by the applicant matters in the reckoning of the 90-day period in Art. 34. (3) of MAL.

From the above, it is clear that a notification letter is not compliant with the statutory requirements of the document required to be delivered by the tribunal and received by the parties.

The letter is not an arbitral award and does not claim to be. It does not determine the

merits of the case or state the seat of arbitration. It does not, or in the case of UoN v. Multiscope, bear the signatures of the entire tribunal.

Lastly, anyone who does not see the absurdity of recognising receipt of the notification letter instead of the award should try to enforce that letter as an arbitral award!

Nineteenth: What, then, is the legal status of a letter notifying parties that the award is ready for collection upon payment of the outstanding tribunal’s fees?

With profound respect, I humbly suggest that the subject letter is, at best, a debt collection letter complete with notification of the interest which would accrue in default of payment.

It is not even a “demand letter”, since there is no threat of litigation if the demand is not complied with within a stated date after which legal proceedings would be commenced without further notice. Please re-read the notification letter above and decide for yourself.

Twentieth: Is a party’s delay or failure to pay its share of the Tribunal’s fees relevant in the consideration of when the period started running or at all in Article 34.(3) of MAL?

No.

Twenty first: Can the Kenya’s Court of Appeal and Supreme Court possibly help? I hope so: that they will give regard to the text’s international nature and treatment in other MAL jurisdictions.

High Court views can potentially be corrected or harmonised by higher courts. However, I am not optimistic here, given that the higher courts get their judges from the High Court and from the bar both of which are unsettled on this issue.

Twenty second: How, then would the Timely Payment of Arbitrators’ Fees be Assured?

All the same, arbitration is primarily about parties, not about arbitrators. Arbitrators have powers to demand sufficient initial and subsequent deposits for their fees and disbursements and to withhold the award pending the payment of any outstanding balance. They typically also charge interest. A party has the liberty to pay the defaulting party’s share. An arbitrator can also either recuse himself or herself or

terminate the proceedings if the parties do not pay the deposits. If a tribunal elects to proceed, it should not impose or benefit from unlawful penalty to the parties.

MAL Jurisdictions within the Commonwealth

Given the international nature of arbitration law, I now turn to jurisprudence in other jurisdictions.

Uganda

S. 34. (3) of the Arbitration and Conciliation Act (Uganda Act) follows the MAL wording except that the period is not three but one month, while s. 36 of the Uganda Act, stipulates that “where the time for making an application to set aside the arbitral award under S. 34 has expired, or that application having been made it has been refused, the award shall be enforced in the same manner as if it were a decree of Court.”

However, Rule 7. (1) of the Arbitration Rules (First Schedule) under that Act states,

“Any party who objects to an award filed or registered in the court may, within ninety days after the notice of the filing of the award has been served upon that party, apply for the award to be set aside and lodge his or her objections to it, together with necessary copies and fees for serving them upon the other parties interested.”¹⁸

This inconsistency has been addressed in numerous cases and referred to as “cutting and pasting the provisions of the old rules on the new rules without ensuring that there was no conflict between them... has therefore led to this confusion and in the absence of any ambiguity in the Act, the Act prevails over the rules...”¹⁹. The Supreme Court of Uganda ruled that Rule 7(1) was inconsistent with the Act²⁰.

In *Fountain v. Nantamu & Another*²¹ where the award was read by the arbitrator

¹⁸ *Kilembe Mines Ltd v. B.M. Steel Ltd*. Accessible at <file:///C:/Users/Paul/OneDrive/Documents/Arbitration.Cases.Uganda/Kilembe.BMSteel.htm>

¹⁹ *Uganda Lottery Ltd. V. Attorney General*, High Court (Commercial Division) M?C 627 of 2008

²⁰ *Mohammed v Roko Construction Ltd (CIVIL APPEAL NO. 014 OF 2015)* [2017] UGSC 13 (5 May 2017) <https://ulii.org/ug/judgment/supreme-court/2017/13>

²¹ <https://ulii.org/ug/judgment/commercial-court/2013/87>

on the 7th of September 2009 and filed with Centre for Alternative Dispute Resolution (CADER) on the same day but was not physically given to the parties because of an outstanding payment. This was not resolved until on or about the 3rd of March 2011 when the award was also filed in court.

“To my mind receiving an award like receiving a Judgment is on the day the Judgment is read and signed. I respectfully do not agree that it is on the day that the award is physically given or is available to a party. That in this case would have been the 7th September 2009. The Arbitration was filed in Court on the 3rd March 2011 which is provided for under Rule 2 of the Arbitration Rule (first schedule to the ACA).

However, since the Roko Construction Ltd Appeal (Supra) decision it is clear that the time line of 30 days in Uganda is mandatory and there is no way round it. If that period is regarded as too tight for the parties, then the law will have to be amended.... Until then it is up to the parties on receipt of the award to ensure that they pay the arbitrators fees promptly in order to meet the 30-day rule. Any dispute on fees can be handled subsequently.” (Emphases added.)

Nigeria

The law on the setting aside of arbitral awards under Nigerian law is characterised by fragmentation. This is partly due to the fact that arbitration laws differ²² between federal and state levels and between the states in terms of arbitration statutes and court rules. Then there is the fact that whether the 3-month period is extendable is answered differently depending on whether the arbitration is domestic or international. These differences give rise to endless permutations.

The multiplicity of time limitations is captured by Webber F.J., in *Efana Ekeng Ita v. Edet Zutere Idiok*²³. There are numerous conflicts between the time limits given in statutes and those provided in court rules. The principle that the limitation period stipulated in an Act prevails²⁴ over the period given in rules holds but does not seem to be consistently applied.

²² The diversity is even greater considering that federal and within the states, setting aside periods vary for court-ordered arbitration – these are not within the scope of this article.

²³ Nigeria Law Reports, Vol. IV, page 1000 as cited in *Vitamalt Plc v. Ibrahim Abdullahi CA? L?181/04*

²⁴ *Stabilini Visinoni Ltd v. Mallinson & Partners Ltd (2014) 12NWLR (Pt 1420) (CA)*

Oyekunle and Ojo²⁵ states that it is mandatory that signed copies of such awards must be forwarded by the tribunal to each party. S. 26(4) of the Arbitration and Conciliation Act provides that “a copy of the award made and signed by the Arbitrators in accordance with subsections (1) and (2) of this Act shall be delivered.” The Lagos State Arbitration Law requires the award to be notified to the parties by service on them of written notice to that effect which must be done without delay after the award is made.

Perhaps it is the use of the word “forward” as opposed to the word “deliver” which saves Nigeria from the needless confusion on whether an award was delivered or received once a notification letter was sent to the parties.

S. 29. (1) of the Federal Arbitration Act of Nigeria stipulates that

“A party which is aggrieved by an arbitral award may within 3 months from the date of the award apply to court to set the award aside”.

Interestingly, the Draft Arbitration and Conciliation Bill 2017 will, if enacted into law, have Nigeria revert to the wording Article 34. (3) of MAL but with a slight innovation, as follows:

“An application for setting aside shall not be made after three months have elapsed from the date on which the party making that application had received the award...” (Emphases added.)

By employing “shall” instead of “may” it removes any appearance of discretion even though “may not” in this context clearly means “must not” or “shall not”. It is the concept of receipt of the award which could be problematic given the inconsistency in Kenyan courts.

State laws have varying provisions. For example, in Lagos State²⁶ a party which is aggrieved by an arbitral award “may within 3 months from the date of the award...(apply to court) to set aside the award...”. In the absence of any Rule of Court relating to the time an award set-aside must be made in Oyo State²⁷, then the Rules of

²⁵ Handbook of Arbitration and ADR Practice in Nigeria, LexisNexis 2018.

²⁶ Lagos State Arbitration Law 2009 s. 63.

²⁷ Bioku investment and Property Co Ltd v. Nipol Ltd [1986] NWLR 767 (CA)

the Supreme Court of England are applicable by virtue of the relevant Civil Procedure Rule. The time allowed in Kaduna²⁸ is 15 days.

India

The Supreme Court of India has pronounced itself clearly on this issue in two cases, Union of India v. Tesco Trichy Engineers and State of Maharashtra & Others v. M/s Ark Builders Ltd, both of which are cited in Para 11 of UoN v. Multiscope. That court is categorical that the delivery of an arbitration award becomes effective when it is physically received by a party.

Ireland

In Moohan v. S.&R. Motors [Donegal] Ltd²⁹ Clarke J.says as follows:

“3.4 ... It is also important to note that, in accordance with the terms of Article 34(3) of the UNCITRAL Model Law, time begins to run when the party seeking to set aside “has received the award”.

3.9 ... It seems to me that the wording of the UNCITRAL Model Law is clear. It speaks of time beginning to run when the person challenging the award has “received the award”. It seems to me that the use of the term “received” in respect of an award means just that. The party has to physically receive the award. The language used in the UNCITRAL Model Law is in total distinction to the phrase used in the Rules of the Superior Courts which speaks of award being “published to the parties”, which, for the reasons analysed by Kelly J., occurs when the parties are told by an arbitrator that his or her award is available.

3.10 It seems to me, therefore, that time does not begin to run in respect of the three month period specified in the UNCITRAL Model Law until the party concerned has actually received the relevant award. However, time begins to run in respect of the Rules of the Superior Courts (because of the different wording used in those Rules) when the parties are notified that the award concerned is available.

²⁸ Kaduna State Civil Procedure Rules 1977.

²⁹ Neutral Citation: [2009] IEHC 391 High Court of Ireland Record Number:2009 139 MCA Date of Delivery:31 July 2009 Court: High Court Composition of Court, accessible at http://www.uncitral.org/docs/clout/IRL/IRL_310709_FT-1.pdf#

3.11 On that basis it is clear that, so far as the UNCITRAL Model Law (if it applies) is concerned, this challenge is within time as it is common case that this challenge was commenced within three months of the time when the arbitrator’s award was actually received by the parties...” (Emphases added.)

Australia and New Zealand

The two jurisdictions are considered together only because Stewart J’s judgment dated 20th February 2020 in *Sharma v Military Ceramics Corporation* [2020]³⁰ does so as follows:

“On 4 April 2018, Ms Rooney published her final award in the arbitration. The award reflects it as having been signed and dated in Sydney on that date. By letter dated 6 April 2018, Ms Deborah Tomkinson, the Secretary General of ACICA, wrote to the parties to the arbitration proceeding saying that ACICA had been asked by the arbitral tribunal to communicate the final award. The letter stated that the final award is “enclosed” and that hard copies of the award would follow by courier. At no stage did the applicant dispute that he had received the award as an attachment to the email from Ms Tomkinson on 6 April 2018.

As indicated above, Art 34(3) of the Model Law requires an application for setting aside an award to be made within three months “from the date on which the party making that application had received the award”. The applicant’s application for relief against the arbitral award was issued on 29 November 2019, the question is whether the applicant “had received the award” on or before 29 August 2019, i.e. three months’ earlier.

In the circumstances, the court found that the applicant received a copy of the final arbitral award on or shortly after 6 August 2019.”

ICSID

There are two relevant provisions:

Article 49 of the ICSID Convention requires the Secretary General to “promptly dispatch certified copies of the award to the parties” and stipulates that “the award shall

³⁰ FCA 216, Federal Court of Australia, File number: NSD 2003 of 2019 <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2020/2020fca0216> accessed on 1st June 2020

be deemed to have been rendered on the date on which the certified copies were dispatched.” This pre-empts questions about parties being required to collect the award and makes the date when a party received the award irrelevant. In addition, what ICSID should deliver to the parties is defined, as is the case under MAL. However, ICSID runs highly administered arbitrations in which the possibility of unpaid fees at the last stage of the proceedings is most unlikely.

Article 52 requires that an annulment application “shall be made within 120 days after the date on which the award was rendered...” According to Schreuer C. et al³¹, the available information suggests that applications for annulment were generally submitted in a timely manner and but that there were arguments about whether the particular given were sufficient.

Bishop and Marchili³² understand Article 52.(2) of ICSID convention to mean that an annulment application “must be made within 120 days after the date on which the award was rendered”. Incidentally, since ICSID is created by a treaty, then the interpretation of Article 52(2) of the Convention is subject to Article 31. (1) of Vienna Convention on the Law of Treaties (VCLT), which requires that,

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

This has been interpreted to mean that the plain or common sense meaning of a word prevails except where is clear that the word meant something else to the drafters or the meaning of the word has changed over time.

MAL is not, strictly speaking, a treaty. Its adoption by states creates national laws, not treaty obligations. However, plain reading is also the first port of call in the interpretation of national laws. I am not aware, but remain open to correction, of any jurisdiction where the literal or common-sense meaning of a word is not given the first and usually the last bite in the interpretation of every legal text.

³¹ The ICSIS A Convention: A Commentary, 2nd Edition, Cambridge University Press pages 1024 -1026.

³² Annulment under the ICSID Convention, Oxford University Press 2012

Conclusion

Arbitration is not a self-service cafe where parties pick and pay. What is contemplated in ad hoc arbitrations under MAL is a different format or more formal restaurants, so to speak. Parties sit, order and pay a deposit. When the meal is ready, the chef/arbitrator informs them of their final bill. Once that is settled, he or she delivers the food, ensuring that each party has received what it ordered, or, in his considered opinion, deserves!

Notification that the award is ready is a completely extraneous factor for consideration in set-aside applications under MAL. The recognition of the date of receipt of a “debt collection letter” as receipt of an arbitral award is a most absurd proposition. A tribunal must discharge the statutory obligation to deliver the award and to ensure that each party has received the award. Breaking the statute under which arbitration operates in order to ostensibly “promote” arbitration harms arbitration. Talk of throwing the baby away with the bath water!

The conclusion is that the Kenyan courts’ mainstream view on the interpretation Article 34. (3) of MAL is manifestly incorrect, unlikely to be cured by the higher courts, different from what was intended by the drafters of MAL and inconsistent with the jurisprudence from other MAL jurisdictions. Given that in my view the subject legal text is free of ambiguity, this is also not a situation which requires legislative reform.

The divergence is deep rooted. The High Court in Kenya cannot redeem itself. It seems unconcerned with the divergence. The admission that the different interpretations have crystalized into schools of thought is, while great because it is honest, also quite unsettling.

On this particular issue, High Court could well mean “House of Confusion.” Before you judge me harshly, read the court’s decision in *UoN v. Multiscope*. Its remarks about its decision in this case being based on the mainstream view is correct. This would not be the first time an even higher court has officially accepted confusion among its ranks. Reference is made to the comment made by Okwengu, M’Inoti and Shichale JJA in *Mumias Sugar Company Ltd v. Nalinkumar M Shah*³³. The judges lament about the “chaotic” manner in which courts have treated interest claims. The chaos on interest in the courts of law continues to the detriment of judgement creditors.

³³ Civil Appeal No. 21 of 2011, Kenya Court of Appeal at Mombasa.

Such conflicting interpretations are not restricted to law. The other area where interpretation of text is important is religion, where differences are either resolved through negotiations or allowed to coexist indefinitely through the creation of factions, sects and denominations.

Arbitration is a matter of choice. Parties go to arbitration because they choose to. They also choose the state in which to arbitrate even domestic arbitrations. I have seen contracts created in Kenya between Kenyan companies for matters to be performed in Kenya but with a different jurisdiction chosen as the seat of arbitration.

The proponents of the mainstream view claim that their position promotes arbitration and would attract international arbitration to Kenya. Given a choice between arbitrating in a seat which complies with an internationally accepted interpretation of a universal legal text and one which does not, I would personally choose and prescribe the former without hesitation. Kenya has at least four options on the Article 34. (3) of MAL. First, kukaa ngumu, maintain the status quo. Second, persuade the other jurisdiction that they have strayed and correct them accordingly. Third, align its jurisprudence with that of other MAL jurisdictions. Four, change s. 35.(3) of Arbitration Act of Kenya to read that the date when a party receives the tribunal's notification that the award is ready shall be deemed as the date of the notification of the arbitral award.

Access to Justice: A Critique of the Small Claims Court in Kenya

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Prof. Ojienda, SC's published articles include: "Sustainability and The Ivory Trade. Whither the African Elephant?" published in the 2002 issue of the East African Law Review; "Pitfalls in the Fight against Corruption in Kenya: Corruption or Inertia?" in "Anti-Corruption and Good Governance in East Africa: Laying Foundations for Reform" by T. O. Ojienda (eds) pages 95 – 131; "Exploring New Horizons in the Discipline of Advocates, Towards a Review of the Existing Regime of Law" published in "The Advocate; Learning Law by Doing Law: The Theoretical

Underpinnings and Practical Implications of Clinical Legal Education in Kenya"; and *"An Inventory of Kenya's Compliance with International Rights Obligations: A Case Study of the International Covenant on Civil and Political Rights" the East African Journal of Human Rights and Democracy Vol. 1, Issue No. 1, September 2003 at page 91-104*; *"Sectoral Legal Aid in Kenya: The Case of the Rift Valley Law Society Juvenile Legal Aid Project"*, published in various journals including *the Advocate, the Lawyer, and the Newcastle Law Bulletin*; *"Surrogate Motherhood and the Law in Kenya: A Comparative Analysis in a Kenya Perspective"*; *"Polygamous Marriages and Succession in Kenya: Whither "the other woman?"*"; *"Reflections on the Implementation of Clinical Legal Education in Moi University, Kenya"* published in *the International Journal of Clinical Education Edition No. 2, June 2002 at page 49-63*; *"Taking a Bold Step Towards Reform: Justifying Calls for Continuing Legal Education and Professional Indemnity"* published in *Law society of Kenya Publication (2003)*; *"Terrorism: Justifying Terror in Kenya?"* published in *The East African Lawyer, Issue No. 5 at pages 18-22*; *"Land Law and Tenure Reform in Kenya: A Constitutional Framework for Securing Land Rights"*; *"A Commentary on Understanding the East African Court of Justice"* published in *the East African Lawyer, Issue No. 6 at pages 52-56*; *"Where Medicine Meets the Law: The Case of HIV/AIDS Prevention and Control Bill 2003"* published in *The Advocate at page 36-40*; *"The Advocates Disciplinary Process-Rethinking the Role of the Law Society"* published in *The Lawyer, Issue No. 78 at pages 15-16*; *"Ramifications of a Customs Union for East Africa"* published in *The East African Lawyer, Issue No. 4 at pages 17-25*; *"Gender Question: Creating Avenues to Promote Women Rights after the Defeat of the proposed Constitution"* published in *the Moi University Journal Vol. 1 2006 No.1, pages 82-92*; *"Of Mare Liberum and the Ever Creeping State Jurisdiction: Taking an Inventory of the Freedom of the Seas"* published in *the Moi University Journal Vol. 1 2006 No. 1, pages 105 - 131*; *"Legal and Ethical Issues Surrounding HIV and AIDS: Recommending Viable Policy and Legislative Interventions"* published in *The East African Lawyer, Issue No. 12 at pages 19-24*; *"Implementing the New Partnership for Africa's Development (NEPAD): Evaluating the Efficiency of the African Peer Review Mechanism"* published in *the Kenya Law Review, 2007 Vol. 1, pages 81-119*; *"Protection and Restitution for Survivors of Sexual and Gender Based Violence: A case for Kenya."*(with R. A. Ogwang and R. Aura) 90 Pages, ISSN:1812-1276; *"Legal and Institutional Framework of the TJRC - Way Forward"* published in *the Law Society of Kenya Journal Vol. 6 2010 No. 1, pages 61 - 95*; *"A Critical Look at the Land Question in the New Constitution"* published in *Nairobi Law Monthly, Vol. 1, Issue No. 1 of 2010 at pages 76 - 81*; and a Book Chapter entitled *"Land Law in the New Dispensation"* in a book edited by P.L.O. Lumumba and Dr. Mbondenyi Maurice.

As a robust litigation counsel, Prof. Ojienda, SC, has successfully handled numerous landmark cases at the Supreme Court of Kenya, on Land and Environment Law, Electoral Law, Commercial Law, Family Law, and other areas of law. Prof. Ojienda, SC represents various individuals, State agencies, private entities, county governments and multinational agencies. He has represented these entities before Kenyan courts, from the subordinate courts, all the way to the Supreme Court of Kenya. Some of his landmark cases at the apex Court include, *Independent Electoral and Boundaries Commission & 2 others v. Evans Kidero (Petition 20 of 2014)*; *Justus Kariuki Mate & another v. Hon. Martin Nyaga Wambora (Petition 32 of 2014)*; *In the Matter of the National Land Commission - National Land Commission v. Attorney General & 5 others*

(Advisory Opinion Reference No 2 of 2014); Speaker of the Senate & another v Attorney-General & 4 others [2013] eKLR; Lemanken Aramat v. Harun Meitamei Lempaka & 2 others [2014] eKLR; Cyprian Awiti & another v. Independent Electoral and Boundaries Commission & 2 others [2019] eKLR; Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others; Martin Wanderi & 106 others v. Engineers Registration Board & 10 others [2018] eKLR; Moi v. Rosanna Pluda [2017] eKLR; Town Council of Awendo v. Nelson O. Onyango & 13 others, among many others which are available at www.proftomojiendaandassociates.com. Prof Ojienda, SC can be reached through tomojienda@yahoo.com.

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Abstract

This paper considers access to justice via the small claims courts in Kenya and elsewhere. The Small Claims Court (the SCC) in Kenya is established under the Small Claims Court Act, 2016 (Principal Act) but is not yet operationalized. The idea behind the SCC is to enable access to justice through a quick, inexpensive and expeditious informal process. However, the Small Claims Court (Amendment) Act, 2020 amended the Principal Act in order to introduce changes to the workings of the SCC. The changes concern the pecuniary jurisdiction of the SCC, the representation of parties and adjournment of matters before the SCC. Such changes are problematic and add to the challenges in dealing with the backlog of cases by the Judiciary. The changes also impact negatively on the esteem of the legal profession as concerns legal representation of parties before the SCC.

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Introduction

The idea behind small claims courts or tribunals is to enable access to justice for the masses through a quick, inexpensive and expeditious informal process. This is in tandem with article 48 of the Constitution of Kenya, 2010 that guarantees all persons the right of access to justice.¹ In Kenya, the Small Claims Court (hereinafter “the SCC”) though established by the Small Claims Court Act, 2016² (hereinafter “the SCC Act, 2016” or “the Principal Act”) is yet to be operationalized. The SCC draws its mandate from article 169 (1)(d) of the Constitution of Kenya, 2010 which creates subordinate courts.³ Per section 4(2) of the SCC Act, 2016, and pursuant to article 6(3) of the Constitution,⁴ the Chief Justice is empowered to designate any court station as a SCC and specify the geographical jurisdiction of any such Court, through a Gazette notice to that effect.

The Small Claims Court (Amendment) Act, 2020⁵ was recently enacted to amend the SCC Act, 2016; the amendment Act was assented to on April 30, 2020. The amendment Act flowed from the Small Claims Court (Amendment) Bill, 2020⁶ (hereinafter “the SCC (Amendment) Bill, 2020” or “the Bill”). The Bill sought to introduce changes to the workings of the SCC, as concerns the pecuniary jurisdiction of the SCC, representation of parties before the SCC, and the rule on adjournment of matters before the SCC. The changes are nothing but problematic keeping in mind the realities and challenges currently faced by the Kenyan Judiciary in dealing with the backlog of cases. The changes equally impact negatively on the esteem of the legal profession as far as legal representation is concerned.

¹Article 48 of the Constitution 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.”*

² Section 4(1) of the Small Claims Court Act, No. 2 of 2016 (hereinafter “the SCC Act, 2016”) <http://kenyalaw.org:8181/exist/kenyalex/actview.xml?actid=No.%202%20of%202016#part_I_V>.

³Article 169(1) of the Constitution also creates other subordinate courts, which include: (a) the Magistrates courts; (b) the Kadhis’ courts; (c) the Courts Martial; and (d) local tribunals established by an Act of Parliament.

⁴Article 6(3) of the Constitution states that; *“A national State organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.”*

⁵No. 5 of 2020, Laws of Kenya <http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2020/SmallClaimsCourt_Amendment_Act_No.5of2020.pdf>.

⁶Kenya Gazette Supplement No. 22, National Assembly Bill No. 4 of 2020, dated March 19, 2020<http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2020/SmallClaimsCourt_Amendment_Bill_2020.PDF>.

The Legal Framework on the Small Claims Court in Kenya

This part of the paper looks at the legal framework on the small claims court in Kenya as provided under the SCC Act, 2016—prior to the enactment of the SCC (Amendment) Act, 2020. The SCC is to be presided over by an Adjudicator who must be an advocate of the High Court of Kenya with at least three years’ experience in the legal field.⁷ As indicated above, the Chief Justice is empowered to determine the local limits jurisdiction of the SCCs. In doing so, the Chief Justice must ensure that the said courts are accessible in every sub-county and progressively in other decentralized units of judicial service delivery.⁸

The subject matter jurisdiction of the SCC is limited, mostly to contractual and tort claims.⁹ The SCC’ jurisdiction over contractual claims is limited to civil disputes relating to a contract for sale and supply of goods or services, a contract relating to money held and received, or set-off and counterclaim under any contract. On the other hand, the SCC’s jurisdiction over tort claims is limited to civil disputes relating to liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property, and compensation for personal injuries.

The pecuniary jurisdiction of the SCC is also limited to ensure that only small claims involving small moneys come before the court. Under Section 12(3) of the SCC Act, 2016, the pecuniary jurisdiction of the SCC was limited to KES 200, 000; this has been enhanced under the SCC (Amendment) Act, 2020. Nonetheless, the Chief Justice is empowered to determine any other pecuniary jurisdiction for the SCC as he thinks fit, via a Gazette notice to that effect.¹⁰

Besides, there are express exclusions on the jurisdiction of the SCC. First, claims can be removed from the ambit of the SCC owing to the *sub judice* and *res judicata* rules. If a claim has been lodged at the SCC, no proceedings relating to the same course of action are to be brought before any other court except where the proceedings before that other court were commenced before the claim was lodged with the SCC or the claim before the other court has been withdrawn.¹¹ On the same note, a claim cannot be brought before the SCC if proceedings relating to that claim are pending in or have been heard and

⁷Section 5 of the SCC Act, 2016.

⁸*Ibid.* section 11.

⁹*Ibid.* section 12(1).

¹⁰*Ibid.* section 12(4).

¹¹*Ibid.* section 13(1).

determined by any other Court.¹² In any case, a higher court may transfer a claim to the SCC.¹³ Second, the SCC is prohibited from adjudicating on a claim where the cause of action is founded on defamation, libel, slander, malicious prosecution, or on a dispute over a title to or possession of land, or a matter concerning employment and labor relations.¹⁴

The procedure for filing, hearing and determination of matters coming before the SCC is provided for under part IV of the SCC Act, 2016 and the Small Claims Courts Rules, 2019 (hereinafter “the SCC Rules, 2019”).¹⁵ On matters procedure, the rules are a bit relaxed as concerns the SCC so that access to justice is not impeded by too much formality and procedural technicalities. First, the rules on filing of claims before the SCC are rather flexible and are provided for under section 23 of the SCC Act, 2016. The claimant or their duly authorized representative institutes a claim by filing a statement of claim. One may also present their claim orally to an officer of the court who is then required to reduce the claim to writing in the prescribed form and have it signed or authenticated by the claimant or an authorized representative. A statement of claim or defense can be lodged via electronic means too.

Second, different rules apply as concerns the representation of parties before the SCC. Representation of parties before the SCC is provided for under section 20 of the SCC Act, 2016. Under section 20(1) of the Act, a party to the proceedings before the Court must appear in person, but where he or she is unable to appear in person be represented by a duly authorized representative. Further, section 20(2) of the Act forbade legal practitioners from representing parties before the SCC; this has changed under the SCC (Amendment) Act, 2020. However, before permitting a person to act as a representative of a party, the Court has to satisfy itself that the person has sufficient knowledge of the case and sufficient authority to bind the party being represented.¹⁶

Third, the rules of evidence are relaxed at the SCC as their strict application in the court is excluded by virtue of section 32(1) of the SCC Act, 2016. Fourth, stringent rules apply as concerns the hearing and determination of matters to ensure the expeditious disposal of cases before the court. All proceedings before the SCC on any particular day must be

¹²*Ibid.* section 13(2).

¹³*Ibid.* section 13(3).

¹⁴*Ibid.* section 13(5).

¹⁵See <<http://kenyalaw.org:8181/exist/kenyalex/actview.xml?actid=No.%202%20of%202016>>.

¹⁶ Section 20(3) of the SCC Act, 2016.

heard and determined on the same day or on a day-to-day basis until final determination, so far as practicable.¹⁷ In addition, judgment given in determination of any claim before the Court must be delivered on the same day and in any event, not later than three days from the date of the hearing.¹⁸ Moreover, the SCC may only adjourn the hearing of any matter under exceptional circumstances, which must be recorded.¹⁹ This has changed slightly under the SCC (Amendment) Act, 2020.

Analysis of the changes that were sought under the Small Claims Court (Amendment) Bill, 2020

The SCC (Amendment) Bill, 2020 was sponsored to the National Assembly of Kenya by Honourable Aden Duale, the then Leader of Majority Party. Clause 2 of the Bill sought to amend section 12(3) of the SCC Act, 2016 to enhance the pecuniary jurisdiction of the SCC. It stated that, ‘Section 12 of the Small Claims Court Act, 2016, hereinafter referred to as the “principal Act”, is amended in sub-section (3) by deleting the words “two hundred thousand shillings” and substituting therefor the words “one million shillings”.’ Clause 3 of the Bill sought to amend section 20 of the SCC Act, 2016 in respect of representation of parties before the SCC. It stated that, ‘Section 20 of the principal Act is amended—(a) by deleting sub-section (2); and (b) in sub-section (3), by inserting the words “where the representative is not a legal practitioner” immediately after the words “under sub-section (1)”.’ Lastly, clause 4 of the Bill sought to amend section 34 of the SCC Act, 2016 and introduce changes to the SCC rule on adjournment of matters before the court. It stated that ‘Section 34 of the principal Act is amended by deleting sub-section (3) and substituting therefor the following new sub-section— “(3) The Court may allow up to three adjournments of the hearing of any matter on reasonable grounds which shall be recorded and may, in exceptional circumstances, allow other adjournments.”’

In sum, the Bill sought changes to the Principal Act in a manner that interfered with the foundational basis and workings of the SCC. One, to amend section 12(3) of the Principal Act in order to increase the pecuniary jurisdiction of the SCC from the KES 200, 000 to KES 1 Million. Two, to delete section 20(2) of the Principal Act to remove the prohibition on legal practitioners from representing parties before the SCC. Three, to amend section 20(3) of the Principal Act to allow legal practitioners, alongside laypersons, to represent parties before the SCC. Four, to delete section 34(3) of the

¹⁷ *Ibid.* section 34(1).

¹⁸ *Ibid.* section 34(2).

¹⁹ *Ibid.* section 34(3).

Principal Act in order to introduce a new provision which allows the SCC to entertain a maximum of three (3) adjournments of the hearing of any matter before the court on reasonable grounds, and any further adjournments only under exceptional circumstances.

Arguments against increasing the pecuniary jurisdiction of the Small Claims Court

In seeking to amend section 12(3) of the Principal Act,²⁰ clause 2 of the Bill proposed that the pecuniary jurisdiction of the SCC be increased from the current KES 200,000 to KES 1 Million. However, such increase in the pecuniary jurisdiction of the Court inevitably amounts to substantial injustice. As the comparative analysis below will reveal, the pecuniary jurisdiction of small claims courts or tribunals generally is relatively low. This is so because the idea behind such courts hinges towards the creation of straightforward judicial institutions that provide easy access to an informal, inexpensive and speedy process of resolution of simple civil claims, mostly debt recovery disputes.

One of the factors that determine the simplicity or complexity of a civil dispute is the monetary value of the subject matter involved, that is, the amount of money that is at stake in the dispute. Increasing this amount from KES 200,000 to KES 1 Million amounts to substantial injustice²¹ when viewed in comparison to the current state of the Kenyan economy. The state of the Kenyan economy is such that KES 1 Million is a lot of money, and not small money. That being the case, a dispute involving KES 1 Million cannot be subjected to the extremely simplified proceedings of the SCC.

On the contrary, subjecting such huge amounts of money to the jurisdiction of the SCC will necessitate the invocation of strict civil procedure rules, a fact that is bound to lead to prolonged resolution of cases before the SCC. In turn, this will result in an increase in case backlog in the SCCs, thus being counterproductive and defeating the very purpose for the establishment of the SCC. Besides, the establishment of too many

²⁰Section 12(3) of the SCC Act, 2016 provided that; ‘The pecuniary jurisdiction of the Court shall be limited to two hundred thousand shillings.’

²¹The Merriam Webster legal dictionary defines ‘substantial justice’ as ‘justice of a sufficient degree especially to satisfy a standard of fairness’; it also means, ‘justice administered according to the substance and not necessarily the form of the law’. See <<https://www.merriam-webster.com/legal/substantial%20justice>>.

judicial institutions creates new problems of court bureaucracy and more expenses for the Judiciary to take care of.

Rather than increasing the pecuniary jurisdiction of the SCC, the factors that delay access to justice should be considered instead and addressed. To do so may require amending the necessary legislation such as the civil procedure or litigation rules (in this case, the Civil Procedure Rules, 2010 applicable in Kenya) in order to make civil litigation simple and less protracted. It may also entail merging the lowest ranking magistrates' courts (the Resident Magistrates' Courts in the case of Kenya) with the SCCs and assigning entry-level magistrates to the small claims, thus rendering the SCCs impractical. The result will be lesser costs of putting up such SCC premises, in terms of facility and salary expenses for the Adjudicators, clerks and other SCC staff.

The solution to inaccessible justice due to prolonged and convoluted litigation does not lie in having more courts, but in increasing the number of court staff, particularly judges and magistrates. Case backlog in the Judiciary is yet to be cleared. In that case, if the SCCs are to be maintained, their pecuniary jurisdiction should not be increased to give room for the Resident Magistrates' Courts to deal with the more complex civil issues whose monetary value exceed KES 200,000. Per section 7(1) (e) of the Magistrates' Courts Act, 2015,²² the jurisdiction of the Resident Magistrate's Court is capped at KES 5 Million. However, with the introduction of the SCC, the pecuniary jurisdiction of the Resident Magistrate's Court will have to change in order to accommodate the SCCs.

Since the SCC is intended to provide quick, inexpensive and expedited justice, a cap of KES 200,000 is sufficient in that regard; otherwise, the case backlog will be transferred from the Resident Magistrates' Courts to the SCCs. Moreover, to prevent concurrent jurisdiction between the Resident Magistrate's Courts and the SCCs, there is need to amend section 7(1)(e) of the Magistrates' Courts Act, 2015 to restrict the pecuniary jurisdiction of the Resident Magistrates' Courts to any claim where the value of the subject matter is above KES 200,000 but not in excess of KES 5 Million.

Arguments against the representation of parties by laypersons

Clause 3 of the Bill, introduced changes to section 20 of the Principal Act,²³ and sought to allow legal practitioners to practice before the SCCs alongside laypersons. Removing

²²Act No. 26 of 2015, Laws of Kenya
<<http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%2026%20of%202015>>

²³ Section 20 of the SCC Act, 2016 provides as follows;

the ban on representation of parties by legal practitioners and bringing legal practitioners on board the SCC is imperative. Despite the simplified nature of proceedings before SCCs, legal practitioners should still have the legal right to appear in these courts should a party to a claim prefer to be represented by an advocate. Quick justice must equally be just if the right to access justice is truly going to be upheld. Even so, the Adjudicators of the SCCs would have to ensure that the simplified procedures of these courts are complied with, to avoid delays in the delivery of justice and the backlog of cases normally occasioned by protracted litigation coupled with complex procedures before the Magistrates' Courts, other subordinate courts, and the superior courts.

Yet, the Bill, just like the Principal Act, painted a scenario whereby it was legal for laypersons (non-advocates and non-professionals) to appear before the SCCs to represent parties to a claim. Nevertheless, the Advocates Act²⁴ restricts the practice of law to legal professionals, advocates²⁵ and certain officers who can act as advocates,²⁶ especially in disputes that are purely civil claims. Conversely, allowing laypersons to practice law in judicial institutions, including the SCCs, means opening a Pandora's box. In doing so, both the Bill and the Principal Act, as it was, defeated the very objective of the Advocates Act by introducing quacks into the justice system to attempt to offer legal advice and representation to parties without the requisite legal training, professionalism, regulation and discipline. How do you regulate quacks! How do you discipline quacks! If laypersons are allowed to 'practice law', it is regrettable that the SCCs will be transformed into nothing more than a playfield for conmen, crooks and swindlers.

It is of utmost importance that the SCCs, if operationalized, should operate within the acceptable standards of legal professionalism despite their simplified procedures. Parties

20. Representation before the Court

(1) A party to the proceedings shall appear in person or where he or she is unable to appear in person, be represented by a duly authorised representative.

(2) The representative referred to in subsection (1) shall not be a legal practitioner.

(3) A Court shall, before permitting a person to act as a representative under subsection (1), satisfy itself that the person has sufficient knowledge of the case and sufficient authority to bind the party being represented.

²⁴Chapter 16, Laws of Kenya of Kenya
<<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2016>>.

²⁵Section 9 of the Advocates Act, Chapter 16, Laws of Kenya. Such advocates must have been admitted as such, their name having been entered upon the Roll of Advocates, and have in force a valid practicing certificate.

²⁶*Ibid.* section 10.

to disputes before the SCCs should appear in person, or be represented by duly authorized legal practitioners.

Arguments against interference with the discretion of Adjudicators in respect of adjournments

Clause 4 of the Bill entailed an amendment to section 34(3) of the Principal Act,²⁷ to allow for up to three adjournments of the hearing of any matter on reasonable grounds and any other adjournments only on exceptional circumstances. This amendment sought to rein in on the Adjudicator's discretion to allow or not allow adjournment of hearings of small claims, in the spirit of the informal but expeditious adjudication of cases in the SCCs.

On the contrary, regarding the general prosecution of civil suits, order 17 of the Civil Procedure Rules, 2010 (like section 34 of the SCC Act, 2016 as it was before amendment) generally advocates for the hearing of civil suits on a day-to-day basis. Order 17 of the Civil Procedure Rules, 2010, however, leaves the grant or denial of requests for adjournments to the discretion of the Court. Order 17, rule 1 of the Civil Procedure Rules, 2010 provides that, '(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment. (2) When the court grants an adjournment it shall give a date for further hearing or directions.' Further, regarding the adjournment of the hearing of applications in civil suits generally, order 51, rule 6 of the Civil Procedure Rules, 2010 provides that; 'The hearing of any application may from time to time be adjourned upon such terms as the court thinks fit.' In this regard, the discretion of the ordinary courts to grant or deny requests for adjournments is equally not tampered with.

Nonetheless, the SCC is not bound by the Civil Procedure Rules, 2010. Under section 17 of the SCC Act, 2016, it is provided that, 'Subject to this Act and Rules, the Court

²⁷Section 34 of the SCC Act, 2016 provided as follows;

34. Expeditious disposal of cases

- (1) All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination.*
- (2) Judgment given in determination of any claim shall be delivered on the same day and in any event, not later than three (3) days from the date of the hearing.*
- (3) The Court may only adjourn the hearing of any matter under exceptional circumstances which shall be recorded.*

shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice.’ Moreover, pursuant to rule 31 of the SCC Rules, 2019, the SCC is not to be bound by the strict rules of procedure or evidence in the conduct of its proceedings. As such, the SCC is only bound by its own procedures as set out under part IV of the Principal Act and the SCC Rules, 2019.

So, what is different about adjournments in the ordinary civil courts and those in the SCCs? Why stringent rules on adjournments before the SCC and not the other civil courts? Is article 48 of the Constitution of Kenya, 2010 not applicable to all courts? The right of access to justice, especially through the expeditious disposal of cases, should be upheld equally across the spectrum if the backlog of cases in the Judiciary is indeed going to be merely a memory of the past. Accordingly, the grant or denial of requests to adjourn matters before the SCC should be left to the discretion of the Adjudicator of the court as and when he or she deems it just to do so depending on the circumstances of each case.

To understand further whether the amendments under the SCC (Amendment) Bill, 2020 were necessary, it is imperative to understand the genesis and rationale behind the SCC in Kenya. A comparative study of the small claims courts and tribunals elsewhere is equally important.

The historical development of the Small Claims Court in Kenya

On 11 November 2003, the Government of Kenya launched the Governance, Justice, Law and Order Sector (GJLOS) Reform Programme (hereinafter “GJLOS”) in a bid to address the nationwide challenges affecting institutions within the governance, justice, law and order sectors.²⁸ GJLOS was developed in the context of Kenya’s Economic Recovery Strategy for Wealth and Employment Creation, 2003-2007 (ERSWEC); a development policy document launched in June 2003 and which aimed to promote good

²⁸See e.g., Republic of Kenya, ‘Governance, Justice, Law and Order Sector (GJLOS) Reform Programme: Policies, Laws and Regulations Assessment Report’ (September, 2007) <https://acjr.org.za/resource-centre/gjlos_policies_assesments_report.pdf>; Republic of Kenya, ‘Governance, Justice, Law and Order Sector (GJLOS) Reform Programme: Administrative Data Collection and Analysis Report’ (May, 2007) <<https://acjr.org.za/resource-centre/governance-justice-and-law-and-order-sector-reform-programme-administrative-data-collection-and-analysis-report>>.

governance, respect for human rights, equal access to justice, and respect for the rule of law in Kenya.²⁹

The objective of GJLOS was to formulate sector-wide solutions to the challenges faced in GJLOS institutions, mainly government ministries, departments and agencies.³⁰ The aim was to develop good governance among the GJLOS institutions and stakeholders and enable speedy and fair dispensation of affordable and accessible justice, especially for the poor, marginalized and vulnerable—through initiatives such as the introduction of small claims courts which would provide a small, quick process to adjudicate minor disputes.³¹ The other objectives of GJLOS were to, inter alia, increase access to justice by increasing the number of Court of Appeal sessions across the country, improving judicial infrastructure by building more courts, increasing mobile courts, and automating court processes and the registries.

Due to the ambitious nature of GJLOS in providing far-reaching reforms in the legal institutions, the programme was considerably funded by a number of donor countries and international organizations. The programme was to be implemented in two phases; a one-year Short Term Priorities Programme (STPP), and a four-year Medium Term Strategy (MTS). However, in September 2009 donors withdrew their funding stating that the programme was overly ambitious and that it had not yielded any results in the more than six years of its existence.³²

²⁹*Ibid.*

³⁰The GJLOS institutions and stakeholders included the State Department for Interior; the State Department for Coordination of National Government; the Office of the Attorney General and Department of Justice; the Judiciary; the Ethics and Anti-Corruption Commission (EACC); the Office of the Director of Public Prosecutions (ODPP); the Kenya National Commission on Human Rights (KNCHR); the Independent Electoral and Boundaries Commission (IEBC); the Judicial Service Commission (JSC); the National Police Service Commission (NPSC); the Independent Policing Oversight Authority (IPOA); the National Gender and Equality Commission (NGEC); the Commission for the Implementation of the Constitution (CIC); the Office of the Registrar of Political Parties (ORPP); and the Witness Protection Agency (WPA).

³¹See e.g., GJLOS Advisory Team, 'Kenya: Governance, Justice, Law and Order Sector (GJLOS) Programme; Fourth Programme Review, Final Report, Submitted to the Fourth Joint Review Meeting' (2007) p 76 <https://sarpn.org/documents/d0002961/Kenya_GJLOS_2007.pdf>.

³²See e.g., Murithi Mutiga, 'Police to return reforms funds' (Daily Nation, October 10, 2009) <<https://www.nation.co.ke/news/politics/1064-670762-76t074z/index.html>>; GJLOS Advisory Team, 'Kenya: Governance, Justice, Law and Order Sector (GJLOS) Programme; Fourth Programme Review, Final Report, Submitted to the Fourth Joint Review Meeting' (2007) p 76 <https://sarpn.org/documents/d0002961/Kenya_GJLOS_2007.pdf> (The six key intended

Left unaided, the Judiciary launched the Judiciary Strategic Plan 2009-2012 whose objective was to formulate judicial reforms. In order to achieve this, on 29 May 2009 the government appointed the Taskforce on Judicial Reforms chaired by Honourable Mr. Justice William Ouko. The terms of reference of the Taskforce included considering and advising on short and long term measures for addressing the backlog of cases in the Judiciary. The taskforce submitted its Initial Report on 10 August 2009 and the Final Report in July 2010 recommending measures to aid in reducing the case backlog in the Judiciary. Its key recommendations were, inter alia, to increase the number of judiciary staff, review court procedures and introduce small claims courts to handle minor cases. Regarding small claims courts and the resolution of minor cases, the Taskforce stated that

Due to delays in the determination of cases through the conventional court system, some litigants pursue their legal rights through the police, local administration or self-help. There are many cases of a minor nature that have clogged the judicial system, which ought not to be in the ordinary courts. The Task Force is of the view that minor cases should be resolved rapidly through less technical mechanisms. In this regard, the Task Force recommends the enactment of the Small Claims Courts Bill to establish small claims courts. A draft of this legislation is appended to this Report as Annex II.³³

It is noteworthy that under clause 7(2) of the Small Claims Court Bill, 2010, appended to the Final Report of the Taskforce on Judicial Reforms as Annex II, the pecuniary jurisdiction of the intended small claims court in Kenya was set at KES 100,000.

The Judiciary Transformation Framework (JTF), 2012-2016,³⁴ followed thereafter and sought, among other things, the simplification of court procedures to reduce costs. JTF also sought the enactment of a Small Claims Court Act to establish the Small Claims

results of GJLOS as identified at the programme level were: (i) responsive and enforceable policy, law and regulations; (ii) more effective GJLOS institutions; (iii) reduced corruption related impunity; (iv) improved access to justice, especially for the poor, marginalized and vulnerable; (v) more informed and participative citizenry and non-state actors; and (vi) effective management and coordination of the GJLOS programme).

³³See Final Report of the Taskforce on Judicial Reforms (July, 2010) p 55 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Final_Report_of_the_Task_Force_on_Judicial_Reforms.pdf>.

³⁴See Judiciary, 'Judiciary Transformation Framework (JTF)', 31 May 2012 <<http://kenyalaw.org/kl/fileadmin/pdfdownloads/JudiciaryTransformationFramework.pdf>>.

Courts, in order to ensure access to and expeditious delivery of justice.³⁵ Consequently, all this culminated in the enactment of the Small Claims Court Act in 2016.

Accordingly, since the rationale behind the establishment of the SCCs is to minimize the time and costs of litigation, this is best achieved by keeping the cap on claims at KES 200,000 or lower. The SCCs must equally apply simple rules of procedure and evidence to enable the inexpensive and expeditious adjudication of the said small disputes, and require parties appearing in person and those represented by legal practitioners to diligently adhere to the said rules.

A comparative analysis of small claims courts in other jurisdictions

Kenya is not alone in the endeavor to establish small claims courts or tribunals. A number of countries have in place small claims courts or tribunals, which operate under simplified court procedures in order to ensure the expeditious disposal of minor civil disputes. However, the cap on the pecuniary jurisdiction of these courts varies from jurisdiction to jurisdiction depending on the economic status of each State or country. In this comparative analysis, the below jurisdictions, which have in place a small claims dispute resolution system, have been selected randomly to help bring out the prevailing idea behind the SCCs, that is, to enable access to justice through a small, quick, inexpensive and informal adjudication process.

Australia

Australia has in place a small claims dispute resolution system.³⁶ However, the small claims dispute resolution system in Australia operates in two forms, depending on the state or territory in question.³⁷ One form of the small claims dispute resolution system entails the establishment of specialist small claims courts or tribunals separate from the ordinary courts to handle minor claims. Examples of such include the independent Civil and Administrative Tribunals in the Australian Capital Territory, New South Wales, Northern Territory, Queensland, and Victoria. The other form of the small claims dispute resolution system entails the mere establishment of special and separate court

³⁵See Judiciary, ‘Sustaining Judiciary Transformation (SJT): a Service Delivery Agenda, 2017-2021’, p 19 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf>.

³⁶See e.g., Australian Competition and Consumer Commission (ACCC), ‘Small Claims Tribunals’ <<https://www.accc.gov.au/contact-us/other-helpful-agencies/small-claims-tribunals>>; E Eugene Clark, ‘Small Claims Courts and Tribunals in Australia: Development and Emerging Issues’ 10 University of Tasmania Law Review (1991) <<http://www.austlii.edu.au/au/journals/UTasLawRw/1991/7.pdf>>.

³⁷See E Eugene Clark (1991) p 204.

procedures for small claims within the Magistrates courts' system, that is, a small claims division within the Magistrates' Courts. Examples of such small claims divisions are those used in Tasmania, Western Australia, and South Australia.

In the case of Western Australia, in 2005 the Court of Petty Sessions, the Small Claims Tribunal, and the Local Court were merged to create the Magistrates Court of Western Australia, a single subordinate court with jurisdiction over both civil and criminal matters.³⁸ This merger is said to have enhanced access to justice because it simplified court procedures and resolved cases faster and at a lesser cost. As concerns civil matters, the pecuniary jurisdiction of the Magistrates Court of Western Australia in respect of minor claims is limited to any claim whose value does not exceed \$10,000 (approximately KES 600,000).³⁹ Otherwise, the pecuniary jurisdiction of the Magistrates Court of Western Australia in respect of civil matters is generally limited to \$75,000 (approximately KES 5 Million).

In South Australia, small or minor claims are handled by the South Australia Magistrates Court as there are also no specialist small claims courts or tribunals.⁴⁰ The small claims are filed in the Civil (Minor Claims) Division of the South Australia Magistrates Court, as opposed to the Civil (General Claims) Division of the Court which handles claims whose value is above \$12,000 but not in excess of \$100,000.⁴¹ So, basically the South Australia Magistrates Court deals with small claims up to the value of \$12,000 (approximately KES 800,000) using simplified court procedures. If the value of the subject matter exceeds \$12,000 but no more than \$100,000, the Magistrates Court will still hear the claim but use the procedures of the ordinary courts.

It is also notable that in respect of minor claims before the South Australia Magistrates Court, parties are required to appear in person as legal practitioners are generally barred

³⁸See Government of Western Australia, Department of Justice, 'Magistrates Court' (December 1, 2015) <https://courts.justice.wa.gov.au/M/magistrates_court.aspx?uid=0300-7242-1972-1430>.

³⁹See e.g., Small Business Development Corporation, 'Recover a debt through the Magistrates Courts' <<https://www.smallbusiness.wa.gov.au/business-advice/financial-management/recover-debt-through-magistrates-court>>; Jemin Jo, 'Minor Case Claims – Western Australia' <<https://www.gotocourt.com.au/civil-law/wa/minor-case-claims/>>.

⁴⁰See Courts Administration Authority of South Australia, '\$12,000 or less' <<http://www.courts.sa.gov.au/RepresentYourself/CivilClaims/MinorClaims/Pages/default.aspx>>.

⁴¹See Courts Administration Authority of South Australia, 'Civil Claims' <<http://www.courts.sa.gov.au/RepresentYourself/CivilClaims/Pages/default.aspx>>.

from representing parties in relation to the minor claims. However, there are special circumstances that can necessitate representation by a legal practitioner. Such special circumstances arise where the other party is a legal practitioner, or where both parties agree to legal representation, or where one party believes they would be unfairly disadvantaged if they do not get legal representation.⁴² That said, legal practitioners are not barred from helping the parties in preparing the legal documents to be filed in court, nor in advising parties about the adjudication process of the minor claims.

South Africa

In South Africa, the Small Claims Courts Act, 1984⁴³ established the Small Claims Courts (SCCs).⁴⁴ Nonetheless, subsequent amendments were made to the Small Claims Courts Act, 1984 by the Small Claims Courts Amendment Act, 1986.⁴⁵ The SCCs have jurisdiction to adjudicate on any civil claim whose value does not exceed R20,000 (approximately KES 100,000).⁴⁶ The nature of claims and causes handled by the courts are provided for under section 15 of the Small Claims Courts Act, 1984, as amended by section 8 of the Small Claims Courts Amendment Act, 1986, as follows:

(a) actions for the delivery or transfer of any property, movable or immovable, not exceeding in value the amount determined by the Minister from time to time by notice in the Gazette;

(b) actions for ejectment against the occupier of any premises or land within the area of jurisdiction of the court: Provided that where the right of occupation of the premises or land is in dispute between the parties, that right does not exceed in clear value to the occupier the amount determined by the Minister from time to time by notice in the Gazette;

⁴²See Rule 13(4) of the Magistrates Court (Civil) Rules, 2013 (Amendment 28) <<http://www.courts.sa.gov.au/Lists/Court%20Rules/Attachments/294/Magistrates%20Court%20Civil%20Rules%202013.pdf>>.

⁴³No. 61 of 1984, Laws of South Africa <<https://www.justice.gov.za/legislation/acts/1984-061.pdf>>.

⁴⁴Section 2 of the Small Claims Court Act, 1984.

⁴⁵No. 92 of 1986, Laws of South Africa <https://www.gov.za/sites/default/files/gcis_document/201503/act-92-1986.pdf>.

⁴⁶The Republic of South Africa, Department of Justice and Constitutional Development, 'Small Claims Courts' <<https://www.justice.gov.za/scc/scc.htm>>.

(c) actions based on or arising out of a liquid document or a mortgage bond, where the claim does not exceed the amount determined by the Minister from time to time by notice in the Gazette;

(d) actions based on or arising out of a credit agreement as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005), where the claim or the value of the property in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette; [Para. (d) substituted by s. 172 (2) of Act 34 of 2005.]

(e) actions other than those already mentioned in this section, where the claim or the value of the matter in dispute does not exceed the amount det

(f) ermined by the Minister from time to time by notice in the Gazette;

(g) actions for counterclaims not exceeding the amount determined by the Minister from time to time by notice in the Gazette, in respect of any cause of action mentioned in paragraphs (a) to (e).

[S. 15 substituted by s. 8 of Act 92 of 1986.]

A party to the proceedings before the SCC appears in person and is not to be represented by any person, except for juristic persons who are to be represented by either their duly nominated directors or any other duly authorized officers.⁴⁷ The SCCs are separate from the Magistrates' Courts and are presided over by a Commissioner for Small Claims, who is an advocate, attorney, or magistrate of five years' practice.⁴⁸ The pecuniary jurisdiction of the ordinary Magistrates' Courts (or District Courts) in relation to civil cases is generally capped at R100,000.

⁴⁷Section 7(2) and (4) of the Small Claims Court Act, 1984, Laws of South Africa.

⁴⁸*Ibid.* sections 8 and 9.

The State of Kentucky in the United States of America

In Kentucky, the Small Claims Division of the District Court handles small claims. The District Court is the lowest courts in Kentucky’s Court system.⁴⁹ The value of the small claims is capped at \$2,500 (approximately KES 250,000), exclusive of interest and costs.⁵⁰ The subject-matter jurisdiction of the Small Claims Division of the District Court is as follows:

- (1) The small claims division shall have jurisdiction, concurrent with that of the District Court, in all civil actions, other than libel, slander, alienation of affections, malicious prosecution and abuse of process actions, when the amount of money or damages or the value of the personal property claimed does not exceed two thousand five hundred dollars (\$2,500) exclusive of interest and costs.
- (2) The division may also be used in civil matters when the plaintiff seeks to disaffirm, avoid, or rescind a contract or agreement for the purchase of goods or services not in excess of two thousand five hundred dollars (\$2,500) exclusive of interest and costs.
- (3) The division shall have authority to grant appropriate relief, except no prejudgment actions for attachment, garnishment, replevin or other provisional remedy may be filed in the division.⁵¹

Furthermore, one is prohibited from filing an assigned claim or a class action in the Small Claims Division of the District Court. Likewise, one cannot file any action by a person, firm, partnership, association, or corporation engaged, either primarily or secondarily, in the business of lending money at interest, nor any collection agency or collection agent, in furtherance of their business.⁵² In any case, legal representation of parties to small claims by an attorney-at-law is permitted but not required.⁵³

⁴⁹Ky. Rev. Stat. § 24A.220 <<https://casetext.com/statute/kentucky-revised-statutes/title-4-judicial-branch/chapter-24a-district-court/small-claims/section-24a220-establishment-of-small-claims-division>>; See generally, ‘Small Claims Handbook: A Citizen’s Guide to Handling Small Claims Complaints in Kentucky’ <https://kycourts.gov/resources/publicationsresources/Publications/P6SmallClaimsHandbook_eb.pdf>.

⁵⁰Ky. Rev. Stat. § 24A.230 <<https://casetext.com/statute/kentucky-revised-statutes/title-4-judicial-branch/chapter-24a-district-court/small-claims/section-24a230-jurisdiction-authority>>.

⁵¹*Ibid.*

⁵²Ky. Rev. Stat. § 24A.240 <<https://casetext.com/statute/kentucky-revised-statutes/title-4-judicial-branch/chapter-24a-district-court/small-claims/section-24a240-appearance-of-attorneys-actions-prohibited-personal-representatives-as-parties>>.

⁵³*Ibid.*

Changes to the Small Claims Court in Kenya under the Small Claims Court (Amendment) Act, 2020

After considering submissions from the public in line with article 118 of the Constitution of Kenya, 2010,⁵⁴ the SCC (Amendment) Bill, 2020 was passed by Parliament. The SCC (Amendment) Bill, 2020 was ultimately assented into law on April 30, 2020.⁵⁵ The amendments to the SCC Act, 2016 under the SCC (Amendment) Act, 2020 are as follows:

(i) The pecuniary jurisdiction of the SCC has been enhanced from KES 200, 000 to KES 1 million;⁵⁶

(ii) The ban on legal representation of parties by legal practitioners has been removed;⁵⁷

(iii) Per section 20(1) of the SCC Act, 2016, parties that will be appearing before the SCC will do so in person or through duly authorized representatives, where they are unable to appear in person. Section 2(a) of the SCC (Amendment) Act, 2020 defines a ‘Duly authorized representative’ to mean ‘the next of kin or a close relative of a party to the proceedings appointed in writing and approved by the Adjudicator to represent that party in court proceedings.’⁵⁸

(iv) Duly authorized representatives representing parties before the SCC can be legal practitioners or laypersons so long as they are the next of kin or a close relative of the party they are representing before the SCC.

(v) The remuneration of advocates appearing before the SCC will be regulated. Section 5 of the SCC (Amendment) Act, 2020 empowers the Chief Justice, in consultation with the Council of the Society (the Law Society of Kenya) to make orders as concerns the remuneration of advocates appearing before the SCC.

⁵⁴Article 118 of the Constitution of Kenya, 2010 allows for public participation and involvement in the legislative and other business of the Parliament of Kenya and its committees. See ‘Report on the Consideration of the Small Claims Court (Amendment) Bill, 2020 (National Assembly Bill No. 4)’ <http://www.parliament.go.ke/sites/default/files/2020-04/Report%20on%20the%20Small%20Claims%20Court%20%28Amenment%29%20Bill%2C%202020%20%281%29_0.pdf>.

⁵⁵See Small Claims Court (Amendment) Act No. 5 of 2020 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2020/SmallClaimsCourt_Amenment_Act_No.5of2020.pdf>.

⁵⁶*Ibid.* section 2(b) and 3.

⁵⁷*Ibid.* section 4(a).

⁵⁸*Ibid.* section 2(a).

(vi) Essentially, a party to proceedings before the SCC may appear in person, or through a duly authorized representative where personal appearance is not possible, or choose to be represented by a legal practitioner.

(vii) The SCCs may award the cost of proceedings to the successful party only.⁵⁹ Prior to the amendment under section 6 of the SCC (Amendment) Act, 2020, section 33(1) of the SCC Act, 2016 provided that the SCC could only award costs to the successful party upon satisfaction that the subject claim the court.

(viii) The was not vexatious, frivolous or an abuse of the due process of (ix) discretionary powers of the SCC Adjudicators to adjourn matters before the court have been greatly restricted. The SCC Adjudicator can only allow a maximum of three adjournments under exceptional and unforeseen circumstances which are to be recorded.⁶⁰ The exceptional and unforeseen circumstances that will be considered before allowing an adjournment include:

- (a) the absence of the parties concerned or their advocate or other participants to the proceedings required to appear in court for justified personal reasons which may include sickness, death, accident or other calamities;
- (b) an application by a party for the Adjudicator to withdraw from hearing the matter;
- (c) a request by parties to settle the matter out of court;
- (d) an appeal filed in the matter where orders of stay of proceedings have been granted;
- (e) an application by a party to summon new witnesses to court, collect new evidence, new inspection or evaluation or supplementary investigation on the subject matter of the case; and

⁵⁹*Ibid.* section 6.

⁶⁰*Ibid.* section 7. The amended section 34(3) of the SCC Act, 2016 provided that ‘The Court may only adjourn the hearing of any matter under exceptional circumstances which shall be recorded’ and did not limit the number of adjournments to be allowed in respect of any case before the SCC.

No.	Issue	Provision	Possible Conflicts	Recommendation
1.	The subject-matter jurisdiction of the SCCs	Section 12(1) of the SCC Act, 2016, whereby the SCCs will entertain civil claims in the nature of: (a) a contract for sale and supply of goods or services; (b) a contract relating to money held and received; (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of	Apart from simple debt recovery disputes, the other civil claims that the SCCs will be required to adjudicate upon are rather complex and require the grant of discretionary damages. Such disputes are bound to prolong litigation before the SCCs and equally create disparity in the award of damages in SCCs across the country.	The subject-matter jurisdiction of the SCCs should be limited to straightforward debt recovery disputes and should not be broadened to include complex civil matters requiring the grant of discretionary damages, such as tortious claims, and certain contractual disputes, among others.

		movable property; (d) compensation for personal injuries; and (e) set-off and counterclaim under any contract.		
2.	The pecuniary jurisdiction of the SCCs; concurrent with that of the RMCs	Section 12(3) of the SCC Act, 2016, and section 2(b) and 3 of the SCC (Amendment) Act, 2020, whereby the pecuniary jurisdiction of the SCCs is capped at KES 1 million from the initial KES 200,000. (The proposal	Under Section 7(1)(e) of the Magistrates' Courts Act, 2015, the jurisdiction of the RMCs is capped at KES 5 Million, without a lower cap. Hence, there will be concurrent jurisdiction between the SCCs and the RMCs for the subject civil claims whose value does not exceed KES 1 million.	Amend Section 7(1)(e) of the Magistrates' Courts Act, 2015 to restrict the pecuniary jurisdiction of the RMCs to any civil claim where the value of the subject matter is above KES 200,000 but not in excess of KES 5 Million; except for the types of civil claims which are expressly excluded from the jurisdiction of the SCCs. Amend Section 48 of the SCC Act, 2016 to give the SCCs exclusive jurisdiction over the subject civil claims whose value is KES 1 million or less.

		<p>to increase the pecuniary jurisdiction of the SCCs to KES 1 million should have been rejected.)</p> <p>_____</p> <p>_____</p> <p>Section 48 of the SCC Act, 2016, which gives litigants the right to lodge claims in other courts, and states that; ‘Nothing in this Act precludes a person from lodging a claim that is within</p>		
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		the jurisdiction of the Court in any other Court if that person elects to institute proceedings in that other Court to hear and determine that claim.’		
3.	Qualifications of the SCC Adjudicators vis-à-vis the Resident Magistrates; and the career progression of the SCC Adjudicators	Sections 5 and 6 of the SCC Act, 2016, whereby the JSC is empowered to appoint Adjudicators for the SCCs from among persons who are advocates of the High Court of Kenya and have at least three	Coupled with the requirements under Section 32(2) of the Judicial Service Act, 2011, a Resident Magistrate shall be appointed from among persons who are advocates of the High Court of Kenya and who have three years’ post admission experience and a current law practicing certificate. So, what is the job group and salary scale for the SCC Adjudicators in comparison to that of the Resident Magistrates, despite their similar qualifications? What is the career progression for the SCC Adjudicators?	Merge the SCCs with the RMCs and create a Small Claims Division within the Civil Registry to cater for the small claims. The small claims will then be presided over by Resident Magistrates as an entry level to the judiciary and thereafter they will be allowed to entertain other civil claims. Alternatively, let the small claims be handled by any Resident Magistrate, using special and separate procedures for small claims. This does away with the need for independent SCCs and Adjudicators; hence, the need to appoint more

		years' experience in the legal field.		Resident Magistrates instead.
4.	Appeals from the SCCs	Section 38 of the SCC Act, 2016, Rule 30 of the SCC Rules, 2019, and Order 42 of the Civil Procedure Rules, 2010; whereby appeals shall lie directly from the SCCs to the High Court.	In bypassing the Magistrates' Courts and providing that appeals lie from the SCCs directly to the High Court, this creates a conflict with the jurisdiction of the Magistrates' Courts and tampers with the High Court's jurisdiction as well. This will also add to the backlog of cases in the High Court.	The judgments and orders of the SCC Adjudicator should be final, with only the option of review; but no appeals to any other court.

(f) any other exceptional and unforeseen circumstances which in the opinion of the court justifies or warrants an adjournment.

Possible conflicts after the operationalisation of the Small Claims Court in Kenya

If the SCCs are operationalized under the existing legal framework under the SCC Act, 2016, the SCC Rules, 2019, and the amendments under the SCC (Amendment) Act, 2020, there are possible conflicts that will arise in the operations of the SCCs and the Resident Magistrates Courts (hereinafter "RMCs"). The following is a summary of the

possible conflicts that will arise in the workings of the courts and the Judiciary in Kenya following the operationalisation of the SCCs.

Conclusion

As aforementioned, the objective of small claims courts, tribunals, or court divisions is to expedite the adjudication of civil matters involving small money or property valued at small monetary amounts. An increase in the pecuniary jurisdiction of the small claims courts, tribunals, or court divisions to handle claims involving large monies, therefore, amounts to substantial injustice in such courts, tribunals, or court divisions. In Kenya, an amount above KES 200,000 is not small money in Kenyan economic terms. Ideally, any civil dispute of an amount or value higher than KES 200,000 should be handled by the Resident Magistrate's Court. In the alternative, the Small Claims Court (SCC) should be merged with the Resident Magistrate's Court, with the entry level into the judicial profession being the handling of small claims. This should be followed by immediate appointment of more Resident Magistrates.

Moreover, legal representation in the small claims courts, tribunals, or court divisions should be regulated to keep out laypersons so that the court system and the legal profession is not overpowered by crooks masquerading as legal professionals. However, the legal fees charged by legal practitioners for small claims should be reasonable, not expensive. As such, the amendments to section 20 of the SCC Act, 2016, of the Laws of Kenya to allow parties to either appear in person or be represented by duly authorized representatives (restricted to next of kin and close relatives) or to engage legal practitioners seems workable. This is because access to justice equally means giving parties the opportunity to self-represent or to allow a legal professional to handle their matter.

Nonetheless, strict practice rules and guidelines to legal practitioners appearing before SCCs on how to simplify the litigation is needed in order to achieve the objectives of the SCC to provide access to justice through a quick, inexpensive and expeditious informal process. In any case, it is of significance to the esteem of the legal profession that laypersons are generally not allowed to offer legal representation to parties appearing before the SCC in Kenya.

Finally, there should be harmony in the structure of the courts in relation to the small claims courts, tribunals or court divisions. Harmony is needed in terms of the qualification of court adjudicators, subject matter and pecuniary jurisdiction, and the

consideration of appeals from the small claims courts, tribunals, or court divisions. In Kenya, there are requisite amendments under the Magistrates Court Act, 2015, the Judicial Service Act, 2011 and others under the SCC Act, 2016 to eliminate any conflicts between the SCCs and the Resident Magistrates' Court. Conflicts are bound to arise as pertains to the pecuniary and subject matter jurisdictions of the two courts, the qualifications of the SCC Adjudicators in relation to those of the Resident Magistrates, the career progression of the SCC Adjudicators, and the handling of appeals from the SCCs.

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Contending with the Schools of Thought on ADR before and during Arraignments: A Departure from the Old Cultural Order

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Abstract

There are several schools of thought on whether Alternative Dispute Resolution (ADR) is applicable and appropriate in resolving criminal cases. There are also multiple objections these perspectives. The Fiss doctrine captures the strongest objection to the application of settlement of dispute through ADR. This paper seeks to highlight these schools of thought and respond to the objections contained in the Fiss doctrine. The paper also considers the legal framework on the application of ADR after an arrest has been made as well as during arraignment of an accused person in Court. The issue that immediately arises after a decision to engage ADR in criminal cases is what happens to the presumption of innocence, burden, and standard of proof. This paper proposes that these are principles engraved in criminal law tradition that must be reconsidered. The paper suggest that these principles are not suspended during plea bargaining negotiations but introduce dynamics on what Prosecutors would do with information gathered from such negotiations.

Introduction

Alternative Dispute Resolution (ADR) is a democratization imperative through the multiple door principles of access to justice¹. The question that arises is whether it can pervade the criminal law arena with ease. Under the multiple door principle, one would expect that there is no limit to the type of disputes that can be resolved through ADR. African traditional cultures and indeed most traditional cultures have evident regard for rules of dealing with criminal conduct. To understand the culture of ADR in criminal matters it is important to understand and conceptualize culture from an anthropological approach where it is comprised of the complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a

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¹ Murigi, Henry K. 2020. "Institutionalization of Alternative Dispute Resolution in Kenya: A Democratization Imperative." Journal of Conflict Management and Sustainable Development 229 - 250. (Verba 1963) (W 1991)

member of society. Culture has been defined differently in each generation of knowledge². This is because it is not static. Some aspects of culture adjust to the changes that emerge in society while other aspects are considered archaic after some time³. African culture is often viewed as traditions in the primitive period even though there is no agreement among historians, theoreticians and scholars on the start point or end of the primitive period⁴. What is however clear is, at some point most African states have agreed to change the way of doing things. Most often the African states have had to transition from one culture to another. The challenge is that two cultures cannot be merged with absolute perfection and without one overbearing on the other. Failure to consider the strength of the African culture was as a result of a series of accidents⁵. These are (1) African history was told by the West and in their lenses and this approach disregarded certain unique aspects such as armed conflict⁶, (2) there was an assumption that African tradition was not a sufficient source of knowledge⁷, (3) the Africans who attempted to explain culture were largely influenced by western institutional thinking, frameworks, theories and methodologies⁸ and (4) the continuous transition from African culture was not properly managed, explained and effected by the West⁹. Some have argued that we will never properly understand the jungle by listening to the version narrated by the antelopes only. We will be better placed to understand it when we also listen to the lions' narration. This struggle continues even with Kenya being in charge of its destiny many years after independence. The concern of this paper is the changes that have been introduced by adopting ADR or at least attempting to adopt it in Criminal cases through diversion and plea bargaining.

² Almond, G., & Verba, S. (1963). *The civic culture: Political attitudes and democracy in five nations*. Princeton, NJ: Princeton University Press.

³ Avruch, K, and Black, PW. The culture question and conflict resolution. *Peace & Change*. Vol. 16(1). January 1991. Pp. 22-45

⁴ Huntington, Samuel P. (1997). *The clash of civilizations and the remaking of world order*.

⁵ Elkin David J. and Richard E.B. Simeon (1979) 'A Cause in Search of its Effect or What does Political Culture Explain' *Comparative Politics* Vol. 11:2 pp 127-47

⁶ Dalton Russell J and Shin Doh Chull (2014) "Reassessing the Civic Culture Model" in *Political Culture and Value Change' in the Civic Culture Transformed from Allegiant to Assertive Citizens* Cambridge University Press, New York pp 91-115

⁷ Elkin David J. and Richard E.B. Simeon (1979) 'A Cause in Search of its Effect or What does Political Culture Explain' *Comparative Politics* Vol. 11:2 pp 127-47

⁸ Russell J. Dalton and Christian Welzel (2014) 'Political Culture and Value Change' in *The Civic Culture Transformed from Allegiant to Assertive Citizens* Cambridge University Press, New York

⁹ Krause Keith (ed) 1997, *Cross Cultural Dimension of Multi-Lateral Non-Proliferation of arms control*. Frank Cass, London

Schools of Thought on ADR in Criminal Cases

There appears to be two world views on the approach to ADR in criminal cases. The first perspective views ADR as constrained or limited in its application in criminal cases. This is what would be referred to as the restrictive school. This is premised on the thinking that crime is committed against the person and society simultaneously. This view is rigid in approach to ADR in criminal cases. This perspective elevates the centrality of the role of the Prosecution and correctly so in criminal litigation. Here you will find court decisions such as Justice Lesit in the case of **Republic v Abdulahi Noor Mohamed** (alias Arab)¹⁰ held that “*crime is an injury not only against the affected individual(s) but also against the society. Offences are prosecuted by the state, which in so doing protects the social rights of all citizens. Therefore, at a minimum, the prosecution should be consulted before having the reconciliation agreements and customary laws applied in resolving criminal cases. In this case, the prosecution turned down any an offer by the accused to negotiate a plea agreement proposal. Application of alternative dispute resolution mechanisms must be consistent with the Constitution and the written law of the land*”. The more troubling aspect of this decision was the Court found that “*The charge against the accused is a felony and as such reconciliation as a form of settling the proceedings is prohibited. In the case of Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another*¹¹ Justice Edward Muriithi held that “*Alternative Dispute Resolution mechanisms of Article 159 (2) (c) must be supportive and not destructive of the ability of the DPP to conduct his primary role as the executor of the State’s powers of prosecution under Article 157 (6) of the Constitution*”.

The second world view considers the need to embrace ADR as a cultural imperative. This is what would be referred to as the cultural relativity school. This school argues that ADR is applicable and should be encouraged by the Courts. This school of thought supports the broad application of ADR in criminal matters and accepts alternative justice systems as part of the court structure. This school elevates the role of the community in achieving Justice that is relevant to the society. This view is more flexible and adaptable to realities of community engagements. This is what Kariuki Muigua addresses in looking at traditional dispute mechanism under Article 159 of the Constitution of Kenya and argues that they are applicable subject to repugnancy test ¹².

¹⁰ [2016] eKLRA

¹¹ [2018] eKLR

¹² Muigua, Kariuki. (2018) 6 (1). "Institutionalizing Traditional Dispute Resolution and other Community Justice Systems." *Alternative Dispute Resolution* 84 - 166.

Here you will find decisions such as Justice Dulu J in the case of **Republic v. Juliana Mwikali Kiteme & Others**¹³ where it was held that “*Having perused the affidavits of Katonye Mwangi the mother of the deceased and Stephene Wambua Mwangangi the brother of the deceased. Both are in agreement that the criminal proceedings against all the accused herein be terminated as the accused had paid cows in accordance with Kamba customs. A copy of the handwritten agreement on the mode of payment was filed up. Under Article 159 (2) (c) of the Constitution this court is enjoined traditional reconciliation, subject to certain limitations under Article 159(3). Having considered the request of the prosecuting counsel on behalf of the DPP and the documents filed on the reconciliation of the affected persons herein, I am of the view that this is a matter where the court should promote reconciliation as envisaged by the constitution.*”

Justice Korir in the case of **Republic v. Mohammed Adow Mohamed**¹⁴ made a finding to the effect that the ends of justice would be achieved if ADR is encouraged. The Court held “*Mr. Kimathi then proceeded on the instructions of the DPP to make an oral application in court to have the matter marked as settled. He cited Article 159(1) of the Constitution which allows the courts and tribunals to be guided by alternative dispute resolution including reconciliation, mediation, arbitration and tradition dispute resolution mechanism. He urged the court to consider the case as sui generis as the parties have submitted themselves of to traditional the Islamic laws which provide an avenue for reconciliation. In the unique circumstances of the present application, I am satisfied that the ends of justice will be met by allowing rather than disallowing the application*”.

Also, Justice Ngenye-Macharia in **Republic v. P K M**¹⁵, made a finding based on a criminal revision filed by the DPP objecting to withdrawal of charges relating to threats to kill and creating a disturbance. The Court held that “*Although the learned trial magistrate did not cite the provision of the Constitution that promotes reconciliation, it is my view that he correctly applied alternative dispute resolution mechanism envisaged under Article 159 (2) (c). he did note that both the accused and the complainant were living together even as the charges were filed, and it therefore made no sense to further push their disputes by not allowing the withdrawal of the case. In view thereof, if this application were allowed, the court would vitiate the process of promoting reconciliation which has already taken effect, in any event.*”

¹³[2017] eKLR

¹⁴ [2013] eKLR

¹⁵ [2017] eKLR

From these two schools of thought on applicability of ADR in criminal cases at least three principles can be distilled. First, ADR is an appropriate mechanism for resolving criminal matters albeit with certain constraints, Second, the parties in a criminal trial must actively play a significant role in the negotiations leading to an ADR settlement. In particular, the Prosecution must be involved in the negotiations leading to a reconciliation agreement. Third, the Courts view ADR in criminal cases as most appropriate when it leads to reconciliation between the parties as envisaged in Article 159 of the Constitution.

The Fiss Doctrine

The formal rigid school finds support from several quarters since it is premised on a cautious approach to ADR in the criminal justice system. This is supported by jurisprudence to the effect that one should approach ADR in Criminal justice with caution and hesitation. The Fiss doctrine emanates from the article by Owen Fiss in 1984 titled "Against Settlement" which highlighted the principal reasons why settlement is not encouraged instead adjudication is a preferred mode of dispute resolution¹⁶. Several reasons were advanced for the hesitation to adopt ADR in criminal justice system as espoused in the Fiss Doctrine. First, ADR is generally viewed as a procedure that mainly privatizes disputes and fails to reinforce the needs and demands of the public when pursuing justice. Here the argument is that ADR pursues settlement as the highest ideal at the expense of demands of justice. Second, the doctrine argues that there will be an imbalance of power if the ideals of ADR are to be achieved since the dispute is reduced to contestation between the parties. In the context of criminal law, the dispute is reduced to the State and the Accused persons. Here the imbalance arises because the State retains the tools of monopoly of violence against domestic and foreign threats to peace and national security. One cannot assume that there is a level playing field between the state and an accused person and the latter is somewhat disadvantaged. Third, the lack of authoritative consent makes it impossible to have ADR accepted in criminal matters. The issue of authority to engage in ADR is premised on the principles of consent and agreement between parties. In Kenya, the State powers of prosecution are held by the Director of Public Prosecutions (DPP)¹⁷. The DPP is guided by certain principles in discharging his function. In particular, the need to discharge the functions of the Office on behalf of the people of Kenya¹⁸.

¹⁶ Fiss, Owen M. 1984. "Against Settlement." Yale Law Journal 1073 - 1090.

¹⁷ Article 157 of the Constitution

¹⁸ Section 4 (e) of the Office of Director of Public Prosecution Act No 2 of 2013

What guides a decision to enter into ADR is certainly subject to the national values and principles of governance which include public participation, social justice, integrity, and accountability. This explains why there is need to involve the victims of an offence and for the victimless crimes be accountable in the decisions made¹⁹. This is the issue the Fiss doctrine raises on the dynamic of consent. Another variant of this issue of consent that is highlighted in the Fiss doctrine is where an accused person is corporate. For instance, where a co-director has committed an offence against the company, yet the actions are viewed to be offences by the Company, the question of authority to engage in ADR arises. Section 123 of the Penal Code provides that the offending directors are held responsible, and the prosecution is required to demonstrate their culpability as when as that of the Company²⁰. Since companies operate through resolutions, the concern is whether such a resolution to engage in ADR by the company will be necessary.

Fourth, as seen above, privatizing disputes seems to place settlement at a premium as opposed to a judgment of the Court. Fiss sees judgment of Courts in criminal cases as an imperative for peace as opposed to justice. In other words, he places peace as a higher ideal than the justice of an individual case and contends that the societal ideals are left unattended. This is what Paul M Gachoka, and Sunday Mamba refer to as a focus on retributive justice as opposed to restorative justice²¹. The objections raised by the Fiss doctrine have been adequately responded to by the creation of proper frameworks that guarantee safety guards for ADR in the criminal justice system. These safeguards are contained in clear and elaborate procedures contained in the Constitution, The Office of the Director of Public Prosecutions Act, 2013, Criminal Procedure Code, Diversion Guidelines, Diversion Policy, Guidelines on Plea Bargaining and Guidelines on the Decision to Charge.

Philosophy of Arraignment

Essentially, plea is one of the most important parts of a criminal trial since it determines the entire trial²². To understand the philosophy of plea one must begin by looking at a

¹⁹ Victim Protection Act

²⁰ Under this section, the ingredients that the prosecution ought to prove is that (1) the Company or corporation committed an offence and (2) the directors did not stop it or were part of it. Where the Prosecution is able to prove these two, then there is issue of cumulative liability does not arise.

²¹Mamba, Paul M Gachoka & Sunday. 2019. "An Appraisal on the Jurisprudential and Precedential Leaps Institutionalizing the Ideals of Alternative Dispute Resolution in Criminal Justice System." *Alternative Dispute Resolution Journal* 49-66.

²² Republic v Henry Rotich & 2 others [2019] eKLR

charge/information or complaint from the lenses of an investigator and prosecutor. The complaint is based on an unmet expectation by the suspect from agreeable norms that have been set by society in laws. The norms are mostly codified into statutes, but some are embedded in the human nature otherwise referred to as morality. How we perceive the law influences how we interact with people and the judgments they allocate to behavior. The concepts of ethics, justice, morality, equity, equality inform the discussion of what the law is or ought to be. Put differently, when attempting to define law certain legal philosophers such as, Cicero, Aristotle, Socrates, Thomas Aquinas, John Locke to mention a few have not agreed on the lenses to use while attempting to define law with some describing its attribute. The more acceptable position on the attributes of law can be summarized as follows: law is indeterminate, it has as many definitions as those who attempt to define it. Since an attempt to define law raises more questions than answers, we adopt for purpose of understanding law in the context of a plea as what has been codified²³. This should be acceptable as a value neutral conceptualization of law²⁴. Interactions between individuals in society are always characterized by disagreements or disputes. How the individuals relate with each other is influenced by commonly accepted minimums set in law, ethics, or moral conduct. The expectation of what is agreeable conduct at all times is always debatable.

Two ideological issues arise on what should happen before arraignment. The first is a Hobbesian argument about human nature that assumes that people are generally bad and unrestrained there will be a war of all against all²⁵. It could be argued that once a person has been arrested there is a presumption that something went wrong somewhere since things do not just happen. It would not be a stretch to assume that one does not get arrested unless something has been said against them that requires an inquiry. Such an inquiry or investigations do not necessarily seek to bring out the best in the arrested person. Instead, some view investigations as pursuing with all diligence and tactics the evidence available to incriminate the arrested person more.

The second view is Lockean²⁶ which assumes an optimistic view of human nature and pits human behavior against the ideal contained in the Constitution as a liberty charter.

²³ Codification is not defined as conversion of Judge made laws into statute in the Common law sense. It refers to ha has been restated as the law in a certain jurisdiction in form of Statutes or legal codes (Codex or Book)

²⁴ Morriss, Andrew P. (1999). "Codification and Right Answers". Chic. -Kent L. Rev.

²⁵ Hobbes, Thomas. 1588-1679. *Leviathan*. Baltimore : Penguin Books .

²⁶ Locke, John. 1690. *Two Treatises of Government*. Indianapolis: Hackett Publishing Company.

This view of human nature perceives crime as an accident or mistake that should be corrected through the criminal justice system. It is generally accepted that man is not expected to act beyond what human limits permit and when they do there is an appropriate explanation for such excesses. The reason why human rights are enshrined in the Constitution is for their practicality and not merely a paraded intent. This view insists on full application of the constitution before, during and after an arrest is conducted. We must accept that the bare minimum is that human beings are born free but are not free from their actions. This is what is Rousseau referred to as man is born free but everywhere, he/she remains in chains²⁷. One would therefore conclude that the detective uses a Hobbesian approach to investigation while others in the justice chain should adopt either a Lockean or Rousseau approach in dealing with an arrested person. Consequently, the metaphysical transition of status from arrested to accused must then be viewed in light of the realities of pre-charge process. It is important to note that Article 49 of the Constitution deals with rights of an *arrested person* and Article 50 of the Constitution provides for rights of an *accused person*. Mostly the arrested person is least aware or concerned with this transition since all they care for is their life and liberty. However, the law appreciates that there is a clear transition in terms of how an arrested person is treated and also how the accused person is to be treated. There is little in statutory law that addresses this status change from arrested person to accused person, but the implications are many.

There has been a debate on how the court approach this transition. Some courts allow pre-charge detention based on the gravity of the offence while others hold a different view. For instance, Justice Kimaru held that the police should not detain an accused person without a holding charge²⁸. Justice Prof Joel Ngugi introduced a two-prong test to be satisfied before a pre-charge detention is allowed²⁹. He held that (1) *“the State must persuade the Court that it is acting in absolute good faith and that the continued detention of the individual without a charge being preferred whether provisional or otherwise is inevitable due to existing exceptional circumstances and (2) the continued detention of the individual without charge is the least restrictive action it can take in balancing the quadruple interests present in a potential criminal trial: the rights of the arrested individual; the public interest, order and security; the needs to preserve the*

²⁷ Rousseau, Jean Jacques. 1895. *The Social Contract ...* Translated with an historical and critical introduction and notes by H. J. Tozer, etc. London: Swan Sonnenschein & Co.

²⁸ *Michael Rotich v Republic* [2016] eKLR

²⁹ *Sudi Oscar Kipchumba v Republic (Through National Cohesion & Integration Commission)* [2020] eKLR

integrity of the administration of justice; and the interests of victims of crime where appropriate". There is an appreciation that an arrested person equally enjoys rights but not as an accused person. What is also clear is that the arrested or accused person is the center of attention in the contestations. ADR has introduced several interventions during these two stages which are discussed below.

Pre-Charge ADR Interventions: - Diversion

The old constitutional order focused on punishment of offenders through retributive justice. The philosophy of diversion can be located in restorative justice as opposed to retributive justice. Diversion is one of the mechanisms that deals with restorative justice. Diversion can be defined as a system for giving a chance for a first-time criminal offender in lesser crimes to perform community service, make restitution for damage due to the crime, obtain treatment for alcohol or drug problems and/or counselling for antisocial or mentally unstable conduct and where the suspect cooperates and the diversion results in progress, the charges eventually may be dropped³⁰. Diversion has been defined in Kenya to mean the process for resolving criminal cases without resort to full judicial proceedings³¹. Diversion can take the form of a simple caution or warning, an apology to the victim, payment for damage done, or it may involve referral to a structured diversion programme, restorative justice process or similar scheme³². This can be seen more so in the treatment of juvenile offenders as it is undesirable for pre-trial detention for such offenders³³.

In the forwarding remarks on the diversion guidelines the Director of Public Prosecution was aware of this ideological and philosophical shift when he remarked "*Criminal practice in Kenya has long focused on retributive justice with an emphasis on punishing offenders for their crimes. Modern-day criminal law practice has shifted from this approach, instead focusing on restitution, restoration, and reintegration*"³⁴. Diversion guidelines are based on Article 159 of the Constitution which aims to facilitate alternative dispute resolution through out of Court settlement. These diversion guidelines are well thought out and capture the heart of the debate and give an

³⁰ <https://dictionary.law.com/Default.aspx?selected=558>

³¹ Guidelines on Decision to Charge by Office of Director Public Prosecutions 2019

³² *Ibid*

³³ Widodo. 2017. "The Diversion Based on Philosophy of Restorative Justice Indonesia Version: Between Ideality and Reality in Settlement of Childs Cases by An Investigator." *Journal of Philosophy Culture and Religion* 1-12.

³⁴ Diversion Guidelines and Explanatory Notes of the Office of the Director of Public Prosecutions, 2019

appropriate response to the Fiss doctrine. The guidelines provide the framework through which this model of ADR can be explored. The diversion guidelines contain inter-alia concerns on the decision-making process in regard to diversion and explains why such a decision is important. The guidelines also give directions on what types of cases can be adopted for diversion. It also prescribes the procedure for making a diversion request both before and after a decision to charge is made. The guidelines provide for the factors to be considered in the decision on diversion.

One can argue that they fit the restrictive school since they have been limited to the opinion and discretion of the public Prosecutor³⁵. Indeed, diversion is only available to petty offenders, cases involving child offenders and vulnerable categories of persons³⁶. The old order would not have anticipated such approach to criminal justice system and relied on the programs that are reached at the stage of sentencing. There is an admission in the policy that some public Prosecutors decisions on diversion would be viewed as improper until the diversion philosophy becomes embedded into the criminal justice system and as such a clear record with carefully thought-out reasons reduces this risk³⁷.

ADR during Arraignment

At the first appearance in Court an arrested person is required to respond to information or charge presented to him/her. There are many considerations that inform the content of a charge. What must however be clear is the statement of the offence, the particulars, and all other details of the persons among others³⁸. Once the charge sheet or information is read out the arrested person is then required to respond by indicating whether the charge is true (meaning guilty) or false (meaning not guilty)³⁹. The requirement on the part of the accused person is to state true or false suggesting that there are only two possible positions that can be taken in any matter and the Court expects certainty in the response. ADR seeks to address this straight jacket approach to justice and appreciates that there can be more than two responses in a criminal case. Restorative justice

³⁵ The Guideline on Diversion Policy Clause 2.1 provides that the persons Who decides if a case should be diverted is at the sole discretion of the responsible Public Prosecutor.

Prosecutor, or any other persons exercising the DPP's delegated powers.

³⁶ Guideline on Diversion Policy Clause 2.8 – Diversion Categories Public Prosecutors have a mandatory obligation to consider diversion for adult offenders who are alleged to have committed petty offences.

are alleged to have committed petty offences.

³⁷ See page 14 of the Guidelines *Ibid* pg 14

³⁸ See Section 135 of the Criminal Procedure Code

³⁹ See the case of Adan Vs Republic 1973 EA 445

approach to criminal cases is likely to enhance both procedural and substantive justice on the issue of criminal liability by allowing for the transformation of the question criminal culpability from a qualitative "yes or no" to a quantitative question of "how much is true or false"⁴⁰. This is a new avenue of resolving cases through ADR and is likely to introduce a reduction in case backlog.

Here it is important to note that the introduction of a framework for plea bargaining effectively means that there has been a departure from the old order which insisted only a yes or no answer to all charges. Plea agreements and negotiations are a new arena that have been embraced by ODPP under the Plea-Bargaining Guidelines⁴¹. The guidelines are elaborate and contain both the normative values as well as the prescriptive contents and composition of plea bargaining, negotiations, and agreements. The guidelines are premised on Section 137 A-N of the Criminal Procedure Code Cap 75 Laws of Kenya which is a normative derivative of Article 159 of the Constitution. It is also noteworthy that Section 176 of the same act is relevant to reconciliation as a normative derivative of the same Article.

Contending with Criminal Law Principles

a) Burden and Standard of Proof in Plea-Negotiations

The debate that arises is the standard to be used by the parties during the negotiations in light of the strict legal requirement on the burden and standard of proof in criminal cases. It must be remembered that the burden of proof is on the prosecution at all times and the standard of proof is beyond reasonable doubt. The burden and standard of proof are not suspended during plea negotiations. It is also instructive to state that there is no statutory provision on what amounts to reasonable doubt. The Courts have however adopted a pragmatic assessment of the content of burden and standard of proof⁴². This introduces a quandary on the tenor and content of ADR in criminal practice since the arena of disputation has accepted imperatives. The response here would be that at least plea

⁴⁰ Fisher, Talia. 2007. "The Boundaries of Plea Bargaining: Negotiating the Standard of Proof." *The Journal of Criminal Law and Criminology* 943 - 1007.

⁴¹ Office of the Director of Public Prosecutions, Plea Bargaining Guidelines 2019

⁴² See **Miller Vs Minister of Pension (1947) 2 ALLER 372**. Lord Denning said "the degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If evidence is so strong against a man as to leave only a remote possibility of his favor which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice.

agreements are accepted as legitimate legal and statutory ideals that should be adopted in resolving criminal matters⁴³. Plea agreements and negotiations end up with a plea agreement and the tenets and principles of the law of contract are relevant. Although the burden and standard of proof is not suspended due to or during plea negotiation, different approaches are adopted during negotiations which are akin to contract negotiations⁴⁴.

One approach is to entertain a transaction between the prosecution and accused on the procedural requirements for negotiations. This transaction should entertain waiver of rights between parties such as a right of an accused person to give incriminating evidence with a view to get a reduced sentence on the one hand and prosecution waiving the right to insist on the maximum sentence or settling on a lesser charge. The right against self-incrimination is applicable during the investigations stage and all through the trial⁴⁵. Consequently, it would be one of the main bargaining points for an accused person. The accused person can argue that he/she is willing to give self-incriminating evidence that would largely incriminate a co-accused in exchange for being treated as witness against co-accused persons. In this exchange, the Prosecution forfeits a prospect for conviction against that accused person in exchange for a maximum sentence for a co-accused person or other suspects. This approach leaves the parties at an advantage of formulating and customizing justice to suit the situation which fits into the cultural relative school. The other rigid is the restrictive approach where there is insistence on the part of the prosecution that the demands of substantive justice must be met by the offender serving a shorter jail term and the offender agreeing to reduce the cost of trial. There may be a limited incentive on the part of the accused person to accept this approach.

b) Presumption of Innocence

Reasonable doubt and presumption of innocence go hand in hand and are in favor of the accused person. This presumption of innocence finds its root in the Latin maxim *ei incumbit probatio qui dicit non qui negat* (the burden of proof is on the one who declares not on one who denies). This philosophy can be traced way back into the times of Antonius Pius. He was a different breed of emperor in the Roman Empire between 138 to 161AD and is remembered in legal history as the one who coined the phrase

⁴³ Alschuler, Albert W. 1979. "Plea Bargaining and Its History." *Law and Society Yearly Review* 213

⁴⁴ Stuntz, William J. 1992. "Plea Bargaining as Contract." *Yale Law Journal* 1909-1913.

⁴⁵ *Republic v Mark Lloyd Steveson* [2016] eKLR

presumption of innocence⁴⁶. He asserted the principle that the trial was to be held and punishment inflicted in the place where the crime was committed in addition to the important principle that accused persons are not to be treated as guilty before trial. The attendant twin questions that arise are (1) whether the presumption of innocence is waived because an accused person has attempted plea negotiations and (2) how far the presumption should be stretched certainly not to presupposition of innocence. In 1997, the Supreme Court of Canada in *R vs Lifchus* {1997}3 SCR 320 suggested the following explanation: -

A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

The law requires that in every criminal case the prosecutor will review the evidence (evidential test) and make certain considerations when there is sufficient evidence (public interest and threshold test) in arriving at a decision to charge based on law, rules, policies, and guidelines⁴⁷. Therefore, when a prosecutor has evaluated the evidence including all exculpatory material, there is usually limited doubt that there is a prospect of conviction. The challenge is that sometimes the Prosecutor is not always aware of the evidence in possession of the Accused person who may know a lot more about the crime and the circumstances surrounding the offence. Justice Odunga recently held that the duty to disclose evidential material is only on the part of the State and not on the Accused person⁴⁸. Although this decision is still debatable since two courts of similar jurisdiction

⁴⁶ Hankins, James. “Exclusivist Republicanism and the Non-Monarchical Republic.” Political Theory Volume 38, Issue No. 4 (2010): pp 452–82

⁴⁷ Article 157 of the Constitution, ODPP ACT, Guidelines on the Decision to Charge 2019,

⁴⁸ Joseph Nduvi Mbuvi v Republic [2019] eKLR

have made a different finding,⁴⁹ the issue of concern here is how parties are to engage with each other during plea negotiations. The question that arises is whether the Accused person is obligated as a gesture of good faith to disclose much more than the Prosecution may be aware of. Also, when an accused person enters plea negotiation and discloses certain aspects unknown to the prosecution, although the negotiations are on a without prejudice basis, it is debatable as to what the prosecution can do with such information. The accused person also waives the right of appeal and is expected to disclose in good faith all matters that he is aware of during the plea negotiations. To this end the plea bargain seems to place an obligation to an accused person to disclose everything including what is not contained in the information available to the prosecution. This would then fit in the restrictive ADR category.

Conclusion

Changing any culture is not an easy thing. It contains struggles with the past and present with the aim of getting a desired future. The promise of ADR is that it offers better relational arraignments irrespective of the situation at hand. The deliberative arrangements that societies hold as precious should be explored to their fullest potential. This paper sought to contend with the schools of thought that dominate the debate whether ADR is indeed applicable. Public bodies, no matter how well-intentioned, are expected to and may only lawfully do what the law empowers them to do since the essence of the principle of legality is the bedrock of our constitutional dispensation, which is enshrined in our Constitution⁵⁰. The introduction of the diversion policy, guidelines on plea bargaining have changed the landscape for dealing with criminal justice system dynamics. The paper has found that indeed the restrictive school carries the day in terms of application of ADR in the criminal justice system. The alternative justice systems seem to be the purest cultural relative school of ADR in criminal justice system. The restrictive school seems to be based on the ontological foundation that

⁴⁹ In **R vs. IP Veronica Gitahi & Another Mombasa HCCR Case No. 41 of 2014** in the court set out the factors that would militate against the supply of the said statements which factors do not exist in this case. See also paragraph 45 of **Leonard Maina Mwangi vs DPP & Others Criminal Case No. 57 of 2016** the supply of defense evidence is meant to enable the prosecution to prepare for the trial and that no prejudice has been shown by the decision to have the said statements supplied. In her view, it was only fair and proper that the application be dismissed. This is also compounded by the finding of the Court of Appeal in **Thomas Patrick Gilbert Cholmondeley vs. Republic [2008] eKLR** where the court found that there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state which was determined in the old constitutional order.

⁵⁰ Justice Mativo in the Case of **Republic v Chief Magistrate, Milimani Criminal Division & 4 others Ex-Parte John Wachira Wambugu & another [2018] eKLR**

everything done must meet the requirements of certain set parameters. The prosecutor has discretion as envisaged in the constitution to make decisions which affect the entire criminal process. The principle of presumption of innocence should not lead to a presupposition of innocence as that is not the degree intended in law even during plea negotiations. The accused person equally has rights and privileges that can be waived ADR negotiations.

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The Disruptive Impact of Covid-19 On Arbitration Practice in The East African Region

*By: Austin Ouko**

Abstract

The disruption caused by the Covid-19 pandemic has made arbitration practitioners in the East African region to change and re-think the way they do things and provide services. Practitioners who had previously shunned IT and virtual hearings in arbitral proceedings have been forced to turn to them as the crisis persists. As a result, a new norm has emerged on how arbitrations are conducted in the region and which is likely to continue post Covid-19 period owing to the cost savings and efficiencies they have introduced in arbitration with more disruptive changes expected in the future.

1. Introduction

The Covid-19 crisis has ended and upended lives around the globe. Hundreds of thousands of people have died, millions of employees around the globe have lost their jobs, their seemingly secure career plans and, often their perspective for how to continue.¹ Its secondary effects have also been devastating. Borders have been closed, impeding the flow of people, goods and services. Entire countries were placed under lockdown, bringing economic life close to a standstill; challenging legislative and judicial processes; and limiting direct social interactions to the nuclear family. As such the pandemic's secondary effects pose fundamental challenges to the rules that govern our social, political, and economic lives.² Most probably, they will never be the same again.

In line with the global response to the pandemic, the East African Governments of

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¹Stephan Wilske, 'The Impact of Covid-19 on International Arbitration – Hiccup or Turning Point' (2020) 13(1) *Contemporary Asia Arbitration Journal* 7-44.

²Katharina Pistor, 'Law in the Time of COVID-19', (2020) <<https://scholarship.law.columbia.edu/books/240>> accessed on 19 May 2020.

Kenya, Rwanda and Uganda have been issuing directives requiring the public to social distance and avoid face to face meetings.³ Therefore, a great majority of business and professional interactions in East Africa are now being forced to take place online as personal contact in offices and meetings risks infection with a novel disease of unpredictable consequences. Needless to mention that where economic and social life change so drastically, the legal world has to change as well. Arbitration is no exception. Largely, due to the fact that domestic arbitrations in East Africa traditionally operated on the assumption that the proceedings take place in-person, with parties, counsel, witnesses, and transcribers all performing their roles in the presence of one another and, of course, in the presence of the arbitrators reading hard-copy documents.⁴

The common law adversarial hearings practiced in East Africa traditionally have been said to provide the opportunity for evidence to be presented in person and to be tested before a neutral and largely impassive adjudicator. Parties can be represented or they can advocate their case themselves. They have their ‘justice moment’ – their day in court – and they can see and hear justice being done in a physical space that communicates, through semiotics, the seriousness of the process and its public nature. Professionals prepare cases for oral argument, marshal the legal and factual strengths and then ‘perform’ before the adjudicator in order to achieve the best possible outcome for their clients. The adjudicator has the opportunity to hear evidence and legal arguments, to see the disputing parties face-to-face and to make assessments of the opposing cases as presented and the credibility of the evidence.⁵

Similarly, Alternative Dispute Resolution (ADR) theorists and practitioners have long assumed that empathy gained from in-person contact is necessary for resolving disputes.

³See *Public Legal Information on Kenya’s Response to COVID-19* <<http://kenyalaw.org/kenyalawblog/kenyas-response-to-covid-19/>> accessed on 4 July 2020; *Uganda, Public Health (Control of Covid - 19) Rules, 2020, Statutory instruments Supplement No. 11 The Uganda Gazette No. 19, Volume CXIII, 24 March, 2020* <<https://perma.cc/4WVW-M73W>> accessed on 2 July 2020; *Rwanda Covid-19: ‘Cabinet Approves new Guidelines, effective 4th May 2020’* <<https://www.gov.rw/blog-detail/covid-19-cabinet-reviews-lockdown-measures-effective-may-4th-2020>> (accessed on 2 July 2020).

⁴George A. Bermann, “Dispute Resolution in Pandemic Circumstances” in Pistor, (n 2) 167 - 174.

⁵Professor Dame Hazel Genn, ‘Online Courts and the Future of Justice Gray’s Inn’ Birkenhead Lecture (16 October 2017) <https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf> accessed on 19 April 2020.

⁶ This assumption is being jettisoned. The challenges the world is facing today due to the Covid-19 outbreak have highlighted the advantages of arbitration as a dispute resolution mechanism which is flexible, innovative and adaptive to the needs of parties seeking to resolve a dispute.

Arbitration practitioners have had to change and re-think the way they do things and provide services as dispute resolution cannot stop. The change is quite rapid and we are already witnessing innovative ways of providing services. Practitioners are increasingly exchanging pleadings via e-mail, and most communications from arbitrators are electronic. Attention has also been focused on those moments in which proceedings ordinarily take place before the arbitral tribunal. Attitudes and practices around conducting arbitral hearings remotely that seemed impracticable or impossible a few months ago have fast become the norm. Hearings in light of Covid 19 restrictions have forced a “change of venue” from a physical room to a virtual room stands to be most disruptive. Videoconference, audioconference, or other similar means of communication (“virtual hearing”) have become more prevalent due to available platforms such as Zoom, BlueJeans, UberConference, Cisco, Webex Meetings, Join.me, GoToMeeting, Skype, Adobe Connect and Lifesize Video Conferencing. International arbitral institutions are offering customised online platforms, for example, the Stockholm Chamber of Commerce, the International Arbitration Centre and the International Dispute Resolution Centre.⁷

All that is required is that the tribunal chair establish a meeting and invite all relevant parties to participate. These platforms appear to accommodate as many persons as are ever likely to participate in any given proceeding. As a result, a virtual hearing unfolds mostly as it would in person.⁸ Further, decisions and awards are being signed electronically.

Even in instances where the parties agree or the tribunal determines, that convening in a single physical location is indispensable and that doing so is possible despite current

⁶Amy J. Schmitz, *Expanding Access to Remedies through E-Court Initiatives*, (2019) 67 *Buff. L. Rev.* 89.

⁷[Seoul Protocol on Video Conferencing in International Arbitration](#); [ACICA Online Arbitration Guidance Note](#); [CIArb Guidance Note on Remote Dispute Resolution Proceedings](#); [HKIAC Guidance for Virtual Hearings](#); [AAA-ICDR Virtual Hearing Guide](#); [Africa Arbitration Academy Protocol on Virtual Hearings in Africa](#); and [ISTAC Online Hearing Rules and Procedures](#). accessed on 13 December 2020.

⁸Bermann, (n 4).

conditions, the parties have to abide by the Government's directives at the physical location of the hearing and take appropriate sanitary measures to ensure the safety of all participants, in particular by allowing sufficient distance between participants, making masks and disinfectant gel available, and any other appropriate measures.⁹

It is against this backdrop, that this paper focuses on the fundamental shift of how the practice of arbitration has evolved as a result of the Covid-19 pandemic disruption. The paper is divided into five parts. Part II will discuss how East African arbitral practitioners have adopted technology in their arbitral proceedings. Part III will explore the legal framework governing the use of technology and virtual hearings in arbitrations in the region. Part IV will attempt to highlight some issues that are emerging as a result. Part V concludes by stating that the disruptive changes in how arbitrations are being conducted as a result of Covid-19 pandemic are likely to stay even after the pandemic is over and therefore, arbitration practitioners should brace themselves for more changes in the coming future as technology takes root in the practice.

2. Adoption of Technology in Domestic Arbitrations in East Africa

Already years ago, the arbitration community globally was on a quest to make fuller use of available technologies. The motivation for technological innovation in arbitration, was largely one of economy in time and cost. In other words, greater and better use of technology was already identified as distinctly in arbitration's best interests and, according to some, inevitable. If that is the case, the present pandemic is only hastening arbitration's progress, albeit somewhat precipitously, down a path it was destined to travel anyway.¹⁰ For example, the use of video conferencing technology had provoked an interesting split in the opinions of arbitrators and counsel alike. On one side stood traditionalists who believed that it is fundamentally unsound to question a witness from a remote location; on the other side stood enthusiasts who believed that video technology would help eliminate much of the time and expense that bedevils arbitration hearings and of course, several practitioners stood somewhere in between those two poles.¹¹

⁹International Chamber of Commerce, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, (9 April 2020) <<https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>> accessed on 4 July 2020.

¹⁰Bermann, (n 4).

¹¹Sophie Nappert, "The Impact of Technology on Arbitral Decision Making - The Practitioner's Perspective" (September 2016) <https://www.researchgate.net/publication/303749723_The_Impact_of_Technology_on_Arbitral_Decision_Making_-_The_Practitioner's_Perspective> accessed on 26 June 2020.

However, adaptation to Governments public health directives as a result of the Covid-19 pandemic situation has forced the traditionalists and the practitioner who were standing in the middle to largely take up video conferencing mode of conducting arbitrations. Nonetheless, there remains a sizeable portion of practitioners who remain uncomfortable with the prospect of conducting all or part of an arbitral hearing virtually. On the other hand parties are being advised to choose arbitrators with the right technology expertise to manage the arbitral proceedings to limit costs and take advantage of the benefits and flexibility offered by arbitration as the situation persists.¹² Advanced facilities available today have reduced conventional impediments and legal uncertainties surrounding the use of information technology, such as cost on procuring equipment, other technological issues involving data protection, confidentiality of documents and evidence adduced during the proceedings and privacy of the parties.¹³

Looking beyond the current pandemic, a variety of possible reasons are conceivable for virtual hearings, ranging from certain participants not being able to attend physically due to professional inconvenience such as an important business meeting or more critical causes like a medical condition to other more altruistic reasons such as decreasing carbon footprint.¹⁴

On 8th April 2020, the Chartered Institute of Arbitrators launched its Guidance Note on Remote Dispute Resolution Proceedings, designed to equip both parties and arbitrators with the necessary tools and techniques for conducting arbitral proceedings in compliance with social distance regulations.¹⁵ The Institute's Guidance Note cuts across

¹²Kariuki Muigua and Jeffah Ombati, "Achieving expeditious Justice: Harnessing Technology for Cost Effective International Commercial Arbitral Proceedings", (December 2018) <<http://kmco.co.ke/wp-content/uploads/2018/12/Achieving-expeditious-Justice-Harnessing-Technology-for-Cost-Effective-Arbitral-Proceedings-17th-December-2018.pdf>> accessed on 1 June 2020.

¹³Chitranjali Negi, 'Concept of Video Conferencing in ADR: An Overview-Access to Justice', (2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662344> accessed on 28th June 2020.

¹⁴Maxi Scherer, 'Remote Hearings in International Arbitration: An Analytical Framework' (2020) 37(4) *Journal of International Arbitration* (forthcoming).

¹⁵Chartered Institute of Arbitrators, 'Guidance Note on Remote Dispute Resolution Proceedings', <<https://www.ciarb.org/media/8967/remote-hearings-guidance-note.pdf>> accessed on 4 July 2020; see also Chartered Institute of Arbitrators (CI Arb), Guidelines for Witness Conferencing in International Arbitration 2019, available at <<https://www.ciarb.org/news/ciarb-s-new->

legal, technical and logistical issues. It offers practical advice on how under remote conditions, proceedings can continue and how parties can pro-actively adapt in ways that will ultimately be positive for the way dispute resolution is practiced. In developing the Guidance Note, the institute seeks to empower neutrals in mediation, arbitration and a host of other dispute resolution mechanisms to rapidly evolve.¹⁶ It is good to note that all other Arbitral Institutions have issued guidance notes and measures to assist tribunals and parties on how to handle remote hearings.¹⁷

The advantage of the move to virtual hearings includes ease of access for parties and representatives by removing the need to travel to an arbitral venue. An arbitrator can ‘virtually hear’ a matter when sitting in their chambers, house or even kitchen.¹⁸ Thereby drastically decreasing the cost of doing an arbitration. These additional savings tend to revolve around the cost of travel, lodging expenses and venue reservation without sacrificing the important dynamic of face to face interaction.¹⁹ Further, virtual platforms can be accessed anytime, anywhere, and are not reliant upon the parties and the arbitrator convening on a shared schedule, so disputes can be moved through the system more quickly.²⁰

The fundamental requirements of arbitration of giving each party a reasonable opportunity of putting his case and dealing with that of his opponent while avoiding unnecessary delay or expense are practically harmonized with the ease and comfort of

guidelines-for-witness-conferencing-in-internationalarbitration/..> accessed on 13 December 2020.

¹⁶*Ibid.*

¹⁷See generally, *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, ICC (2020); Guidance Note on Nairobi Centre International Arbitration Facilities Booking Conditions and Use during the COVID-19 Period. The Australian Centre for International Commercial Arbitration (ACICA) published guidance on managing the impact of COVID-19 and the use of arbitration to mitigate risk. *Arbitration and COVID-19*, Hong Kong International Arbitration Centre (April 16, 2020), https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/News/Covid-19%20Joint%20Statement.pdf. *A Brief Guide to Online Hearings at ICSID*, International Centre for Settlement of Investment Disputes (March 23, 2020), <https://icsid.worldbank.org/en/Pages/News.aspx?CID=362>.

¹⁸Genn, (n 5).

¹⁹Shekhar Kumar, ‘Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation’, (2019) 27 J. Marshall J. Computer & Info. L. 81.

²⁰JTC Resource Bulletin, ‘ODR for Courts’, Version 2.0 (29 November 2017) <https://www.ncsc.org/__data/assets/pdf_file/0031/18499/2017-12-18-odr-for-courts-v2-final.pdf> accessed on 30 March 2020.

the parties, witnesses and arbitrator.²¹ While slight limitations remain depending on the quality of the equipment and platform employed by the tribunal, the general facial and physical expressions communicated by witnesses are rarely inhibited by use of such technology.²²

Moreover, virtual platforms can remove symbols that could hinder arbitration proceedings by discomforting one or both of the parties. A party to a dispute may feel suppressed in a face-to-face meeting due to many different reasons. Oftentimes the threat of physical violence, shyness in face-to-face settings, and socio-economic status cues can prevent a party from fully expressing their opinion. In a virtual hearing, the fact that the parties are completely isolated significantly decreases, if not completely eliminates, the fear that such settings would stifle a party. Furthermore, it has been said that part of the attraction of arbitration, traditionally, is that it moves dispute resolution from an identifiable place such as a courtroom, to any place. Arbitration is less concerned with the symbolism that a particular place might represent. Completely removing the necessity of a physical forum eliminates the possibility that symbolism is suggested to the parties; thus truly moving dispute resolution to anywhere.²³

A recent experimental study suggests that the credibility of a claimant was rated more highly when she had been seen and heard. There is growing interest in the impact of interpersonal communication through different media in a range of contexts - what happens when you have zoom or video links or no images at all? Research suggests that virtual communication can create a different relationship to that built on face to face communication. For example, in video conferences the viewer may take shortcuts when evaluating information presented by the speaker, making judgements based on how likeable they perceive the speaker to be rather than the quality of the arguments presented by the speaker.²⁴ It is also more difficult to concentrate for an extended amount of time, when staring at a screen.

²¹Solomon Ekwenze, 'Video Conferencing in Arbitration: An Overview' (11 November 2012) <<https://coou.edu.ng/resources/video-conferencing-in-arbitration.pdf>> accessed on 28 June 2020.

²²Negi, (n 13).

²³Kumar, (n 19).

²⁴Genn, (n 5).

Additionally, there might be some elements of hearing management that can be more challenging than when everyone is in one physical location. Virtual hearings may not be appropriate in cases where the credibility of the witness is at stake. It is much easier, goes the argument, to know when a witness is quite simply lying or misremembering facts if we can all see him in front of us in the room.²⁵ Also, conducting hearings remotely will make it significantly harder to ensure that the testifying witness is not secretly being advised or reading from hidden documents without the knowledge of the tribunal or opposing party.²⁶

In some instances, the ability of the counsel and tribunal to assess the answers of a witness may be impaired, particularly as video presence might exacerbate differences of culture or language potentially leading to a loss of nuance. Video technology may not be appropriate for dealing with complex evidence such as competing forensic accounting models, as it is not easy to put detailed spreadsheets to experts and witnesses in a way that can be adequately understood by tribunals sitting remotely.²⁷

It has also been argued that remote attendance will often mean that parties and counsel will lack the ability to pick up on the tribunal's collective body language and reaction to the evidence, particularly where the tribunal members are themselves attending virtually from different locations and are unable to visibly confer. This often indicates the weight the tribunal is giving to the evidence, which can inform the case strategy as the hearing progresses.²⁸ Further, the inability of counsel to meet in person with clients, witnesses and experts also makes virtual hearings less desirable. These formal meetings and the informal lunches and dinners that follow help counsel develop trust with their clients and witnesses. Something is inevitably lost when hearing preparations are done remotely.²⁹

²⁵Nappert, (n 11).

²⁶Wilske, (n 1).

²⁷Jason Hambury, 'Coronavirus will speed up the adoption of virtual arbitrations', <<https://www.pinsentmasons.com/out-law/analysis/coronavirus-speed-adoption-virtual-arbitration>> accessed on 3 July 2020.

²⁸*Ibid.*

²⁹Troutman Pepper, 'Virtual International Arbitration and the COVID-19 Pandemic: One Institution's Approach', (15 April 2020) <<https://www.lexology.com/library/detail.aspx?g=759b1c2a-bbed-4527-982d-fcedc6dc3bc5>> accessed on 4 July 2020.

Moreover, with too many participants and where individuals do not feel directly controlled by the arbitrators or judges, often a lack of discipline is visible. Many participants feel much more relaxed during virtual hearings, so relaxed that a Judge in a virtual court hearing in the US found it necessary to remind lawyers appearing in remote court hearings through Zoom that they should not dress like they were at a poolside nor should the lawyers remain in bed during the hearings.³⁰

Logistically, it requires an incredible amount of coordination to streamline the process, and to schedule an appropriate time for the hearing to take place. This is especially the case where the members of the tribunal, counsel, witnesses and experts are all located in different time zones. A start time of 10:00 am for one individual could mean a 4:00 am start time for another. To accommodate this, sitting times may be shorter, a single hearing may be split into several tranches, and a smaller number of witnesses may be called.³¹

It has also been argued that remote hearings may diminish the prospects of a settlement during the hearing as decision makers on both sides will not be physically present together, making the opportunity for commercial discussions during breaks less likely. Parties will need to think about other ways for decision makers to keep open any commercial dialogue, including the possibility of virtual chatrooms that allow them to speak privately during the hearing. On the contrary, modern video technology can accommodate multiple video streams, with different video chat rooms for each side's counsel and arbitrators, although these chat rooms cannot completely replicate the back-and-forth sidebars, comments, and attendant camaraderie that accompany a fully in-person hearing.³² What happens where tribunals decide to proceed with a remote hearing without the parties' agreement, or where a party has objected, this may give rise to a potential challenge.³³ This concern will be addressed in the next part of this paper.

Although, whether being able literally to see and hear parties and witnesses assists the tribunal in assessing credibility is highly contested. Some arbitrators think it is essential. Others think that not only is it not essential, but that it is misleading, since the best liars

³⁰ Wilske, (n 1).

³¹Alex Lo, 'Virtual Hearings and Alternative Arbitral Procedures in the COVID-19 Era: Efficiency, Due Process, and Other Considerations' (2020) 13(1) *Contemporary Asia Arbitration Journal* 85-98

³²Nappert, (n 11).

³³Hambury, (n 24).

are precisely those that are most convincing. Experimental research supports the assertion that arbitrators do little better than chance in detecting lies, and that factors such as appearance, eye contact and physical tricks can be misleading in assessing credibility.³⁴

But it is at this juncture in the development of technology in arbitration that the sort of views highlighted above expose deeper underlying beliefs. The newest wave of high definition video conferencing platforms and equipment provide as clear a picture of a participant on the screen as one would get if the parties were sitting right next to each other in the room. The participant's body language, facial expressions, and voice tone are, if anything, magnified by the medium of the video conference. It is no longer tenable with this kind of high definition video to object that one cannot process a witness's gestures, non-verbal and subliminal cues.³⁵ However, the degree of difficulty in monitoring every witnesses at all times without causing any substantial disruption and delays to the proceedings is much higher (not to mention that the technology has its limits and blind spots). It would also be harder for tribunals to enforce any orders for the sequestration of witnesses.³⁶

Further, practitioners have suggested that technological solutions, such as a rotating camera that is operated by the tribunal or a camera that can zoom out to show the surroundings where a witness is testifying, may be able to mitigate the concern that it is difficult for a cross examiner and the tribunal to monitor whether the witness is being passed notes or reading from hidden document or assisted by others off-camera.³⁷

In most virtual proceedings the parties (or one of the parties) will wish to maintain all aspects of the proceedings private. There is concern that the Internet being an open network, communications through e-mail or via a website platform may be inherently less secure than mail, fax or telephone. In particular Zoom, one well known provider of video conferencing services, received a lot of criticism because of privacy issues.³⁸ There is also a risk of unauthorised persons intercepting such communications transmitted over the internet and hackers may break into computers connected to the Internet. An example of one such technique to gain unauthorised access is spoofing, the

³⁴Genn, (n 5).

³⁵Nappert, (n 10).

³⁶Lo, (n 31).

³⁷*Ibid.*

³⁸Wilske, (n 1).

unauthorised person assuming the identity of an existing authorised user to access confidential information. Sniffer packages are also used to intercept and manipulate particular data. More secure are closed systems, which are screened from the Internet. Instead of using the Internet on public networks, practitioners are urged to use closed systems with dedicated private lines to transmit communications as they are more secure.³⁹

As technology is developing, the world faces a prospect of even more immersive and realistic technology to simulate in-person interaction. We are on the verge of a revolution in virtual reality technology. Some of technology titans, such as Facebook, Google and Microsoft are about to release virtual reality headsets that will represent a transformative change in current technology. These technology giants are exploring to develop the cheapest and most realistic devices. The first such headsets are now useful for video games than for virtual hearings. But it is unlikely to take long before virtual reality headsets can effectively replace video conferences as proxies for in-person meetings. With their three-dimensional, immersive quality, the headsets will provide a more realistic, real-time feel to a virtual meeting than even today's high-definition video conferences platforms.⁴⁰

All that would be left, then, as a potential objection to virtual hearings, is an indescribable preference for the "feel" of dealing with a witness in person rather than remotely. The notion behind the "feel" is that there is an ineffable component to face to face human contact, in which the participants are afforded a better chance to evaluate and assess the qualities of their interlocutors than they would be by phone, video, or hologram.⁴¹

Even before Covid-19 E-briefs had slowly begun becoming popular in the East African region. An e-brief is an interactive version of the submissions. A party or a counsel in arbitration does not have to wait until the arbitral proceedings' hearing phase to persuasively apply technology. Rather than searching through hundreds of PDF files or boxes of paper, an E-brief enables the tribunal to click on hyperlinks from the cites in the brief to all the referenced exhibits, legal authorities, witness statements and expert

³⁹Julia Hörnle, 'Online Dispute Resolution-The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration', 17th BILETA Annual Conference, 5 and 6 April 2002, Free University, Amsterdam.

⁴⁰Nappert, (n 11).

⁴¹*Ibid.*

reports in an easily accessible digital format.⁴² The E-brief is now becoming more popular especially with the following challenges affecting the paper based systems at this times of the Covid-19. The regions Governments public health directives are encouraging people and professionals to conduct most of their business electronically. Furthermore, paper files are cumbersome to organize, difficult to retrieve quickly, and are subject to the access limitations of normal business hours.⁴³

In this day and era of working from home, paper files are usually only available to one person at a time, limiting the ability of a panel of arbitrators or their assistant to access or work on files at home. Paper files require multiple copies to file, distribute, maintain and store, all of which must be done manually with a risk that files will be lost or misfiled. E-briefs provide the perfect affordable solution for the parties, counsel and arbitrators to easily review all submissions from the statement of claim through post-hearing briefs in a joined-up manner. In a nutshell, these submissions provide the tribunal an opportunity to examine the submissions and evidence in a more holistic fashion thus enabling him to come up with a prudent award.⁴⁴

3. Legal Framework Governing Arbitral Virtual Hearings In East Africa

As regards to the procedural fairness requirement of arbitration, the starting point for consideration must be the legal framework within which the arbitral proceedings and hearings take place.⁴⁵ Many arbitration rules explicitly stipulate that an arbitral tribunal shall hold a hearing if so requested by a party. The traditional understanding and practice until recently has been that “hearing” means a physical hearing.⁴⁶

Article 159 of the Constitution of Kenya recognises ADR as an avenue to access justice. It provides that in the exercise of judicial authority, courts and tribunals shall be guided by alternative forms of dispute resolution including reconciliation, mediation arbitration and traditional dispute resolution mechanisms.⁴⁷ It further bestows responsibility on the state to ensure access to justice for all persons at a reasonable fee that shall not impede

⁴²Muigua, (n 12).

⁴³*Ibid.*

⁴⁴*Ibid.*

⁴⁵David Bateson, ‘Virtual Arbitration: The Impact of Covid-19’(2020) 9 Indian Journal of Arbitration Law, 1 <http://ijal.in/sites/default/files/Vol9Issue1/Amnd/David_Bateson-Virtual_Arbitration_The_Impact_of_COVID-19.pdf> (accessed on 3rd December 2020).

⁴⁶ Wilske, (n 1).

⁴⁷Constitution of Kenya (2010). Art. 159.

them.⁴⁸ It is clear from the above provisions that the Constitution promotes access to justice through ADR. From the language applied in the Constitution, it does not limit alternative means to those expressly provided. This means that the Constitution is able to accommodate virtual methods of dispute resolution despite the fact that it has not been expressly provided for as long as it falls in line with the promotion of access to justice.⁴⁹

In Kenya, the Arbitration Act of 1995 governs the arbitration practice.⁵⁰ In Uganda, the Arbitration and Conciliation Act governs arbitrations.⁵¹ In Tanzania, the Arbitration Act of 2020 governs arbitrations in the Country.⁵² Rwanda's Law on Arbitration and Conciliation in Commercial Matters applies to both domestic and international commercial arbitration and conciliation.⁵³ However, in Burundi although arbitration is supported by law, there is no specific law on the same. The Burundian Civil Procedure Code of 2005 introduced arbitration in the country.⁵⁴

The above stated Arbitration Acts pave way for arbitral proceedings and the enforcement of arbitral awards by the national courts in the East African region. They also outline the instances where the courts can intervene in arbitration matters.⁵⁵ An arbitration

⁴⁸Constitution of Kenya (2010), Art. 48.

⁴⁹James Ngotho Kariuki, 'Embracing Online Dispute Resolution as an Avenue to Justice in Kenya', Thesis Submitted in partial fulfilment of the requirements of the Bachelor of Laws degree, (Strathmore University Law School, January 2017).

⁵⁰ The Arbitration Act, Chapter 49 of the Laws of Kenya. The Act commenced on 2nd January 1995. It applies to domestic arbitration and international arbitrations.

⁵¹Chapter 4 of the Laws of Uganda. The Act commenced on 19 May 2020. It governs **domestic** arbitration, international commercial arbitration and enforcement of foreign arbitral awards, it defines the law relating to conciliation of disputes and to make other provision relating to the foregoing.

⁵²Act Number 2 of 2020. It was assented to by the Tanzanian President on 14 February 2020. The Act's preamble states that it provides for conduct relating to domestic arbitration, international arbitration and enforcement of foreign arbitral awards, repeal of the Arbitration Act and to provide for matters relating to or incidental thereto.

⁵³ Law No. 005/2008 of 12/02/2008, Official Gazette, Special of 6.03.2008. see Article 2 of the Act.

⁵⁴ Kariuki Muigua, 'Arbitration Institutions in East Africa' in *The Transformation of Arbitration in Africa; The Role of Arbitral Institutions* edited by Emilia Onyema, (2016) Kluwer Law International BV, 75 – 91
<https://profiles.uonbi.ac.ke/kariuki_muigua/files/05_onyema_ttaa_ch.4_kariuki_muigua.pdf> accessed on 5 July 2020.

⁵⁵*Ibid.*

agreement should be in writing.⁵⁶ The term ‘writing’ includes an exchange of electronic mail or other means of telecommunication which provides a record of the agreement.⁵⁷

Further, the Kenyan Act requires the parties to an arbitration to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.⁵⁸ The parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.⁵⁹ An interpretation of this Act and sections reveal that technology and virtual methods and procedures can be incorporated in the proceedings as they can assist in expediting the arbitral process as demonstrated in the previous part of this paper.⁶⁰ From the foregoing, the Act tries to distinguish between oral hearings and written proceedings. Considering, that the meaning of “oral hearing” cannot be equated strictly with an in-person hearing, it follows that the right to be heard does not guarantee a right to an oral, in person hearing in all circumstances. The exchange of evidence or arguments can be done orally in both in-person hearing and virtually with the difference that the communication is transmitted either with or without technological tools.⁶¹

Therefore, the current legal and policy frameworks in the region on arbitration do not expressly provide while at the same time do not categorically rule out the use of new technology in arbitral proceedings. This is because both the decision to arbitrate and the manner in which the arbitration is conducted are contractually based, which confers on the parties and the arbitrator significant operational freedom. Indeed, some jurisdictions have expressly embraced and encouraged the use of technology in arbitration proceedings to not only increase efficiency but also save on time and costs.⁶²

⁵⁶The Kenyan Arbitration Act, s 4; The Tanzania Arbitration Act, 2020, ss 46, 68, 69, 70, 72, 73.

⁵⁷The Kenyan Arbitration Act, s 9; The Rwandese law on Arbitration and Conciliation in commercial matters, Art. 9; The Ugandan the Arbitration and Conciliation Acts 3; The Tanzania Arbitration Act, 2020, s 8(7) states that “References in this Act to anything being written or in writing include its being recorded by any means”.

⁵⁸The Kenyan Arbitration Act, s19A; The Rwandese law on Arbitration and Conciliation in commercial matters, Art 37; The Tanzania Arbitration Act, 2020, s 35.

⁵⁹See The Kenyan Arbitration Act, s 20; The Rwandese law on Arbitration and Conciliation in commercial matters, Art 30; The Ugandan the Arbitration and Conciliation Act, s 19; The Tanzania Arbitration Act, 2020, s 36. Further Section 20 of the Ugandan the Arbitration and Conciliation Act provides that If the parties fail to agree under subsection (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the costs and the circumstances of the case and to the convenience of the parties.

⁶⁰Kariuki, (n 54).

⁶¹Bateson, (n 45).

⁶²Muigua (n 12).

Whether and how technology may be appropriate to a particular case will depend on many factors, including, for example, the parties' agreements and preferences, the tribunal's preferences, the amount in dispute, the parties' respective budgets, the disputed issues in the case, and the technology available to the parties and the tribunal.⁶³ The question posed earlier in the previous part of this paper is what happens if the parties do not agree on a virtual hearing? It has been suggested that there are quite some situations where an arbitral tribunal is well advised not to proceed virtually without the parties' consent. This is particularly the case where the applicable law or the governing procedural rules (institutional rules) are silent on the issue of virtual hearings and no direct inference can be made which would allow an arbitral tribunal to proceed with a virtual hearing despite a party's objection.⁶⁴ On this issue, The International Chamber of Commercial Guidance Note on possible Measures Aimed at Mitigating the Effects of the Covid-19 Pandemic guides that, if a tribunal determines to proceed with a virtual hearing without party agreement, or over party objection, it should carefully consider the relevant circumstances, assess whether the award will be enforceable at law and provides reasons for that determination.⁶⁵ Possibly, one might argue that the parties' insistence on a physical hearing might significantly delay the arbitration (especially in the current pandemic of undetermined length) and thus clash with the tribunal's obligation to conduct the proceedings expeditiously and efficiently.⁶⁶

Nonetheless, if the delay is due to the parties' agreement on conducting the arbitration in a certain manner (e.g. a physical hearing), upholding party autonomy seems more important than insisting on expeditiousness. This situation is not dissimilar to those in which parties agree on a (too) lengthy procedural timetable.⁶⁷

Although, it may be desirable that the East African region Arbitration Acts emphasize on the use and role of technology like what the United Arab Emirates has done in its Arbitration Law, 2018.⁶⁸ The law has several references to the use of modern means of

⁶³International Chamber of Commerce, *Report of the ICC Commission on Arbitration and ADR Task Force on the Use of Information Technology in International Arbitration*, (October 2017) <<https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf>> accessed on 29 June 2020.

⁶⁴ Wilske, (n 1).

⁶⁵See<<https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/>> accessed on 6 December 2020.

⁶⁶Scherer, (n 14).

⁶⁷*Ibid.*

⁶⁸ Federal Law No. (6) of 2018 on Arbitration, United Arab Emirates.

communication. For example, Article 7(2) of the Act provides that, an arbitration agreement shall be deemed to be in writing if it is contained in a document signed by the parties or in an exchange of correspondence or other written means of communication or in the form of an electronic message in accordance with the applicable rules of the State concerning electronic transactions. Written correspondence can be deemed to have been delivered if sent, amongst other means, by email.⁶⁹ Article 28(2) provides that arbitral hearings and deliberations can be conducted by modern means of communication and electronic technology. In addition, Article 33(3) provides that hearing may be held through modern means of communication without the physical presence of the parties at the hearing. Pursuant to Article 35, the arbitral tribunal may question witnesses, including expert witnesses, through modern means of communication without their physical presence at the hearing. The emphasis on the use of technology will undoubtedly modernise arbitral proceedings in the UAE.⁷⁰

Similarly, Article 1072b(4) of the Dutch Civil Procedure Code provides that “[i]nstead of a personal appearance of a witness, an expert or a party, the arbitral tribunal may determine that the relevant person have direct contact with the arbitral tribunal and, insofar as applicable, with others, by electronic means,” adding that “[t]he arbitral tribunal shall determine, in consultation with those concerned, which electronic means shall be used to this end and in which manner this shall occur.”⁷¹

4. Emerging Issues in Arbitration in East Africa

The practicality of virtual hearings and use of technology in arbitrations in East Africa, is the current state regarding the social awareness of the citizens to such developments and even the use of technology. For example, current data shows that 22.6 per cent of Kenyans use the internet while 10.4 per cent use computers.⁷² Uganda's internet penetration has reached 42% with up to 19 million Ugandans now connected to the internet out of the total estimated population of the country that stands at 44.5 million

⁶⁹Arbitration Act, Art 24(1)(b).

⁷⁰Essam Al Tamimi and Sara Koleilat-Aranjo, ‘United Arab Emirates: Commentary on the UAE's New Arbitration Law’, (8 August 2018) <<http://www.mondaq.com/x/726276/Arbitration+Dispute+Resolution/Commentary+On+The+UAEs+New+Arbitration+Law>> accessed on 29 June 2020.

⁷¹ Dutch Civil Procedure Code, art. 1072b(4) as cited by Scherer, (n 66).

⁷²Frankline Sunday, ‘Report Says on in Five Kenyans has internet access’, *The Standard* (Nairobi 22 February 2020) available at <<https://www.standardmedia.co.ke/business/article/2001361388/report-says-one-in-five-kenyans-has-internet-access>> accessed on 3 July 2020.

people.⁷³ The internet penetration in Tanzania stood at 25% as at January 2020.⁷⁴ While in Rwanda the internet penetration is 25%.⁷⁵ This means that majority of the population have to resort to traditional methods of dispute resolution. Consequently, this may be a great impediment to the use of technology or virtual hearings in arbitrations.⁷⁶

Another emerging issue is the need to avoid technical failures from the onset and during the virtual hearings, combined with the new necessity to define who immediately addresses technical issues when everyone is in separate locations. Technical breakdowns are a real threat, but, in fact, the risk that they occur can be significantly reduced by implementing a strict set of chronological steps and measures such as testing the equipment beforehand, a test conference with all participants in advance, and fallback solutions in case of disruptions. With regard to technical assistance, virtual hearings might involve a new kind of tribunal secretary, who acts as a technical advisor participating and addressing all technical needs. Arbitration centers offering virtual hearings in the region will have to start including such a technological operator in their service. All of these measures should be determined by a procedural order of the tribunal and, if possible, in agreement with the parties.⁷⁷

Additionally, there is a general assumption that technology always leads to greater efficiency and less expense and thus ultimately decreasing the cost of the proceedings. In reality, the costs and efficiency in a particular case will depend on various factors, such as the technological solutions selected, how and when they are implemented, the associated costs, and the technology sophistication and experience of the parties, the tribunal, and other relevant parties involved in the arbitration.⁷⁸ However, the tribunal is ultimately responsible for the efficiency and integrity of the proceedings, and may proactively encourage the parties to think more fully about the costs and benefits of the proposed technology and whether those costs and benefits would be proportionate to the value in dispute. If the parties do not agree on the technology that one party proposes to

⁷³Michael Kanabi, '42% of Uganda's population now connected to the internet', *NewVision*, (Kmapala, 30 March 2020) <<https://www.newvision.co.ug/news/1517233/-uganda-population-connected-internet>> accessed on 4 July 2020.

⁷⁴See Digital 2020: Tanzania, (18 February 2020) <<https://datareportal.com/reports/digital-2020-tanzania>> accessed 4 July 2020.

⁷⁵ See Digital 2020: Rwanda, (18 February 2020) <<https://datareportal.com/reports/digital-2020-rwanda>> accessed on 5 July 2020.

⁷⁶Kariuki, (n 54).

⁷⁷Bateson, (n 45).

⁷⁸International Chamber of Commerce, (n 63).

use, the tribunal has to consider the costs, benefits, and proportionality of the proposed technology solution and whether the case is simple, complex or somewhere in-between⁷⁹.

The tribunal should keep in mind the fundamental principle of fairness to all parties. Although each party should have a full and fair opportunity to present its case, no party should be allowed to insist on a particular technology solution in order to make the proceedings more expensive or difficult for another party. Thus, the tribunal might deny a request for directions to use a specific form of technology if it finds that the requesting party's preference for that solution is motivated by a desire to cause the other party to incur unreasonable costs or where the tribunal concludes that a less expensive solution would work just as well – both for the parties and the tribunal. Conversely, the tribunal should condemn a party's attempt to complicate or obstruct the proceedings by unjustifiably resisting IT use.⁸⁰

Often, bad times for the economy means good times for dispute resolution practitioners. A number of practitioners expect a surge of new arbitrations in the aftermath of Covid-19 more so for commercial arbitrations.⁸¹ This is because the severe government restrictions and regulations have forced many businesses to close temporarily and some permanently. Further, parties whose obligations under pre-existing contracts have been rendered either impossible or burdensome or costlier will be looking for a way to avoid them. On the same footing, their contractual partners might insist on the contracts being performed. Accordingly, it does not take a prophet to predict that in a few years, there will be an avalanche of caseload dealing with issues such as *force majeure*, material adverse events, frustration of purpose or other legal doctrines coming into play as a result of Covid 19.⁸² There will be a lot of legal and arbitration literature on *force majeure* and other doctrines on avoiding contractual duties. For certain standard situations, legislature or other government related entities might intervene. Issuing *force majeure* certificates is a common practice of commercial chambers in certain parts of the world. These certificates are supposed to be proof of the existence of relevant events that may constitute force majeure and impinge on a party's capacity to perform a contract. For example, Chinese Chambers of Industry and Commerce is readily handing out official

⁷⁹Bateson, (n 45).

⁸⁰ *Ibid.*

⁸¹ Wilske, (n 1).

⁸² *Ibid.*

documents certifying a *force majeure* event. Although these certificates are not legal documents and do not have direct executive or legal effects.

The parties will also be more demanding in times of crises when liquidity is an issue as businesses will be under dramatically increased pressure to save costs including the costs of dispute resolution. Two consequences are predictable; one is that parties to potential business dispute will look around for alternative dispute resolution methods that are less costly than conventional arbitration. Second, where conventional arbitration remains the preferred tool or the one that must ultimately be resorted to, the demand for more time and cost effective arbitral proceedings will definitely rise.⁸³

Conference-goers can be assured that for quite some time the topic “Covid-19” will be indispensable. As a matter of fact, many webinars provide a gist of what will be discussed at arbitration conferences in the future. Not only newsletters and websites are spreading like mushrooms even legal journals have been created to deal with Covid-19 and its legal ramifications.⁸⁴

Lastly, will traditional arbitration conferences survive post Covid-19. For pure information purposes, Webinars might serve the purpose. However, a real arbitration conference with a real world physical meeting of practitioners from different generations, industries and all levels of expertise creates a platform for new formal exchange of information, experiences and networking within the arbitration family. A webinar in an all virtual arbitration world will never provide for opportunities to bump into arbitration stars at a buffet lunch line and to build up shortlists and blacklists of arbitrator candidates simply by watching these candidates at a cocktail bar after the conference is over.⁸⁵

5. Conclusion

As the paper has shown, from its early beginnings, one of the advantages of arbitration was its character of being a dispute resolution mechanism that can adapt to the specific needs of a dispute and its parties. Historically, arbitration was a pioneer of procedural and technological innovation among other things such as electronic filing and service of documents, long before such features were introduced in court proceedings.⁸⁶ It is not

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Bateson, (n 45).

hard to predict that once the arbitration practice makes it to the other side of the Covid-19 virus, there will be much greater use of technology.⁸⁷

Historical arguments around seeing the white of a witness' eyes on cross-examination and misguided invocations of restrictions on the ability to hold hearings remotely must give way to pragmatism now more than ever.⁸⁸ The use of technologies that allow virtual contact between people, while dispensing with personal contact and the time-consuming travel that this contact often requires, is something that seems irreversible that will forever transform the way arbitral justice is delivered. As more people work remotely, the use of virtual technologies will improve in terms of reliability, efficiency and cost to meet the higher demand.⁸⁹

At the end of the day, Covid-19 will certainly not change the core elements of arbitration namely the search for an impartial, independent and fair and just decision making mechanism for determining disputes through a voluntary and flexible process.

⁸⁷ Wilske, (n 1).

⁸⁸ Nassif BouMalhab and Nour Al Jaghoub, 'Covid-19 Middle East Arbitration: Weathering the Covid-19 Storm', available at <<https://www.clydeco.com/en/insights/2020/04/covid-19-arbitration-weathering-the-covid-19-storm>> accessed on 5 July 2020.

⁸⁹ Bateson, (n 45).

Are Arbitrators Employees? A critical analysis of the judgments of the English courts in Jivraj v Hashwani and what it means for Kenya

*By: Aleem Visram**

“Being an arbitrator requires parties to place confidence in the arbitrator...but that would not make an arbitrator any different from any other person performing a service ...An arbitrator is a human being like everyone else. He is not from Mars...an arbitrator is in fact employed by the parties to provide his services, which is to determine the dispute.”¹

Introduction:

The English Courts recently grappled with the issue of whether arbitrators are employees for the purposes of the Employment Equality Regulations 2003² (“the Regulations”) and the Employment Equality Act 2010 (“the EEA”) in order to determine whether or not the provisions relating to discrimination against employees are applicable to arbitrators.

This essay will critically examine the English court’s decision in the case of *Hashwani vs Jivraj*. The author will illustrate the key points as to why arbitrators are not employees for the purposes of the Regulations and the EEA. The author will also offer a Kenyan perspective supporting the findings of the English courts and argue that the principles enunciated by the High Court and UK Supreme Court broadly reflect the applicable law in Kenya. This essay will also identify key issues of concern which have been brought to light in the various judgments including: the role of the arbitrator; the rights of parties to select an arbitrator of their choice; the incompatibility of international institutional and national arbitration rules with the Regulations and the EEA; the likelihood of a diminished choice of London as the seat of international arbitration if arbitrators are classified as employees under English Law; and challenges that lie ahead.

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¹ Zaiwalla 2011:281

² S.I. 2003/1660

The Judgments:

The High Court

The High Court determined that arbitrators are not employees for the purposes of the Regulations or the Act. In reaching this decision, Steel J. examined the role of an arbitrator, specifically the rights, powers and duties of an arbitrator, which he stated are embedded in the unique contractual relationship between the arbitrator and the parties as well as in the Regulations.

Steel J. found the role of the arbitrator and the Regulations to be incompatible with the notion of the arbitrator as an employee. He also determined that the term of the arbitration agreement requiring arbitrators to be members of the Ismaili community was valid and did not breach the Regulations; the Human Rights Act 1998; or public policy at Common Law. Steel J. noted that in the event he was wrong on this count, then in any event, the requirement that the arbitrators be members of the Ismaili community constituted a genuine occupational requirement under the Regulations on the basis that it was proportionate requirement in the circumstances. Finally, the judge found that the requirement that the arbitrators should be Ismaili could not be severed from the rest of the arbitration agreement without the entire clause being invalidated.³

Steel J. paid special attention to the role of the arbitrator and the unique contract between the arbitrator and the parties. He noted that unlike other employees, the arbitrator enjoys a statutory right of immunity from suit; owes a duty to act fairly and equally to all the parties; and cannot be removed without an order from the court. In this way, he concludes that the position of an arbitrator is unique and if any likeness can be drawn, it is more akin to a judge.

In drawing the above parallel, Steel J. noted, that like a Judge, the arbitrator must act in an independent and impartial manner towards the parties which is most unlike the behaviour of an employee, who should act in a way that further the interests of his employer. Steel J. was however unable to reconcile the difference between an arbitrator and a judge in so far as judges are clearly not employees since they are appointed by the Crown to hold office whereas arbitrators are appointed by virtue of a contract to render service (more akin to a salary). In this sense, unlike Judges, arbitrators do not hold constitutional office but rather are contracted to render a service for fees.

³ Style & Cleobury 2011: 565

Steel J. further noted that although arbitrators are appointed by contract, their position differed from employees since the arbitrator is independent; has no client; and she cannot be given instructions on how to work, or told what outcome is to be achieved. Justice Steel remarked that it is this independence from the parties that is precisely what enables the arbitrator to perform his duties, and that the same are irreconcilable with the notion attached to the role of an employee.

In the present case, Steel J. noted that the Ismaili arbitrators were not even charging fees for their service, making them even less likely to be viewed as employees who are ordinarily paid for their work. This consideration, while relevant to the case at hand, does not, in the author's opinion affect the position of arbitrators (as independent service providers) whether or not they are paid. Quoting Mustill and Boyd, Steel J. remarked that the courts ought to recognize the unique nature of the arbitrator rather than "force the relationship between the arbitrator and the parties into an uncongenial theoretical framework..." He further urged the courts to have regard to the "public interest attaching to the status of the arbitrator."⁴

Considering the unique role of an arbitrator, Justice Steel found the Regulations difficult to apply to such a person. He cited the examples of Regulations 6 and 9 in particular (relating to the place of work), remarking that the provisions raise numerous challenges and questions which are impossible to answer in an international commercial arbitration. Similarly, he noted the absurdity of Regulation 22 (relating to liability of employers and principals), which if applicable, would impose vicarious liability on the parties for the (discriminatory) actions of the arbitrator; and difficulties arising from Regulations 27 and 28 (relating to jurisdiction of employment tribunals) which if applicable, would deny the High Court of England jurisdiction over employment related arbitration claims, and negate certain provisions of the English Arbitration Act (1996) relating to removal of arbitrators, and challenge to arbitral awards.

The Court of Appeal

The Court of Appeal reached the opposite conclusion from Steel J. and found that arbitrators are employees for the purposes of the Regulations and the EAA. The court held that the appointment of an arbitrator was a "contract to personally do any work"⁵

⁴ 2009 EWHC 1364 (COMM) at [24]

⁵ [2010] ALL ER 302 at [16]

and therefore “the provision of his service falls within the definition of employment”⁶ under Regulation 2(3). As a result, the restriction of eligibility (of the arbitral tribunal) to members of the Ismaili community amounted to unlawful discrimination on religious grounds.⁷ The court also found that being a member of the Ismaili community was not a genuine occupational requirement of the job within the exception in Regulation 7(3), since the arbitration clause did not empower the tribunal to act *ex aequo et bono*.⁸ The court further held that severing the requirement that the arbitrators be members of the Ismaili community would also invalidate the arbitration agreement since this would be substantially different from what the parties had intended.

The court of appeal took a different view relating to the role of the arbitrators, stating that an arbitrator’s role is:

*“no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will, consulting a doctor about a particular ailment or an accountant about a tax return. Since an arbitrator (or any professional person) contracts to do work personally, the provision of his services falls within the definition of “employment”, and it follows that his appointor must be an employer within the meaning of Regulation 6(1)”.*⁹

It is however the author’s view that the courts analogy as stated above fails to consider institutional arbitrations which are of an entirely different contractual nature. In such appointments, the parties appoint and pay fees to an institution rather than the arbitrator. Secondly, it is the institution who is the “appointer” of the arbitrator rather than the parties. If the courts rational is applied to this situation, then the institution would employ the arbitrator, not the parties.

On the issue of ‘no fees payable’ to the Ismaili arbitrators, the court stated that even if an arbitrator is not paid a fee for her work, she is still an employee, since what is fundamental in arbitration, is that it rests on an agreement between the arbitrator and the parties, and accordingly, there was sufficient consideration to support a contract

⁶ *Ibid*

⁷ *Ibid* at [26]

⁸ [2010] EWCA Civ 712 at [29]

⁹ *Ibid* at [16]

between the parties.¹⁰

The Supreme Court (“UKSC”)

It is worth noting that by the time the matter was heard by the UKSC, the Regulations had been revoked by Section 211 and scheduled 27 of the EEA, however, the issues in the appeal were not affected by the revocation of the Regulations.

The UKSC determined, once and for all, holding their decision to be *acte clair*, that arbitrators are not employees within the Regulations or the EEA.¹¹ The court found that the requirement that the tribunal be comprised of members of the Ismaili community did not preclude other arbitrators from having *access* to employment; self-employment; or occupation, within the meaning of the Regulations.¹² Finally, the court held that the genuine occupational requirement test was inapplicable in the circumstances but in the event the same should apply it would be genuine, legitimate and proportionate to apply the same.¹³

In reaching the above decision, Lord Clarke paid considerable attention to the ECJ decision in *Allonby*¹⁴, which followed the principles laid down in *Lawrie-Blum*¹⁵, in which the court distinguished the difference between an individual who is a “worker”, thus employed from one who is “an independent provider of services” and who is not “under the direction of another person in return for which he receives remuneration.”¹⁶

Lord Clarke also considered the cases of *Percy*¹⁷ and *O'Brien*¹⁸, in which the House of Lords and UKSC applied *Allonby* asking the same question: whether the individual performed services for *and under the direction of* another person in return for which they received remuneration; or, whether or not he or she was an independent provider of services who is not in a relationship of subordination with the recipient of the services provided.

¹⁰ *Ibid* at [14]

¹¹ Buxton 2012:5

¹² [2011] UKSC 40 at [49]

¹³ 2011 1 WLR 1872 at [68]

¹⁴ [2004] ICR 1328

¹⁵ [1987] ICR 483

¹⁶ *Ibid*

¹⁷ [2005] UKHL 73

¹⁸ [2010] UKSC 34

Lord Clarke focused on the words “under the direction of another person” and concluded that those who are not *under* direction or in a position of subordination to those that receive the services from them, are not workers under the Regulations. He concluded that one must look at the circumstances in each particular case and consider the relationship between the parties in order to determine whether or not he or she is under the direction of another. Lord Clarke stated:

“it is in my opinion plain that the arbitrators' role is not one of employment under a contract personally to do work... Although he renders personal services ...he does not perform those services or earn his fees...under the direction of the parties...He is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services.”¹⁹

Lord Clarke further noted that the role of the arbitrator is independent from the parties and an arbitrator has functions and duties which require him to rise above partisan interests rather than to act in a way that furthers the particular interests of either party.²⁰ The Justice remarked that this role is consistent with the position set out in the rules of the International Chamber of Commerce (“ICC”) which articulates the role of an arbitrator as a quasi-judicial officer.

Lord Clarke noted that the English Arbitration Act (1996) contains certain sections, notably, Sections 33, 34, 40, 23, and 24, which are all incompatible with the premise of an arbitrator as being subordinate to the parties. He noted that the same applies to certain provisions in the United Nations Commission on International Trade Law (UNCITRAL) as well as other institutional arbitration rules, and remarked that the Regulations pose major challenges for interpretation if arbitrators were to fall under those provisions.

Lord Mance, agreeing with Lord Clarke²¹ referred to the 1904 case of the German Reichsgericht which supports the argument that arbitrators are not employees, noting that:

¹⁹ [2011] UKSC 40 at [40]

²⁰ *Ibid* at [41]

²¹ Dundas 2011

*“It does not seem permissible to treat the arbitrator as equivalent to a representative or an employee or an entrepreneur. His office has ... an entirely special character, which distinguishes him from other persons handling the affairs of third parties.”*²²

Lord Mance, made further reference to Gary B. Born’s work, which identified the arbitrator's contract as a sui generis agreement: “...in part because this characterization accords with the specialized and distinct nature of the arbitrator's mandate.... that ...differs ... from the provision of many other services and consists in the performance of a relatively sui generis adjudicatory function.”²³

Key Issues arising out of the Judgments and a Kenyan Perspective:

Party Autonomy

A fundamental right in arbitration is the right²⁴ of parties to select an arbitrator of their choice. In this regard, Redfern & Hunter have remarked that “nothing is more important than choosing the right arbitral tribunal. It is a choice which is important not only for the parties to the particular dispute, but also for the reputation and standing for the arbitral process itself”.²⁵ In addition, Onyema notes that a major advantage of arbitration over litigation is that “parties can and do select or choose their own dispute resolver or judge called an arbitrator.”²⁶ This fundamental right would be undermined²⁷ if arbitrators were to be classified as employees within the Regulations or EEA since arbitrators would be subject to the provisions on discrimination, specifically, issues of nationality; community; and religion would no longer be acceptable considerations in selection of an arbitrator. Such provisions would a constrain party autonomy by subjecting parties to the additional burden of having to prove that their selection meets the “genuine occupational requirement” and that it is “proportionate” to apply this exemption, as stipulated in the Regulations.

In this regard, Yang similarly argued that the decision by the court of appeal “has the potential to restrict the power of the parties to agree on the composition of the arbitral

²² RGZ 59, 247 (1904)

²³ Born 2009

²⁴ *Siemens AG & BKMI Industrienlagen GmbH vs Dutco Construction Co*

²⁵ Redfern & Hunter 1999: 190

²⁶ Onyema

²⁷ Tumbridge 2011

tribunal in a commercial contract, thereby altering party autonomy, one of the fundamental principles of international arbitration”²⁸

Role and Powers of the Arbitrator

It is the author’s view that the High Court got it right from the outset. Steel J. correctly found that the powers and role of the arbitrator are incompatible with the notion of an employee. In the Kenyan context, a reading of the Arbitration Act, No. 4 of 1995 (“the KAA”) illustrates the same. A few examples of the unique role and powers may be found in the following provisions: Section 16B, expressly bestows an arbitrator with immunity for all acts or omissions done in good faith; Section 19 places a duty of equal treatment of parties; Section 20 gives the arbitrator powers to determine procedure, making him the master over proceedings; Section 26 provides for the power to sanction the parties for default in compliance; Section 32 creates a lien over fees allowing the arbitrator to withhold delivery of the award in absence of payment of his fees; and Sections 13 and 14 provide a detailed procedure relating to challenge and removal of the arbitrator in the event a party wishes to terminate an arbitrators mandate, ultimately requiring a determination of the challenge and order of the court in order to effect his removal.

In addition to the above, in Kenya, it is arguable that while arbitrator’s do not hold constitutional office like judges, the Constitution of Kenya, 2010 (“the Constitution”) has nevertheless created a special status for arbitrators which exalts them beyond that of an ordinary employee. This argument gains credence arising from the express language set out in Chapter 10 of the Constitution, entitled ‘Judicial Authority’, which at Article 159(2)(c), constitutionally embeds the status of an arbitrator by providing for the promotion of arbitration as an alternative dispute resolution mechanism.

A reading of the Employment Act (No 11 of 2007) in Kenya, together with case law provides a similar test to determine whether a person is an employee or an independent service provider. In the case of *Geoffrey Makana Asenyo vs Nakuru Water & Sanitation Services Company (2014) eKLR*, the court set the tests to determine an employee and an independent contractor as follows;

- (a) *The control test; where an employee is a person who is subject to the command of the master as to the manner in which he or she shall do the work;*

²⁸ Yang 2011: 253

- (b) *The integration test; in which the employee is subjected to the rules and procedures of the employer rather than personal command;*
- (c) *The test of economic or business reality; which takes into account whether the employee is in the business of his or her own account or works for another person, the employer who takes the ultimate risk of loss or chance of profit;*
- (d) *Mutuality of obligation; in which the parties make commitments to maintain the employment relationship over time. Under this test, a contract of service is for essentially services in return for wages, and secondly mutual promises for future performance.*

A reading of the above reflects the same principles set out by the UKSC and squarely places an arbitrator in the position of an independent contractor rather than an employee. This view is supported by Redfern and Hunter who enumerated the various powers of an arbitrator as inter alia: the power to determine the applicable law and seat of the arbitration; determine the language of the arbitration; force a party to produce documents; subpoena a witness under control of a party to the arbitration; administer oaths; force a party to produce the subject matter of dispute; and provide interim measures.²⁹ In addition, Redfern and Hunter noted that the parties are able to only impose limited obligations on the arbitrator, and that such limited duties are further subject to agreement by the arbitrator; and are far less onerous than the enormous powers an arbitrator wields over the parties over the course of the arbitral proceedings.³⁰

In this regard, the role of the arbitrator is more *quasi-judicial* in nature than that of an employee. In case of *Sutcliff v Thackrah*, Lord Salmon summed up the position well, stating that: “arbitrators are in much the same position as Judges, in that they carry out more or less the same function.”³¹

Similarly, in *Bernard Von Hoffman* the European Court of Justice noted the difference between the role of an arbitrator from that of a lawyer stating that “whereas an attempt to reach an agreement by a lawyer taking part in a negotiation is habitually based on expediency and weighing up of interests, the settlement of a dispute by an arbitrator is based on considerations of justice and equity.”³²

²⁹ Blackaby & Partasides with Redfern & Hunter (2009): 317-319

³⁰ *Ibid*

³¹ [1974] A.C. 727,758 (H.L.)

³² [1997] Case C-145/96

International Institutional Rules

A look at some international institutional arbitration rules further supports the notion that arbitrators are not employees. The rules emphasize the choice of a neutral arbitrator having regard to his nationality and other considerations. Nationality is a legitimate consideration in the process of selection, making it clear that arbitrators are not subject to same rules as other employees (which would ordinarily amount to discrimination). Examples of such rules include: CI Arb Arbitration Rules, rule 6(5), UNICITRAL Model Law Rules, Article 6 (4), ICSID Rules at Article 38, LCIA Arbitration Rules at Article s 5 and 6, and ICC Arbitration Rules, rule 9, and the NCIA Arbitration Rules, rule 9. The said rules would likely contravene many national anti-discrimination laws in jurisdictions that may define arbitrators as employees.

Practitioners and Communities

In the UK, prior to the decision by the UKSC, practitioners expressed legitimate concerns that if the Regulations were to be applied to arbitrators (the court of appeal decision) this could have negative impact the scope to query London as a choice of an arbitral seat. In addition, it would raise enforcement issues in the UK and abroad for awards constituted in accordance with prohibited criteria.³³ Lawyers also expressed concerns with the possibility of a knock on effect of the decision. At that time, Edwards³⁴ argued that the potential of the court of appeal decision “could have an impact beyond nationality, such as qualifications held by the arbitrator which under the Act would constitute indirect discrimination”. Similarly, communities and religious bodies that provide mediation or arbitration services to their members (such as the Ismaili community) have argued that the court of appeal decision could lead to the erosion of their tradition to resolve disputes within the community-based ethos.

While the outcome of the decision by UKSC is positive on the whole, challenges lie ahead. Namely, the finding that arbitrators are independent contractor’s or service providers raises concerns relating to lack of protection measures applicable to independent providers of services. In addition, although we may successfully argue that arbitrators are *like* judges, *unlike* judges, in many jurisdictions, including Kenya, arbitrators are not governed by the Constitution or by any other (singular and overarching) disciplinary body.

³³ Smith 2011

³⁴ Edwards 2011

As such, a situation has emerged where arbitrators carry out *quasi-judicial* duties largely exempt from institutional scrutiny, while judges on the other hand are subject to intense scrutiny by the Judicial Service Commission (JSC) mandated with powers to investigate and recommend removal of a judge. In the present scenario, in the event of misconduct, the only recourse available to parties (on a case by case basis) is to raise a challenge, and apply for his or her removal (within the confines of the KAA or other relevant legislation). Beyond removal (from that particular case/matter), there is very little further recourse available to a party, or that can be done to the arbitrator to prevent future misconduct, or means by which to sanction the arbitrator.³⁵ This is especially the case since at present arbitrators do not require a licence to practice.

Balancing accountability and immunity is integral to maintaining confidence in arbitration as a legitimate mechanism for dispute resolution. Finding the appropriate balance may require the arbitration community and stakeholders to engage and communicate meaningfully in an effort to come up with creative solutions that will foster greater confidence and legitimacy in the arbitral process, failure to do so risks inviting external actors to police the arbitral process. Should the courts become the sole avenue for redress of an aggrieved party, it may eventually reach the conclusion that the arbitration community is unable to foster adequate self-regulation or adherence to a code of conduct. Needless to say, the above scenario would be undesirable, the implication of which may hamper the effectiveness of the arbitral tribunal and lead to increased costs and delay (arising from greater supervision and increased challenges). Over time such inefficiency would dilute trust in the arbitral process and erode future prospects of Kenya as a seat for international commercial arbitration.

Conclusion:

This essay has summarized the judgements of the various courts and illustrated the primary reasons why arbitrators are not employees for the purposes of the Regulations or the EEA. The author has focused particularly on the role and powers of the arbitrator; the incompatibility of institutional and national legislation with the role of the arbitrator; the right of parties to select an arbitrator of their choice; and identified concerns by practitioner as well as communities. In spite of the various challenges highlighted, positive efforts are already being undertaken to create institutional structures for purpose of enhancing stakeholder engagement. Several institutions, (CIArb included) regularly

³⁵ New jurisprudence is developing in this area. See Civil Application 538 of 2015. The Arbitrator was ordered to refund one half of total fees paid to him upon his removal.

carry out training courses for arbitrators as well as mentoring programs for young arbitrators. With these efforts ongoing, it is the author's hope that our commitment as a society to constantly improve our standards as a community and to develop our common and shared interests will outweigh our apathy.

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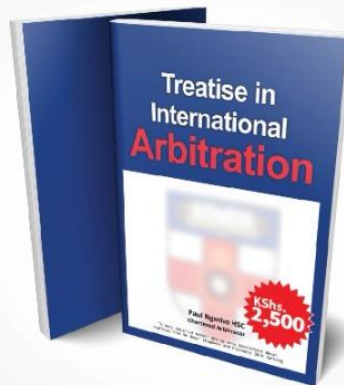
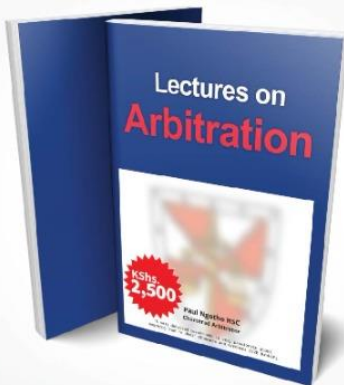
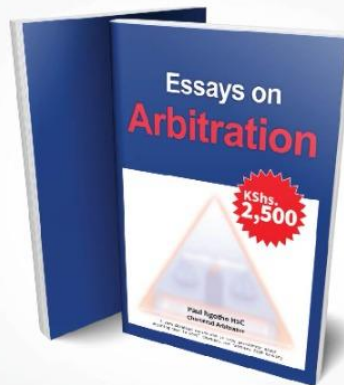
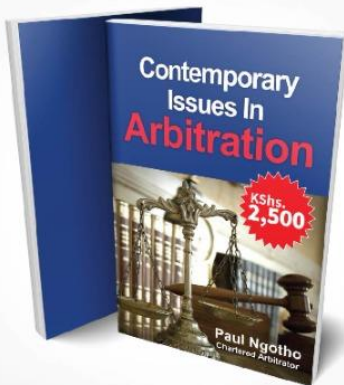
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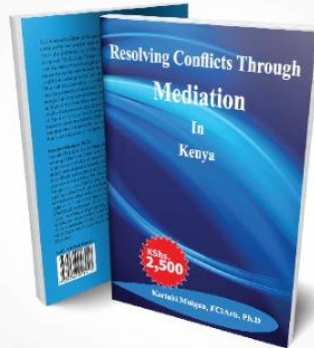
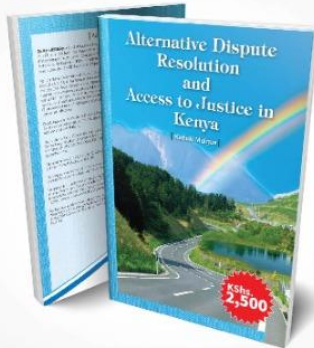
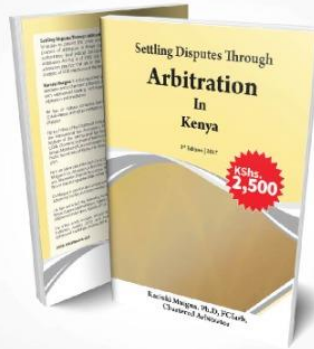
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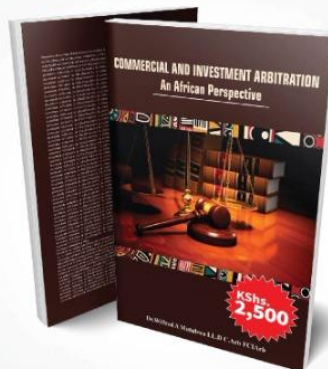
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