



Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future	<i>Kariuki Muigua</i>
The Arbitrability of Family Disputes in Kenya: A Case Study of the Court of Appeal Decision in TSJ v SHSR (2019) eKLR	<i>Vianney Sebayiga</i>
Case Review: Consolidation of Multiparty Contracts: The Indian Experience	<i>Wilfred Mutubwa</i>
Environmental Disputes: Is Mediation the Solution?	<i>Kenneth Wyne Mutuma</i>
Reforming Criminal Law in Kenya to Enhance Conflict Resolution and Realization of Justice in Kenya through Alternative Dispute Resolution Mechanisms	<i>Peter Mwangi Muriithi</i>
Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects	<i>Kariuki Muigua</i>
Facilitating Access to Justice Through Online Dispute Resolution in Kenya	<i>Alexandra A. Ochieng Bernard M. Nyaga</i>
ADR in Land Conflicts: Back to Basics	<i>Stephen Waweru</i>
Challenges of Enforcement of Arbitral Awards	<i>Justice (Rtd) Muga Apondi</i>
Greening Alternative Dispute Resolution in Kenya	<i>Jacqueline Waihenya</i>
Understanding an Arbitrator as a Private Judge	<i>Hon. Justice Jemimah Keli</i>
The Basis for Composite Multi-Contract Arbitration Proceedings- Tamilnadu Road Sector Project Ii, Highways Department Vs M/S. Ircon International Ltd and M/S. Sheladia Associates Inc.	<i>Wilfred Mutubwa</i>
ChamPERTY and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions	<i>Peter Mwangi Muriithi</i>
Review of the Sinohydro Corporation Limited Case: Clarifying the Principles on the Encashment of Performance Guarantees	<i>Ibrahim Kitoo</i>
Second Bite of the Cherry: Appeals Against Arbitral Awards in Kenya	<i>Makadia Georgiadis</i>
Arbitration Act 1995: Is A Reform Overdue?	<i>Austin Ouko</i>
The New Tanzania Arbitration Act: A challenge to Party Autonomy?	<i>Juvenalis J. Ngowi</i>





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# ALTERNATIVE DISPUTE RESOLUTION

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## Editor's Note

Happy New Year 2022!

Welcome to the *Alternative Dispute Resolution (ADR) Journal*, Volume. 10, No 1 2022, a publication of the Chartered Institute of Arbitrators-Kenya Branch (CIArb-K).

The Journal is a scholarly publication that focuses on the role of ADR in access to justice. It highlights the strengths, challenges and opportunities facing the use of ADR with the aim of enhancing its uptake both in Kenya and around the world. The Journal tackles key and emerging issues across a wide spectrum of ADR mechanisms including traditional justice systems, construction adjudication, mediation, negotiation and arbitration. It also highlights emerging areas in ADR including Online Dispute Resolution.

The importance of ADR is widely acknowledged. The Constitution of Kenya, 2010 mandates courts and tribunals to promote ADR while exercising judicial authority.

The Journal illuminates the importance of ADR and suggests practical ways of making it even more appropriate.

The Journal has witnessed immense growth since it was launched. It is now one of the most cited journal publications in Alternative Dispute Resolution and access to justice in Kenya. The Journal is a priceless resource for ADR practitioners, scholars, policy makers, students and all those who seek information on ADR, access to justice, and related fields of knowledge.

This volume contains rich papers on key and pertinent issues on Alternative Dispute Resolution and related fields of knowledge. The themes and topics covered include: *Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future*; *The Arbitrability of Family Disputes in Kenya: A Case Study of the Court of Appeal Decision in TSJ v SHSR*; *Case Review: Consolidation of Multiparty Contracts: The Indian Experience*; *Environmental Disputes: Is Mediation the Solution?*; *Reforming Criminal Law in Kenya to Enhance Conflict Resolution and Realization of Justice in Kenya through Alternative Dispute Resolution Mechanisms*; *Effective Application of Traditional Dispute Resolution*

*Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects; Facilitating Access to Justice Through Online Dispute Resolution in Kenya and ADR in Land Conflicts: Back to Basics;*

*Other themes include: Challenges of Enforcement of Arbitral Awards; Greening Alternative Dispute Resolution in Kenya; Understanding an arbitrator as a private Judge; The Basis for Composite Multi-Contract Arbitration Proceedings- Tamilnadu Road Sector Project II, Highways Department Vs M/S. Ircon International Ltd and M/S. Sheladia Associates Inc; Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions; Review of the Sinohydro Corporation Limited Case: Clarifying the Principles on the Encashment of Performance Guarantees; Second Bite of the Cherry: Appeals Against Arbitral Awards in Kenya; Arbitration Act 1995: Is A Reform Overdue? and The New Tanzania Arbitration Act: A challenge to Party Autonomy?*

The Editorial Board of the ADR Journal undertakes a critical, in depth and non-biased review of all papers submitted to the Journal to ensure adherence to the highest quality academic standards and validity of data. To achieve this end, the Journal draws from the expertise of highly qualified and competent internal and external reviewers. The Journal is peer reviewed and refereed.

The Editorial Board welcomes feedback from our readers across the globe to enable us to continue improving the Journal.

CIArb-K takes this opportunity to thank the publisher, contributing authors, editorial team, reviewers, scholars and those who have made it possible to continue publishing this Journal whose impact has been acknowledged both in Kenya and across the globe.

**Dr. Kariuki Muigua, Ph.D; FCIArb; C.Arb  
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**Nairobi, February 2022.**

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He has experience in over 60 Arbitrations and Mediations, as arbitrator, Mediator and Party Representative. He has published a book, *Commercial and Investment Arbitration: An African Perspective*; and over 20 Articles on the subject in peer reviewed Journals.

In 2017, he was recognised by IArb Africa as one of the top 100 Arbitrators in Africa. In 2020 he was named as one of the Top 50 rising Arbitration Personalities in Africa.

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## Alternative Dispute Resolution – Volume 10 Issue 1

<b>Content</b>	<b>Author</b>	<b>Page</b>
Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future	Kariuki Muigua	1
The Arbitrability of Family Disputes in Kenya: A Case Study of the Court of Appeal Decision in TSJ v SHSR (2019) eKLR	Vianney Sebayiga	23
Case Review: Consolidation of Multiparty Contracts: The Indian Experience	Wilfred Mutubwa	54
Environmental Disputes: Is Mediation the Solution?	Kenneth Wyne M	58
Reforming Criminal Law in Kenya to Enhance Conflict Realization of Justice in Kenya through Alternative Dispute Resolution Mechanisms	Peter M. Muriithi	79
Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya Challenges and Prospects	Kariuki Muigua	87
Facilitating Access to Justice Through Online Dispute Resolution in Kenya	Alexandra A. Ochieng Bernard M. Nyaga	110
ADR in Land Conflicts: Back to Basics	Stephen Waweru	138
Challenges of Enforcement of Arbitral Awards	Hon. Justice. (Rtd) Muga Apondi	157
Greening Alternative Dispute Resolution in Kenya	Jacqueline Waihenya	165
Understanding an arbitrator as a private Judge	Lady Justice Jemimah Keli	175
The Basis for Composite Multi-Contract Arbitration Proceedings- Tamilnadu Road Sector Project II, Highways Department Vs M/S. Ircon International Ltd and M/S. Sheladia Associates Inc.	Wilfred Mutubwa	187
Champerly and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions	Peter M. Muriithi	193
Review of the Sinohydro Corporation Limited Case: Clarifying the Principles on the Encashment of Performance Guarantees	Ibrahim Kitoo	206
Second Bite of the Cherry: Appeals Against Arbitral Awards in Kenya	Makadia Georgiadis	225
Arbitration Act 1995: Is A Reform Overdue?	Austin Ouko	239
The New Tanzania Arbitration Act: A challenge to Party Autonomy?	Juvenalis J. Ngowi	263

## **Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future**

*By: Kariuki Muigua\**

### **1. Introduction**

This paper critically explores the question on whether Alternative Dispute Resolution (ADR) practice in Kenya should be regulated as a specialised area of practice or profession. It is worth noting that the formal justice system in Kenya as we know it today was never part of the indigenous communities in Kenya until the colonial masters introduced the same as a tool of colonization. Community-based conflicts were dealt with using the traditional methods of conflict management and those who administered the same did so within the societal accepted ideals and were guided and regulated by the norms and traditions of the particular community. Notably, there were mostly organized forums where community members appeared for conflict management such as *Njuri Ncheke* among Meru and Council of Elders among the Kikuyu, and each of these had an accepted code of conduct and minimum qualifications for one to join as a memAs such, the members were expected to abide by the set guidelines all the time.<sup>1</sup>

However, with the advent of the colonial masters, most of the ADR and traditional justice systems were relegated to an inferior position, with the main conflict management methods becoming the formal common law system, which went ahead to be established as a profession requiring specialised training and qualifications. A misconception of the African communal way of life, conflict resolution institutions and prejudice against their traditional way of life led to the introduction of the western ideals of justice which were not based on political negotiations and reconciliation.<sup>2</sup>

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<sup>1</sup> See Muigua, K., *Resolving Conflicts through Mediation in Kenya*. (Glenwood Publishers Ltd, Nairobi, 2012), Chap.2, pp. 20-37.

<sup>2</sup> Muigua, K., *Resolving Conflicts through Mediation in Kenya*. (Glenwood Publishers Ltd, Nairobi, 2012), Chap.2, pp. 20-37, p.21.



Although certain minor disputes could be settled in a customary manner, the English Common Law was the ultimate source of authority.<sup>3</sup>

While there was no problem with some of these developments, the practitioners of the alternative and traditional justice systems were rarely recognized under the new system. Even where recognized, the system was to be used only for reference when dealing with a small section of disputes touching on a few issues such as community land, family law, amongst others. The political and legal systems of the colonial masters were superimposed upon the traditional and customary political and legal processes of African people, and the African customs and practices were allowed to continue ‘only if they were not repugnant to justice and morality’.<sup>4</sup>

A few of the ADR mechanisms such as arbitration and mediation, however, gained prominence even under the formal systems, as they were supported by mainly the international business community as forums to address arising commercial disputes. Thus, Kenya, in an attempt to be at par with its international business partners, developed laws on arbitration, which have been revised with time to reflect international best practices. There have also been a few organisations training professionals on mainly the two mechanisms and developing codes of conduct for those training or practicing under their umbrella. However, with the recognition of ADR under the current Constitution of Kenya 2010 and various statutes, there have been an increased need for more professionals to train and gain expertise in various ADR mechanisms. The growing numbers of practitioners from different professional backgrounds come with the challenge of the need for regulation of this seemingly fast growing area of practice, hence the need for this paper.

## **2. Need for Regulation: ADR Practice as a Specialised Branch**

ADR and TDR mechanisms are now formally recognized in the Constitution of Kenya and provided for under various statutes.<sup>5</sup> This has led to increased application of these mechanisms by courts and tribunals, amongst other informal forums. The Judiciary has

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<sup>3</sup>Cobbah, J.A.M., “African Values and the Human Rights Debate: An African Perspective”, *Human Rights Quarterly*, Vol. 9, No. 3 (Aug., 1987), pp. 309-331 at p.315.

<sup>4</sup>The clause is still to be found in the *Judicature Act*, Cap 8, Laws of Kenya and Article 159(3), *Constitution of Kenya* 2010.

<sup>5</sup> See Art. 60, 67, 159 of the Constitution of Kenya, 2010; see also Muigua, K., “Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya”, Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78.

also since launched and rolled out the Court Annexed Mediation Project to especially deal with commercial and family matters.<sup>6</sup> Therefore, it is expected that a good number of disputes that used to end up in court will be managed using these mechanisms.<sup>7</sup> Courts have a constitutional obligation to promote their utilisation whether within the formal framework, that is, court-annexed ADR, or as informal mechanisms as envisaged in the various constitutional provisions.<sup>8</sup>

Alongside this is the fact that in the last few years, ADR practice has emerged as an area of specialisation with both lawyers and non-lawyers becoming ADR practitioners. Thus, seeking to cash in on the consequently increased demand for trained practitioners, ADR centres have been set up to offer training and continuing professional development courses for the trained.<sup>9</sup> This paper grapples with the question as to whether or not ADR and TDR practice should formally be regulated. It examines various arguments by writers and practitioners who believe that ADR, just like lawyers in the court process, should be regulated by an overall body or at least under a centralized policy framework. On the other hand, some believe that ADR practice should be left within the ambit of private regulation by private bodies. This debate is far from being finalised and the discourse herein thus explores only several related issues.

The law, as it is, does not specify whether courts should deal with institutional-affiliated ADR practitioners only or even those practicing independently, for instance, in ad hoc arbitrations. Unlike the legal profession where lawyers or advocates wishing to practice law in Kenya must be affiliated to a professional body, namely, the Law Society of Kenya, ADR practice does not have such requirements. It is for this reason

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<sup>6</sup> Cf. Muigua, K., Court Sanctioned Mediation in Kenya-An Appraisal, available at <http://www.kmco.co.ke/attachments/article/152/Court%20Sanctioned%20Mediation%20in%20Kenya-An%20Appraisal-By%20Kariuki%20Muigua.pdf>.

<sup>7</sup> See generally Muigua, K., 'Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 3, No. 2, (2015), pp. 64-108; See also xiv. Muigua, K., 'Effective Justice for Kenyans: is ADR Really Alternative?' *The Law Society of Kenya Journal*, Vol. II, 2015, No. 1, pp. 49-62.

<sup>8</sup> Article 67(2) (f), Constitution of Kenya; See also sec. 5(1) (f), *National Land Commission Act*, No. 5 of 2012. The National Land Commission is tasked with *inter alia* encouraging the application of traditional dispute resolution mechanisms in land conflicts.

<sup>9</sup> See generally, Muigua, K., "Heralding A New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78.

that the question on regulation of ADR practitioners should be addressed, especially within the current constitutional dispensation.

### **3. To Regulate or Not to Regulate?**

Regulation of ADR is a subject wrought with contentious discourse. There are those who strongly advocate for ADR to be deregulated, while others argue for strong state regulation. On one end, the legislation of ADR carries with it the advantages of encouraging its adoption nationally; establishing standards of ADR practitioner's competence; developing systems of compliance and complaints; <sup>10</sup> addressing weaknesses of ADR such as ensuring the fairness of the procedure and building capacity and coherence of the ADR field. Proponents of regulation have argued that regulation of ADR will increase the use and demand of services and create or enhance an ADR "market".<sup>11</sup>

There are those who believe that the regulation of ADR may have its value in assuring that the parties employ qualified, neutral and skilled mediators and arbitrators in resolving a wide variety of disputes.<sup>12</sup> However, this is countered by the argument that in mediation where the parties select private non-government mediators, monitoring is complimented by the fact that the parties share in the compensation of such neutrals, better assuring their freedom from bias.<sup>13</sup>

This assertion may be relevant to Kenya considering that private mediators are also appointed and compensated the same way. It is therefore possible to argue that the mediator may be compelled by this fact to act fairly. Contention would, however, arise where there are allegations of corruption. It is not clear, at least in Kenya, how the parties would deal with the same. This is because, unlike in arbitration where parties may seek court's intervention in setting aside the otherwise binding arbitral award, mediation award is non-binding and wholly relies on the goodwill of the parties to

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<sup>10</sup>Syme, D. & Bryson, D., 'A Framework for ADR Standards: Questions and Answers on NADRAC's Report,' *The ADR Bulletin*, Vol. 4, No. 1.

<sup>11</sup>Robert, J.M., 'Florida's Experience with Dispute Resolution Regulation: Too much of a Good Thing?' *Florida Conflict Resolution Consortium*, available at <http://consensus.fsu.edu/ADR/PDFS/FloridaADR.pdf> [Accessed on 10/21/2015].

<sup>12</sup> Zack AM, 'The Regulation of ADR : A Silent Presence at the Collective Bargaining Table,' p.4, *Seventh Annual Conference of the ABA Dispute Resolution Section Los Angeles*, California, April 15, 2005, available at <http://www.law.harvard.edu/programs/lwp/people/staffPapers/zack/The%20Regulation%20of%20ADR-ABA%207th%20conference.pdf> [Accessed on 1/12/2015].

<sup>13</sup> Ibid.

respect the same. Therefore, faced with the risk of corruption and the potential non-acceptance of the outcome by the parties, it is arguable that the foregoing argument of the compensation being a sufficient incentive may not be satisfactory. This may, arguably, call for better mechanisms of safeguarding the parties' interests. In arbitration, the argument advanced is that whether of interests or rights disputes, the same process of joint selection and joint funding coupled with mutual selection of neutral from a tried and experienced cadre of professional arbitrators further assures their independence and neutrality, with protection of their integrity as their only ticket to future designations.<sup>14</sup> Again, the issue of independent practitioners would arise. For instance, in Kenya, there has been increased number of professionals taking up ADR. Professional bodies and higher institutions of learning have increased their rate of teaching ADR, as professional course and academic course respectively.

The net effect of this will be increased number of ADR practitioners in the country. As part of professional development, not all of those who get the academic qualifications may enroll with the local institutions for certification as practitioners. There are also those who may obtain foreign qualifications and later seek such certification. However, there are those who are not affiliated to any institution or body. In such instances, it would only be hoped that they would conduct themselves in a professional manner, bearing in mind that any misconduct or unfair conduct may lead to setting aside of the award or even removal as an arbitrator by the High Court. The court process obviously comes with extra costs and it would probably have been more effective to have a supervisory body or institution to report the unscrupulous practitioner for action, without necessarily involving the court. Such instances may thus justify the need for formal regulation, especially for the more formal mechanisms.

Currently, there are attempts to make referral to ADR mandatory in Kenya. This is especially evidenced by the gazetted *Mediation (Pilot Project) Rules, 2015*, which provide that every civil action instituted in court after commencement of these Rules, must be subjected to mandatory screening by the Mediation Deputy Registrar and those found suitable and may be referred to mediation.<sup>15</sup> Thus, there is no choice as to whether one may submit the matters voluntarily or otherwise. While this may promote the use of mediation where the parties are generally satisfied with the outcome, the opposite may also be true. Caution ought to be exercised in balancing the need for

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<sup>14</sup> Zack AM, 'The Regulation of ADR: A Silent Presence at the Collective Bargaining Table,' p.4.

<sup>15</sup> *Mediation (Pilot Project) Rules, 2015*, Rule 4(1).

facilitating expeditious access to justice through ADR and retaining the positive aspects of the processes. For instance, in other jurisdictions where there is provision for mandatory promotion of ADR processes, the use of those processes has not necessarily become common.<sup>16</sup> Among the reasons given for this reluctance towards the adoption of ADR include lack of education and training in the field, lack of court-connected programs, whether voluntary or mandated and insufficient legislation.<sup>17</sup> The argument is thus made that when introducing ADR for the first time, there may be a need for some element of compulsion or legislative control, as this can support its growth.<sup>18</sup> This is the path that the Kenyan Judiciary has taken. The Judiciary mediation programme is on a trial basis and the outcome will inform future framework or direction. The pilot program (having been rolled out to other stations outside Nairobi in May 2018) will define how the practitioners as well as the general public perceive court-annexed mediation and ADR in general. It is therefore important that the concerned drivers of this project use the opportunity to promote educational programming, with the efforts including workshops and seminars among the local practicing lawyers to enhance their understanding of ADR and the services provided by the pilot project.<sup>19</sup> This, it is argued, may enable them to assist their clients in making informed decisions about whether or not to use ADR.<sup>20</sup>

On the other end, it has been argued that legislative regulation, no matter how well meaning, inevitably limits and restrains.<sup>21</sup> The regulation of ADR is feared to hamper its advantages.<sup>22</sup> The developing country's experience with court-annexed ADR indicates that when a judge imposes a conciliator or mediator on the parties, it does not provide the proper incentive for the parties to be candid about the case.<sup>23</sup> ADR

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<sup>16</sup> Leon, J.A.R., 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', *Journal of Dispute Resolution*, Vol. 5, No. 2, (2005).

<sup>17</sup> *Ibid.*

<sup>18</sup> NADRAC, 'Legislating Alternative Dispute Resolution: A guide for government policy-makers and legal drafters,' (November, 2006), Commonwealth of Australia, p. 14.

<sup>19</sup> Leon, J.A.R., 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', *op cit*, p. 414.

<sup>20</sup> *Ibid*, p. 414.

<sup>21</sup> Bryan, K. & Weinstein, M., 'The Case against Misdirected Regulation of ADR,' *Dispute Resolution Magazine*, (Spring, 2013).

<sup>22</sup> Shasore, O., 'Why Practitioners Are Unanimous against Passage of New ADR Bill, (3<sup>rd</sup> March 2015), *This Day Live* <http://www.thisdaylive.com/articles/-why-practitioners-are-unanimous-against-passage-of-new-adr-bill-/203138/> [accessed on 10/22/2015].

<sup>23</sup> Edgardo, B., 'The Comparative Advantage of Mediation in Ecuador' (1998a), Washington D.C., U.S. Agency for International Development, (Unpublished Study, as quoted in Edgardo,

advantages such as low cost, procedural flexibility, enhanced access for marginalized groups and a predictable forum for conflict management tend to disappear when there is discretionary power with court personnel, procedural formalities within the ADR process or an artificial limit to competition within the ADR market.<sup>24</sup>

Court mandated mediation has been argued to negate the fundamental aspects of voluntariness and party control that distinguish it from litigation, the very aspects attributed to its success in a vast number of cases.<sup>25</sup> In addition, the “one size fits all” approach taken by legislation that encourages or requires all to use ADR, without regard to needs in various contexts and to the distinctions among the various processes, is another reason why ADR legislation should be undertaken with caution.<sup>26</sup> For instance, in the Kenyan situation, while the *Mediation (Pilot Project) Rules, 2015* require screening of civil matters for possible submission for mediation, it is possible for the Registrar to realise that some of the cases may be appropriate for arbitration instead of mediation. The programme only takes care of mediation process with no reference to arbitration or any other process, well, apart from litigation. The question that would, therefore, arise is whether the Registrar has powers to force parties into arbitration as well. Further, if they have such powers, the next question would be who would pay for the process, bearing in mind that it is potentially cost-effective but may be expensive as well. On the other hand, if the Registrar lacks such powers, it is also a question worth addressing what the Court would do if it ordered the parties to resort to arbitration but both parties fail to do so due to such factors as costs.

It is, therefore, worth considering whether the Mediation Accreditation Committee, established under the Civil Procedure Act<sup>27</sup>, should have its mandate expanded to deal with all processes, or whether there should be set up another body to deal with the other processes.

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B.&William, R., ‘Law and Economics in Developing Countries’, (Hoover Institution Press, Stanford University, Stanford, California, 2000).

<sup>24</sup> Ibid.

<sup>25</sup> Spencer D, ‘Court given power to order ADR in civil actions’ (2000) 38(9) Law Society Journal 71 at 72; NADRAC, above note 3 (as referenced in Green, Cameron, ‘Where did the ‘alternative’ go? Why Mediation should not be a Mandatory Step in the Litigation Process, DR *Bulletin*, Vol. 12, No. 3, Art. 2, 2010.

<sup>26</sup> See Syme, D. & Bryson, D., ‘A Framework for ADR Standards: Questions and Answers on NADRAC’s Report,’ *op cit*.

<sup>27</sup> S. 59A, S.59B, Cap 21, Laws of Kenya.

#### 4. A Case for a Multi-Layered Approach

It has been argued that ‘deregulation’ does not in fact refer to the absolute lack of regulation, but rather the lack or removal of one particular type of regulation which is legislation. In real sense, deregulation or market regulation is regulated by market forces, in which competition results in private regulation or self-regulation.<sup>28</sup>

According to some proponents, the benefits of industry self-regulation are apparent: speed, flexibility, sensitivity to market circumstances and lower costs.<sup>29</sup> It is argued that because standard setting and identification of breaches are the responsibility of practitioners with detailed knowledge of the industry, this will arguably lead to more practicable standards, more effectively policed.<sup>30</sup> Yet, in practice, say critics, self-regulation often fails to fulfil its theoretical promise, more commonly serving the industry rather than the public interest.<sup>31</sup> Self-regulation refers to the mechanisms used by companies or organisations, both individually and in conjunction with others, to raise and maintain standards of corporate conduct.<sup>32</sup>

Contemporary best practice models recommend a combination of private and public mechanisms with a high level of responsiveness to needs, interests and change in regulated markets. Experts further suggest that reflexive and responsive processes – often associated with self-regulatory approaches and even formal framework approaches – encourage performance beyond compliance.<sup>33</sup> It has been argued that participation in ADR should be compulsory only where there is appropriate assessment of whether the dispute is suitable to be referred to ADR and where appropriate

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<sup>28</sup> Baetjer, Howard Jr., ‘There’s No Such Thing as an Unregulated Market,’ (Wednesday, January 14, 2015), The Freeman, Foundation of Economic Education. <http://fee.org/freeman/theres-no-such-thing-as-an-unregulated-market/> [last accessed on 10/23/2015].

<sup>29</sup> Gunningham, N. & Rees, J., ‘Industry Self-regulation: An Industry Perspective’, (October 1997) *Law & Policy*, Vol. 19, No. 4.

<sup>30</sup> *Ibid.*

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

<sup>32</sup> Sarker, T.K., ‘Voluntary codes of conduct and their implementation in the Australian mining and petroleum industries: is there a business case for CSR?’ *Asian J Bus Ethics*, 2013, Vol. 2, pp.205–224, p. 210.

<sup>33</sup> See Edgardo, B., ‘The Comparative Advantage of Mediation in Ecuador’ (1998a), Washington D.C., U.S. Agency for International Development, (Unpublished Study, as quoted in Edgardo, B. & Wiliam, R., ‘Law and Economics in Developing Countries’, (Hoover Institution Press, Stanford University, Stanford, California, 2000); Nadja Alexander, et al, *Smart Regulation* (Clarendon Press, 1998) 391.



professional standards are maintained and enforced.<sup>34</sup> Currently, the main practice in Kenya is that majority of ADR practitioners are regulated by their respective accrediting professional bodies. While there exists institutional rules for the various institutions in the country, statutory law, such as Arbitration Act, 1995, has provisions that are meant to regulate some of the critical issues such as confidentiality, ethics, enforceability of awards or outcomes of ADR mechanisms. It is, however, important to point out that while the court plays a significant role in upholding professional ethics of ADR practitioners, especially mediators and arbitrators, the same is limited in effectiveness. This is because the statutory provision on the court's power to remove an arbitrator on grounds of misconduct is vague on what exactly entails misconduct. This is where institutional rules or statutory regulations would come in handy to clearly spell out the code of ethics. For the practitioners that are affiliated to institutions, reference can be made to the institutional rules. A challenge arises when the ADR practitioners in questions are independent practitioners. This may therefore require a multi-layered approach to regulation, where we should have private regulation coupled with statutory regulation to ensure that there are gaps.

## **5. Processes or type of ADR**

With regard to legislating the definition and scope of ADR processes<sup>35</sup>, Kenyan lawmakers should take much caution. While legislating ADR terms would come with the advantage of clarity and consistency, it would also result in lack of flexibility in the ADR processes. It is, however, on the foundation of consistent terminology that obligations and protections can be mandated by law.

Article 159(2) (c) of the Constitution of Kenya makes mention of reconciliation, mediation, arbitration and traditional justice systems.<sup>36</sup> The Civil Procedure Act<sup>37</sup>, which provides for court-mandated mediation, 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

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<sup>34</sup> See Sarker, T.K., 'Voluntary codes of conduct and their implementation in the Australian mining and petroleum industries: is there a business case for CSR?' *Asian J Bus Ethics*, *op cit*.

<sup>35</sup> See Muigua, K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 5, No 1, (2017), pp. 74-104.

<sup>36</sup> Constitution of Kenya, 2010, S. 159(2) (c).

<sup>37</sup> Cap 21, Laws of Kenya.



by a judge to settle a dispute within the course of judicial proceedings related thereto.<sup>38</sup> Notably, the Mediation (Pilot Project) Rules, 2015 also adopt this definition.<sup>39</sup>

The Act also provides for the referral of matters to other Alternative Dispute Resolution mechanisms where the parties decide or the court sees it suitable,<sup>40</sup> only making reference to arbitration in a separate section.<sup>41</sup> It conspicuously does not define ADR, nor does it give the list of mechanisms which would fall under its umbrella. Although, this broad provision covers under it a number of terms, policy makers would do well to specifically set out these mechanisms, as this is the foundation of the regulation of ADR such as setting standards for ADR practitioners.

Using consistent terms serves important functions.<sup>42</sup> First, it ensures those who use, or are referred to conflict management services receive consistent and accurate information and have realistic and accurate expectations about the processes they are undertaking. This will enhance their confidence in, and acceptance of, conflict management services. Secondly, it helps courts and other referrers to match processes to specific disputes and different parties. Better matching improves outcomes from these processes. Thirdly, it helps service providers and practitioners to develop consistent and comparable standards. Such understanding also underpins contractual obligations and the effective handling of complaints about conflict management services. Fourthly, it provides a basis for policy and program development, data collection and evaluation. The flipside to outlining an exhaustive list would however be that some of the TDR mechanisms, that the policy makers would be unaware of, risk being left out and consequently be undermined.

It is important to also be aware of the diverse contexts in which ADR is used. Thus, definition or outlining an exhaustive list may impede access to justice through locking out some useful yet unlisted mechanisms. National Alternative Dispute Resolution Advisory Council (NADRAC) in Australia, advocates for the ‘description’ of terms as opposed to their definition, as this sets out the contexts in which such terms are used

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<sup>38</sup>Civil Procedure Act, Chapter 21, Section 59B &D & S. 2.

<sup>39</sup> Rule 3, Mediation (Pilot Project) Rules, 2015.

<sup>40</sup> Ibid, S. 59C.

<sup>41</sup> Ibid, S. 59.

<sup>42</sup> See Leon, J.A.R, ‘Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model,’ *Journal of Dispute Resolution*, op cit.

as opposed to their essential features.<sup>43</sup> This may be useful in contemplating every possible ADR and TDR mechanism as recognised settings. It is imperative to point out that the Constitution of Kenya recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.<sup>44</sup> Further, it requires the State to, *inter alia*, promote all forms of national and cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.<sup>45</sup>

In traditional settings, some of the conflict management mechanisms could be classified as forms of cultural expressions. For instance, the mechanisms they used include, kinship systems, joking relations, third party approach, consensus approach, *riika* (age-sets) social groups, women/men elders and blood brotherhood.<sup>46</sup> Caution should, therefore, be exercised while approaching the issue of definition to ensure that such mechanisms are given a chance. Courts ought to appreciate the fact that culture has a role to play in conflict management. Indeed, the 2010 Constitution of Kenya recognises culture as the foundation of the nation and as cumulative civilisation of the Kenyan people and nation.<sup>47</sup> Further, one of the principles of land policy is encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.<sup>48</sup> It is therefore imperative that in matters that affect a whole community or even individuals, but with a bearing on cultural factors, courts should take into consideration such factors.

Regulation should not result in locking out viable mechanisms as this would defeat the constitutional intentional of recognising TDR for aiding access to justice for all.

## **6. Referral of disputes to ADR**

Law makers need to decide which method of ADR referral should be employed. Referral may be compulsory by a court or voluntary, where parties are at will to decide whether to submit their dispute to an ADR forum. It may also be mandatory or at the discretion of the referrer, as contemplated in the Mediation (Pilot Project) Rules, 2015.

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<sup>43</sup> NADRAC, 'Legislating Alternative Dispute Resolution: A guide for government policy-makers and legal drafters,' (Commonwealth of Australia, November, 2006).

<sup>44</sup> Art. 11(1).

<sup>45</sup> Art. 11(2).

<sup>46</sup> See Muigua, K., *Resolving Conflicts through Mediation in Kenya*, (Glenwood Publishers, 2012), pp. 30-37.

<sup>47</sup> Art. 11.

<sup>48</sup> Art. 60 (1) (g).

The Civil Procedure Act provides for discretionary compulsory referral as well as voluntary referral.<sup>49</sup>

Where there is compulsory participation, it is important that there be established professional standards for the process as well as for the practitioners, to ensure a quality process and a quality outcome. These processes also need to be described so as effectively promote public confidence.

It is noteworthy that one of the main reasons why most of the ADR mechanisms are popular and preferred to litigation are their relative party autonomy which makes parties gain and retain control over the process and the outcome. It is therefore important for the court to ensure that there is no foreseeable factor that may interfere with this autonomy as it may defeat the main purpose of engaging in these processes.

One of the constitutional requirements with regard to access to justice in Kenya is that the State should ensure that cost should not impede access to justice and, if any fee is required, the same should be reasonable. It is, therefore, important that even where persons use private means of accessing justice, the cost should be reasonable. This is especially where there was no prior agreement to engage in ADR. One of the advantages of ADR mechanisms is that the outcome is flexible and parties can settle on outcomes that satisfactorily address their needs. This should not be lost as it would affect parties' ability and willingness to participate in such processes.

Courts are, therefore, under obligation to ensure that parties are able to access justice using the most viable and cost effective conflict management mechanism. In this regard, courts can play a facilitative role in encouraging the use of ADR and TDR mechanisms to access justice.

## **7. Obligations of parties to participate in ADR**

Compulsory participation in ADR is highly opposed by those in favour of voluntary participation in ADR who argue that conciliation or mediation is essentially a consensual process that requires the co-operation and consent of the parties.<sup>50</sup> On the other hand, those who argue in favour of compulsory participation in ADR respond

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<sup>49</sup> See Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model,' *Journal of Dispute Resolution*, op cit.

<sup>50</sup> See NADRAC, 'Legislating Alternative Dispute Resolution: A guide for government policy-makers and legal drafters,' (November, 2006), Commonwealth of Australia.

that if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, then even the most fundamental resistance to compromise can turn to co-operation and consent.<sup>51</sup>

The element of ‘good faith’ which is usually present in voluntary ADR is not assured in compulsory ADR, leading states and courts to give rules requiring parties to participate in ADR in good faith or ‘in a meaningful manner.’<sup>52</sup> Courts also sanction parties for violations of a good-faith-participation requirement such as for failing to attend or participate in an ADR process or engaging in a pattern of obstructive, abusive, or dilatory tactics.<sup>53</sup> Sanctions include the shifting of costs and attorney’s fees, contempt, denial of trial de novo, and even dismissal of the lawsuit.<sup>54</sup> Law makers should thus have regard to what conduct constitutes good conduct, a system of handling claims of bad faith, maintenance of the confidentiality of the process even as such case of bad faith is before the court and the effects of non-compliance with the good faith participation requirement.<sup>55</sup>

The overall goal should be to promote meaningful access to justice for all. For purposes of ensuring justice is done, sometimes courts may force parties to the negotiating table especially where one of the parties refuses to do so with ulterior motive of defeating justice. The third party umpire in collaboration with the court, where necessary, may invent ways of dealing with power imbalances and bad faith for the sake of ensuring justice is achieved.

## 8. Standards and Accreditation of ADR practitioners

It has been argued that development of standards of practitioners will ensure much greater accountability of practitioners. Sociologists argue that professionals perform

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<sup>51</sup> See Clarke, G.R. & Davies, I.T., ‘ADR — Argument For and Against Use of the Mediation Process Particularly In Family and Neighbourhood Disputes,’ *QLD. University Of Technology Law Journal*, pp. 81-96; Katz, L.V., ‘Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin,’ *Journal of Dispute Resolution*, Vol. 1993, Iss.1, Art. 4.

<sup>52</sup> Weston, M.A., "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality," *Indiana Law Journal*, Vol. 76: Iss. 3, Article 2, 2001.

<sup>53</sup>English, R.P., ‘Annotation, Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation’ op cit.

<sup>54</sup> Ibid.

<sup>55</sup> See Leon, J.A.R, ‘Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model’, *Journal of Dispute Resolution*, (2005).

better “on stage” (in public) than they do “off stage” (in private) and this has consequences for issues of integrity in arbitration.<sup>56</sup> It is argued that documented standards would also provide a source of information to enable consumers to know what to expect of an ADR practitioner, a basis for choosing a particular type of ADR, and an ‘industry norm’ against which to measure the performance of the practitioner.<sup>57</sup> They would also improve the public awareness of ADR.

These standards may be provided by either professional groups or by the government. The standards of conduct of individual professional groups are still the primary source of regulation in most states. Codes of professional conduct tailored to mediation and ADR have been issued by various professional organizations.<sup>58</sup>

It is argued that as governments are increasingly legislating to require parties to attend ADR, such as in the litigation context, they need to be accountable for the competence of practitioners performing these services.<sup>59</sup> Legislative instruments that provide for compulsory submission of a dispute to ADR should thus also provide minimum standards of conduct for the practitioners. The provision of standards will also go towards boosting the public’s confidence in ADR, as parties need to have confidence that the quality of the ADR service will meet the standards of professionalism. Knowledge of how the practitioner’s standards are met through training and accreditation, as well as a complaints mechanism will also boost public awareness and public confidence.<sup>60</sup>

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<sup>56</sup>Aloo, L.O. & Wesonga, E.K., ‘What is there to Hide? Privacy and Confidentiality Versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010,’ *Alternative Dispute Resolution*, Vol. 3, No. 2 (Chartered Institute of Arbitration- Kenya, 2015).

<sup>57</sup> National ADR Advisory Council (NADRAC), ‘The Development of Standards for ADR: Discussion Paper’ (March, 2000).

<sup>58</sup> Feerick, J., et al, ‘Standards of Professional Conduct in Alternative Dispute Resolution,’ *Journal of Dispute Resolution*, 1995.

<sup>59</sup> See English, R.P., ‘Annotation, Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in Mediation’ op cit.

<sup>60</sup> See Leon, J.A.R., ‘Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model’, *Journal of Dispute Resolution*, (2005), p. 50; see also Deane, P., et al, ‘Making Mediation Mainstream: A User/Customer Perspective,’ (International Mediation Institute, 2010). Available at [https://immediation.org/private/downloads/A\\_W2d3vlh6edvLHjbTa0Kw/making-mediation-mainstream-1-article.pdf](https://immediation.org/private/downloads/A_W2d3vlh6edvLHjbTa0Kw/making-mediation-mainstream-1-article.pdf) [Accessed on 10/12/2015]; De Palo, G., et al, ‘Rebooting’ The Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Measures to Increase the Number of Mediations in the EU,’ (European Union, 2014).

Standards may, however, in detailing the structure of ADR, restrain creative ways of solving disputes, and with ADR being applicable in a variety of contexts, standards may not be applicable in all the available contexts.<sup>61</sup> Standards should be formulated with the objective of ensuring a fair ADR process, protecting the consumer, establishing public confidence and building capacity in the field. Issues to consider when setting out the duties and standards of ADR practitioners include: how the practitioner is to be selected, the role of the practitioner, impartiality, conflicts of interest, competence, confidentiality, the quality of the process, the termination of the ADR process, recording settlement, publicity, advertising and fees.<sup>62</sup>

It has been suggested that rather than establishing a single body to accredit each mediator individually, a system is required to accredit organisations which in turn accredit mediators. In order for these organisations to be approved, they would need to develop common standards for initial assessment, as well as ongoing monitoring, review and disciplinary processes for mediator.<sup>63</sup>

The downside to this kind of approach would be the risk of locking out those who acquire their skills and expertise outside this jurisdiction as it would not be clear if they would need to compulsorily become members of local organisations for accreditation. For mediation, there is already in place Mediation Accreditation Committee but for the other mechanisms it is not clear how such an approach would be implemented as there exists no body at the moment. This also risks leaving out the informal experts who may be lacking in the required ‘professional’ qualifications to qualify to join such bodies. This requires careful consideration by the concerned stakeholders.

## **9. Confidentiality of communications made during ADR and Inadmissibility of Evidence**

Confidentiality is central to ADR as it allow parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute.<sup>64</sup> The

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<sup>61</sup> Ibid; see also Silver, C., "Models of Quality for Third Parties in Alternative Dispute Resolution" *Articles by Maurer Faculty*, Paper 566, 1996.

<sup>62</sup> Ibid, p. 19; See also National ADR Advisory Council (NADRAC), *A Framework for ADR Standards: Report to the Commonwealth Attorney-General*, (Commonwealth of Australia, April, 2001)

<sup>63</sup> Ibid, p. 62.

<sup>64</sup> Interagency ADR Working Group Steering Committee, ‘Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators’ (April 2006).

parties to the dispute and the neutral third party have a duty to maintain such confidentiality, with the neutral being held to a higher standard of non-disclosure. The neutral has a duty not to disclose to a third party, as well as not to disclose to the other party what has been told to him by a party in private. The question that law makers should consider is whether confidentiality should be mandated by statute, and what sanctions will be employed when breach occurs.<sup>65</sup> They should also consider the circumstances under which an exception to confidentiality lies.<sup>66</sup>

Limitations of confidentiality arise in a variety of instances: by consent of the parties; where mandated by law; where a crime is committed or a threat is made to commit such crime.<sup>67</sup>

## **10. Confidentiality Issues**

Inadmissibility is intertwined with the issue of confidentiality of communications during ADR. This is an approach taken to protect the confidentiality of the ADR process, by statutory provision that evidence of matters in an ADR proceeding is inadmissible in later court proceedings.<sup>68</sup> This issue also includes the compellability of ADR practitioners to give evidence before subsequent court proceedings.<sup>69</sup> The mediation (Pilot Project) Rules, 2015 also recognises the importance of this and provides that all communication during mediation including the mediator's notes are to be deemed to be confidential and shall not be admissible in evidence in any current or subsequent litigation or proceedings.<sup>70</sup>

Protection of communications in ADR should be guaranteed as this protects the finality of the decision reached by the parties and enhances communication for purposes of

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<sup>65</sup>Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', *Journal of Dispute Resolution*, (2005), p. 73.

<sup>66</sup>See Dore LK, 'Public Courts versus Private Justice : It' S Time to Let Some Sun Shine in on Alternative Dispute Resolution' *Chicago-Kent Law Review*, Vol. 81, Issue 2, Symposium: Secrecy in Litigation, (2006), pp. 463-520.

<sup>67</sup> See Rule 12 (2) of the Mediation (Pilot Project) Rules 2015, which provides that the mediator and the parties to any mediation shall treat as confidential information obtained orally or in writing from or about the parties in the mediation and shall not disclose that information unless: required by law to disclose; it relates to child abuse, child neglect, defilement, domestic violence or related criminal or illegal purposes.

<sup>68</sup> See Leon, J.A.R, 'Why Further Development of ADR in Latin America Makes Sense: The Venezuelan Model', *Journal of Dispute Resolution*, 2005, p. 81

<sup>69</sup> Ibid, p. 64.

<sup>70</sup> Rule 12(1).



resolving conflicts. If parties knew that whatever they share may later be used against them, then they would be unwilling to do so, thus, defeating the essence of engaging in ADR and TDR. One of the selling points of these mechanisms is open communication for purposes of reaching a decision or ensuring that parties are able to craft an agreement through sharing.

## 11. Conclusion

The Government policy is to encourage ADR to foster a more conciliatory approach to conflict management. It can also be important that parties have a choice to use an effective ADR process.<sup>71</sup> This overcomes the risk that parties will fail to suggest ADR from fear they will appear weak to the other party.<sup>72</sup> However, there are limitations to the use of formal law in regulating ADR. ADR is practiced in diverse contexts and a single law is unlikely to be able to address all these areas. This explains the widespread use of sector-specific legislation in other jurisdictions, which have deliberately chosen not to enact comprehensive general national ADR legislation.<sup>73</sup>

The inadequacy of the common law to govern ADR in Kenya is plain. It has been rightly observed that the objective of dispute resolution in many non-Western traditions typically is not the ascertainment of legal rights and the allocation of blame and entitlement, as it is in the West; the objective is a resolution, and hopefully a reconciliation, whatever the result.<sup>74</sup> The western concept of contract implies rights and obligations, whereas ADR and TDR have the object of preserving the relationship of the parties, and are thus inconsistent. Furthermore, TDR is practiced in the context of society while contract law is based on an individualistic western culture, which does not uphold the same values. Parties engaging in TDR are unlikely to have fulfilled the

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<sup>71</sup> See Sarker, T.K., 'Voluntary codes of conduct and their implementation in the Australian mining and petroleum industries: is there a business case for CSR?' *Asian J Bus Ethics*, 2013, Vol. 2, pp.205–224, p. 210.

<sup>72</sup> Ibid; 'Court ordered mediation – the debate', *New Zealand Law Journal*, 210, June 2003.

<sup>73</sup> See Buscaglia, E., 'The Comparative Advantage of Mediation in Ecuador' (1998a), Washington D.C., U.S. Agency for International Development, Unpublished Study (as quoted in Buscaglia Edgardo & Ratliff William, 'Law and Economics in Developing Countries', (2000), Hoover Institution Press, Stanford University, Stanford, California); Nadja Alexander, 'International and Comparative Mediation: Legal Perspectives', (2009), Kluwer Law International. Examples of such jurisdictions include Australia, the United States and England.

<sup>74</sup> McConnaughay, P.J., 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' *PKU Transnational Law Review*, Volume 1, Issue 1, pp. 9-31, p.23.



elements compounding a contract, such as offer, acceptance, consideration etc. There is thus a need for legislative governance of these informal systems.

Policy-makers should recognise the desirability of enabling diversity, flexibility and dynamism in conflict management practices and processes. They should also have in mind that ADR processes cannot be viewed in isolation. Party autonomy allows the parties to craft a hybrid process, linking different techniques and processes to meet their contextual need. They thus need to be viewed in the larger ADR context.<sup>75</sup> In drafting legislation, provision should thus be made for parties to retain some autonomy.

The use of ADR and TDR mechanisms in enhancing access into justice can go a long way in achieving a just, fair and peaceful society for national development. While it is important to exercise some degree of regulation in these processes, regard should be had to the bigger picture: promoting access to justice for all people.

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<sup>75</sup> See Robert, J.M., 'Florida's Experience with Dispute Resolution Regulation: Too much of a Good Thing?' *Florida Conflict Resolution Consortium, op cit.*

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## **The Arbitrability of Family Disputes in Kenya: A Case Study of the Court of Appeal Decision in TSJ v SHSR (2019) ECLR**

*By: Viannet Sebayiga \**

### **Abstract**

*Generally, family disputes are considered non-arbitrable because of public policy. In Kenya, the Arbitration Act, Act No 4 of 1995 does not specify the nature of disputes that are arbitrable or non-arbitrable. Moreover, it does not expressly state that family disputes are non-arbitrable. In TSJ v SHSR (2019) eCLR, the Court of Appeal held that family disputes are arbitrable. This paper gives a general overview of the case and evaluates the advantages and disadvantages of settling family disputes through arbitration. Additionally, the paper highlights that while arbitration may be suitable for financial and property division disputes between spouses, it may be unsuitable for child custody and maintenance disputes. Using the Institute of Family Law Arbitrators (IFLA) Scheme in England, this paper illustrates how Kenya can benefit from the gains of family arbitration while ensuring that the best interests of the child are protected. Furthermore, it proposes legislative amendments to laws dealing with family and children matters in Kenya to expressly allow for family arbitration. Lastly, the paper calls for the amendment of the Arbitration Act to specify the disputes which are arbitrable and non-arbitrable in order to promote certainty.*

**Keywords:** Arbitrability, family disputes, best interests of the child, *TSJ v SHSR* (2019) eCLR, Arbitration Act 1995, and the IFLA Scheme.

### **1. Introduction**

In international commercial arbitration, all disputes are presumed to be arbitrable.<sup>1</sup> Parties express their consent to have their dispute resolved by arbitration through an arbitration agreement.<sup>2</sup> The agreement must, however, relate to a subject matter

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<sup>1</sup> *Moses H. Lone Memorial Hospital v. Mercury Construction Corp*, 460 US 1 (1983), the Supreme Court of the United States of America held that any doubt concerning the scope of arbitrable issues should be resolved in favour of arbitration.

<sup>2</sup> Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter M, *Redfern and Hunter on International Arbitration*, 6<sup>th</sup> edition, (Oxford University Press, 2015)71.

capable of settlement by arbitration.<sup>3</sup> The term arbitrability is used to define this state.<sup>4</sup> Arbitrability involves the general enquiry as to what types of disputes are capable of settlement by arbitration.<sup>5</sup> It also addresses the question of whether certain disputes are prohibited from arbitration due to their subject matter.<sup>6</sup> This is because the state has the power to retain exclusive jurisdiction over some matters to protect the interests of third parties or public interest.<sup>7</sup>

Arbitrability can either be objective or subjective. Objective arbitrability relates to whether the subject matter of the dispute may be validly submitted to arbitration or whether it belongs to the exclusive domain of the state.<sup>8</sup> There are provisions in domestic legislation that certain matters of public policy and national interest should be decided by courts.<sup>9</sup> Subjective arbitrability, on the other hand, is concerned with the contractual capacity of the parties.<sup>10</sup> For an arbitration agreement to be valid, the parties must have the capacity to enter into contractual relations.<sup>11</sup>

In general, public law issues involving legal status cannot be determined by arbitration. These include; patent validity, bankruptcy, criminal culpability, certain intellectual property matters, consumer claims, and judicial review of administrative decisions.<sup>12</sup> Family disputes have also been deemed non-arbitrable, either explicitly

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<sup>3</sup> Zheng Tang Sophia, *Jurisdiction and Arbitration Agreement in International Commercial Law*, (Routledge, New York, 2014) 246.

<sup>4</sup> Deskosk Toni and Dokovski Vangel, 'Notes on Arbitrability- Focus on Objective Arbitrability' (2018) 9 *Iustinianus Primus Law Review*,4.

<sup>5</sup> Karim Youssef, 'Fundamental Questions and Applicable Law, Chapter 3- Death of Inarbitrability' in Loukas Mistelis and Stavros Brekoulakis (eds) *Arbitrability: International and Comparative Perspectives* (Kluwer Law International, Netherlands, 2009)1549.

<sup>6</sup> Francis Kariuki, 'Redefining Arbitrability: Assessment of Articles 159 and 189(4) of the Constitution' (2013)1 *Alternative Dispute Resolution*,179.

<sup>7</sup> Deskosk (n 4) 3.

<sup>8</sup> Ibid 5. See also Article 1(5) of the United Nations Commission on Trade Law (UNCITRAL) Model Law (*Model Law hereinafter*) permits each State to determine which disputes may or may not be submitted to arbitration.

<sup>9</sup> Peter Muriithi, 'Demystifying Arbitrability of Disputes in Kenya' (2017) 5 *Alternative Dispute Resolution*,167.

<sup>10</sup> Emmanuel Gaillard and John Savage, *Fouchard Gaillard Godman on International Commercial Arbitration*, (Kluwer Law International, 1999) 312.

<sup>11</sup> Deskosk (n 4). See also Article II (2) of the United Nations Convention on the Recognition and Enforcement of Foreign Awards, 10 June 1958, UNTS 330

<sup>12</sup> Muriithi (n 9) 169. Also see Gary Born, *Non-Arbitrability and International Arbitration Agreement*, 2<sup>nd</sup> edition, (Kluwer Law International, Netherlands,2014) 944. In *Metrocallnc v*

through statute or implicitly through statutes dealing with family matters that provide exhaustive provisions for dispute resolution.<sup>13</sup> In other instances, arbitration is only used to settle financial and property disputes after a marital breakdown.<sup>14</sup>

Most States have expressed their positions on the arbitrability of family disputes in their statutes. Under Chinese<sup>15</sup> and French law<sup>16</sup>, disputes over marriage, child maintenance, adoption, and guardianship are non-arbitrable. The ability to arbitrate family disputes in Canada differs by province. Family matters are non-arbitrable in Quebec.<sup>17</sup> In Ontario, family arbitration can be undertaken in any matter within a marriage contract, separation agreement, and cohabitation agreement. Matters that may be arbitrated include ownership and division of property, child support obligations, and child custody disputes.<sup>18</sup> Family disputes and incidental matters like child support and parental guidance are arbitrable in British Columbia.<sup>19</sup> Any matrimonial cause or incidental matter is non-arbitrable under South African and Zambian law.<sup>20</sup> In Tunisia, disputes concerning personal status are non-arbitrable, however, financial disputes that arise from therein are arbitrable.<sup>21</sup> It is important to note that legislation of most African countries is silent on the arbitrability of family disputes.<sup>22</sup> Therefore, the arbitrability of family disputes varies and is dependent on the state, as shown by the above illustrations.

In states where family disputes are non-arbitrable, the arbitral award on family matters may be set aside or contested on its enforcement on grounds of non-arbitrability.<sup>23</sup> Within its own political, social, and economic policies, each state determines what

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*Electronic Systems (No 2) NSWIRComm 260. (2001) 49 AILR*, it was held that disputes over statutory and constitutional rights cannot be determined by private parties.

<sup>13</sup> Robert French, 'Arbitration and Public Policy' (2016) 24 *Asian Pacific Law Review*, 13.

<sup>14</sup> *Ibid* 14.

<sup>15</sup> Article 3(1), *Arbitration Law of the People's Republic of China* (1995).

<sup>16</sup> Article 2060, *Civil Code* (France).

<sup>17</sup> Section 2639, *the Civil Code of Quebec* (1991). It provides that disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.

<sup>18</sup> Section 51, *Family Law Act of Ontario* (1990).

<sup>19</sup> Part 2, *Family Law of British Columbia* (2011). See also Regulation 5, *Family Law Act Regulation of British Columbia* (2012).

<sup>20</sup> Section 2(2), *Arbitration Act of South Africa* (1965) and Section 6(2)(g), *Arbitration Act of Zambia* (2000).

<sup>21</sup> Section 7, *Arbitration Code of Tunisia* (1993).

<sup>22</sup> Uganda, Kenya, Tanzania, Rwanda, Egypt, Nigeria.

<sup>23</sup> Article II(2) and V(2)(a) of the New York Convention.



matters may or may not be resolved by arbitration.<sup>24</sup> Under the Kenyan Arbitration Act, the High Court may set aside an arbitral award where it finds that the subject matter is not capable of settlement by arbitration under Kenyan laws.<sup>25</sup> The High Court can also exercise this power at the point of the enforcement of an arbitral award.<sup>26</sup> Besides these provisions, there is no other provision in the Act that lays down the requirement of arbitrability.

Given the foregoing uncertainty, this paper examines the arbitrability of family disputes in Kenya following the Court of Appeal decision in *TSJ v SHSR (2019) eCLR*. In addition, a comparative analysis of the Institute of Family Law Arbitrators (IFLA) Scheme in England is made to demonstrate the possibilities of settling family disputes by arbitration in Kenya. The IFLA Scheme is also governed by the 1996 English Arbitration Act<sup>27</sup>, which is regarded as one of the best arbitration legislation in the world due to its clarity and simplicity.<sup>28</sup> It is no surprise that London is one of the most preferred arbitration seats in the world.<sup>29</sup>

Additionally, the English Arbitration Act reflects the key principles of arbitration in the Model Law, which influenced the Kenyan Arbitration Act.<sup>30</sup> This is why the IFLA Scheme in England, which is governed by the English Arbitration Act, is used in this paper. The IFLA Scheme is divided into two parts: the Family Scheme, which deals with financial and property disputes, and the Children Arbitration Scheme which deals with child-related matters. This classification ensures that in arbitral proceedings, the

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<sup>24</sup> Deskosk (n 4) 11.

<sup>25</sup> Section 35(b)(i), *Arbitration Act* (Act No 4 of 1995).

<sup>26</sup> *Ibid* Section 36.

<sup>27</sup> Institute of Family Law Arbitrators, *A Guide to the Family Law Arbitration Scheme*, 2021,3.

<sup>28</sup> Shadat Mohameded , ‘A Critical Analysis of Arbitral Provisional Measures in England and Wales’ (Degree of Philosophy in Law, Brunel University 2014)14.

<sup>29</sup> Queen Mary University of London, *International Arbitration Survey*, 2018, 2.

<sup>30</sup> The key principles reflected in the Model Law are party autonomy, limited court intervention, and finality of the arbitral award. Party autonomy under Section 1(b) of the *English Arbitration Act* is reflected in Article 19(1) of the *Model Law*. Similarly, Section 1(c) of the *English Arbitration Act* follows Article 5 of the *Model Law* on restricting the instances courts can intervene in arbitration. Lastly, both Section 58 of the *English Arbitration Act* and Section 35 of the *Model Law* emphasize that an arbitral award is final and binding on the parties. See also Bruce Harris, Rowan Planterose, and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (4<sup>th</sup> edn, Blackwell Publishing, Oxford 2007) 31.

child's best interests and welfare are taken into account.<sup>31</sup> Therefore, Kenya can learn from the success of family arbitration in England.

The paper is divided into six sections. Part One is this brief introduction on arbitrability and sets the study context. Part Two briefly comments on the Court of Appeal decision in *TSJ v SHSR (2019) eCLR*, and highlights its significance in arbitration and other areas of law. Part Three evaluates the benefits and drawbacks of using arbitration in settling family disputes. It then discusses the principle of *parens patriae* to show that the state retains a key role in protecting the best interests of the child. As a result, it may be hesitant to allow private individuals (arbitrators) to resolve child-related matters. Finally, the part discusses the limitations of the *parens patriae* principle in favour of family arbitration. Part Four illustrates the IFLA Scheme in England and Wales where family disputes, including those on children matters, are settled by arbitration. It also discusses the lessons that Kenya can learn from England in terms of resolving family disputes through arbitration. Part Five gives the recommendations while Part Six concludes the paper.

## **2. The Court of Appeal decision in *TSJ v SHSR (2019) ECLR***

### **2.1 Brief history and facts**

Due to irreconcilable differences, an Ismaili husband applied to the Shia Imami Ismailia National Conciliation and Arbitration Board, Nairobi (*the Arbitration Board hereinafter*) for the dissolution of the marriage with his Ismaili wife. After hearing the parties, the Arbitration Board published an arbitral award which: (i) dissolved the marriage; (ii) ordered for joint parental responsibility with actual child custody granted to the wife but the husband had access and visitation rights; and lastly (iii) ordered the husband to pay monthly spousal and child maintenance. However, the husband did not comply with the award.<sup>32</sup>

### **2.2 Proceedings in the High Court**

The wife filed an application under Section 36 of the Arbitration Act to have the Arbitration Board's arbitral award recognised and enforced. In the same application, she prayed for the release of outstanding monthly spousal and child maintenance due from the husband. In opposition to that application, the husband claimed that the

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<sup>31</sup> Sir James Munby (President of the Family Division), *Arbitration in the Family Court: Practice Guidance*, 2015. (England and Wales), [5]-[6].

<sup>32</sup> *TSJ v SHSR (2019) eCLR* [4].

Arbitration Board has no authority to dissolve a marriage or to make orders for child maintenance and custody, and thus its award cannot be enforced. At the same time, he filed an application with the court under Section 35 of the Arbitration Act, requesting that the arbitral award be set aside. The main issue before the High Court was whether the Arbitration Board had the power to grant a divorce order as well as to determine child custody and child maintenance.<sup>33</sup>

The High Court held that only ordinary courts or the Kadhis Courts have the jurisdiction to hear and determine matrimonial disputes. It was also unequivocally stated that only commercial disputes can be settled by arbitration. As a result, the Arbitration Board lacks the authority to deal with matters of divorce. Additionally, the High Court pronounced itself that the Arbitration Board lacks the power to decide child custody and child maintenance matters, all of which are reserved to the Children's Court. As a result, the Arbitration Board's arbitral award was set aside.<sup>34</sup>

### **2.3 Proceedings in the Court of Appeal**

Dissatisfied with the High Court's orders, the wife appealed to the Court of Appeal faulting the ruling of the High Court. First, she argued that the judge had failed to appreciate that the marriage contract between the parties provided for arbitration in the event of any matrimonial dispute.<sup>35</sup>

Additionally, she claimed that the judge erred by depriving the Arbitration Board of jurisdiction to deal with matters of personal law issues affecting Shia Imami Ismaili members, and ignored binding precedent. She further asserted that the judge disregarded the principles under *Article 159(2)(c) of the Constitution of Kenya* (Constitution hereinafter) that promotes the use of mediation and arbitration as dispute resolution processes.<sup>36</sup>

### **2.4 Summary of the Findings of the Court of Appeal**

There were two main issues for determination before the Court of Appeal. First, whether ordinary courts or Kadhis Courts have exclusive jurisdiction to grant divorce and orders relating to maintenance and custody of the children.<sup>37</sup> Second, whether the

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<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid [11].

<sup>36</sup> Ibid.

<sup>37</sup> Ibid [20]

genre of disputes capable of settlement by arbitration under the Act is limited to commercial disputes and whether personal law matters are arbitrable.<sup>38</sup>

The Court of Appeal began by emphasizing that the Arbitration Act does not limit the application of arbitration to only commercial disputes.<sup>39</sup> The Court reasoned that the Constitution has expanded the use of arbitration beyond commercial matters by commanding courts to promote arbitration and other dispute settlement processes when exercising judicial authority.<sup>40</sup> The Court further observed that the authority to end an Islamic marriage can reside outside of the courts.<sup>41</sup> As a result, the Arbitration Board was within its authority under the Shia Imami Muslim Constitution to decide on marriage and matrimonial property issues. Furthermore, the Court of Appeal further stated that since the parties had freely chosen the Arbitration Board to resolve their dispute, their choice should be respected and given effect.<sup>42</sup>

On matters concerning child-related matters, the Court of Appeal held that the Children's Court does not have exclusive jurisdiction over child custody and child maintenance orders. Therefore, the Arbitration Board has the power to issue such orders on children matters.<sup>43</sup> Additionally, the Court of Appeal held that the High Court is bound by the Court of Appeal decision in *Nurani v Nurani* because of *stare decisis*. In that case, the Court of Appeal found that the Ismailia Provincial Council has the authority to dissolve a Muslim marriage and settle child custody issues because Ismailis submit to its jurisdiction in personal law matters.<sup>44</sup> The Court observed that although the *Nurani decision* was before the promulgation of the 2010 Constitution, its holding is still the correct position of the law today.

In summary, the Court of Appeal allowed the appeal, overturned the High Court ruling and replaced it with an order recognising and enforcing the Arbitration Board's arbitral award.<sup>45</sup>

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid [21]-[23].

<sup>40</sup> Ibid [30].

<sup>41</sup> Ibid [31].

<sup>42</sup> Ibid [38].

<sup>43</sup> Under Article 13 of the Shia Imami Ismaili Constitution, the Arbitration Board is empowered "to act as an arbitration and judicial body and accordingly to hear and adjudicate upon" "(ii) domestic and family matters including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession.

<sup>44</sup> *Nurani v Nurani* (1981) KLR 87.

<sup>45</sup> TSJ (n 32)[31].

## 2.5 Comment and Observations on the Decision

The Court of Appeal decision raises many important issues in the field of arbitration and other areas of law in Kenya.

To begin with, the decision underscores the principle of party autonomy which is at the heart of arbitration. Parties have the power and control of the arbitral process; they choose the arbitrators directly and voluntarily thus making the outcome mutually acceptable to them.<sup>46</sup> The psychological satisfaction and legitimate expectation of parties that their arbitration will go according to their wishes, stems from party autonomy.<sup>47</sup> As a result, the arbitral process becomes more certain and predictable.<sup>48</sup> The Court of Appeal stated that the parties were bound by the Arbitration Board's decision since they had submitted to its authority by virtue of their religious edict under their constitution.<sup>49</sup> Therefore, the Court of Appeal emphasized the importance of party autonomy in arbitration.

Second, the decision demonstrates the courts' commitment to promoting Alternative Dispute Resolution mechanisms (ADR). According to the Constitution, courts shall be guided by ADR mechanisms as one of the principles in exercising judicial authority.<sup>50</sup> The Court of Appeal stressed that promoting ADR is a constitutional obligation.<sup>51</sup> Additionally, the Court further highlighted that the Constitution broadened the scope of arbitrability to include personal law matters which were initially excluded from arbitration.<sup>52</sup> The Court also relied on Section 3 of the Arbitration Act to justify that all disputes whether contractual or not, can be submitted to arbitration.<sup>53</sup> To further illustrate the widened scope of arbitrability under the new constitutional dispensation, the Court also referenced Article 189 of the Constitution which recognises the use of arbitration and other ADR mechanisms in the settlement of inter-governmental

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<sup>46</sup> Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3<sup>rd</sup> edn, Glenwood Publishers Limited, Nairobi 2017)3.

<sup>47</sup> Charles Chatterjee, 'The Reality of the Party Autonomy Rule in International Arbitration' (2009) 20 *Journal of International Arbitration*,551.

<sup>48</sup> Alexis Mourre and Luca Brozolo, 'Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back' (2011) 27 *Arbitration International*,15.

<sup>49</sup> TSJ (n 32) [37]-[38].

<sup>50</sup> Article 159(2)(c), *Constitution of Kenya* (2010).

<sup>51</sup> TSJ (n 32) [29].

<sup>52</sup> Ibid [30].

<sup>53</sup> Section 3 of the Arbitration Act which provides that parties may refer all or certain disputes which may arise between them whether contractual or not.

disputes.<sup>54</sup> To its mind, since arbitration can be used to solve disputes which are ideally supposed to be excluded from the purview of private individuals, then arbitration can also be used for family disputes.<sup>55</sup> The Court of Appeal decision serves as a reminder to courts that ADR processes complement the judicial process in attaining access to justice.<sup>56</sup>

Third, the decision emphasizes the importance of precedent. Precedent is a previous court decision that serves as a guide for current proceedings.<sup>57</sup> The principle of *stare decisis* holds that precedents made by superior courts unless distinguished or overruled are binding on lower courts in similar circumstances.<sup>58</sup> By fostering certainty and predictability, precedent promotes legal stability.<sup>59</sup> A court's commitment to precedent provides a valuable degree of certainty; when acting and planning, people are able to see the repercussions of their actions.<sup>60</sup> The principle of *stare decisis* is enshrined in the Constitution, which provides that the decisions of the Supreme Court bind all other courts.<sup>61</sup> This is extended to other courts in the hierarchy of the court system in Kenya; a decision of a higher court binds lower courts.<sup>62</sup> The Court of Appeal held the High Court was bound by the *Nurani v Nurani* decision.<sup>63</sup>

Fourth, the decision bears an impact on the conflicting position of the High Court on whether child custody and maintenance matters are exclusively under the jurisdiction of the Children's Court. On the one hand, the High Court held in *Najma Ali Ahmed v Swaleh Rubea* that child maintenance and child custody matters are incidental to marriage. Therefore, the Children's Act does not preclude the Khadis Courts from hearing child custody and maintenance cases.<sup>64</sup> The High Court, on the other hand,

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<sup>54</sup> Ibid [30].

<sup>55</sup> Ibid(n 52). See also Article 189, *Constitution of Kenya* (2010).

<sup>56</sup> *Dickson Mukweluine v Attorney General*, Nairobi High Court Petition No 390 of 2012. See also Muigua (n 46)14.

<sup>57</sup> Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, Cambridge 2018)4.

<sup>58</sup> Michael Gerhardt, *The Power of Precedent* (Oxford University Press, Oxford 2008)8.

<sup>59</sup> Duxbury (n 57) 159.

<sup>60</sup> Ibid 160.

<sup>61</sup> Article 163(7), *Constitution of Kenya* (2010).

<sup>62</sup> *Kidero & 5 Others v Waititu & Others* (2014) eKLR. See also *Wanjohi v Steven Kariuki* (2014) eKLR[79]. The Supreme Court in these decisions has consistently upheld the application of the principle of *stare decisis* in Kenya.

<sup>63</sup> TSJ (n 32) [36].

<sup>64</sup> (2010) eKLR. This decision has been followed by other judges of the High Court. In *Abdirahman Mohamed Abdi & Another v Adan Yusuf* (2013) eKLR, the High Court held that

decided in *ZHS v SDS* that matters relating to children are solely under the jurisdiction of the Children's Courts. As a result, only the Children's Courts can deal with custody and maintenance matters under the Children's Act.<sup>65</sup> The Court of Appeal in the *TSJ case*, however, pointed out that nothing in the Children's Act provides that the Children's Court has exclusive jurisdiction on child custody and maintenance matters.<sup>66</sup> It further stated that nothing in the Children's Act prevents a body like the Arbitration Board from arbitrating child custody and maintenance cases.<sup>67</sup> Therefore, the Arbitration Board was within its mandate to decide those issues.

### **3. Family Disputes and Arbitration**

All families experience difficulties and stress at certain times.<sup>68</sup> These conflicts within a family can be termed as family disputes and usually concern property disputes, financial support, child support, child custody, and child visitation disputes.<sup>69</sup> Family conflicts breed resentment and bitterness against spouses.<sup>70</sup> As a result, such disputes can have unfavourable implications for adults and even more serious consequences to children. Children react to their parents' separation in various ways, depending on their age, maturity, and what is going on at home.<sup>71</sup> Most children may skip school when their parents' relationship comes to an end, some will experience psychological disorders like depression, anxiety and sadness, and others may turn to drugs and alcohol.<sup>72</sup>

#### **3.1 Advantages of using arbitration in resolving family disputes**

Arbitration guarantees the resolution of sensitive matters in a private and informal forum.<sup>73</sup> Family disputes can elicit intense and complex emotions which may tempt

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paternity and child custody are incidental to the issues of marriage and fall under the jurisdiction of the Khadis Courts.

<sup>65</sup> (2014)eKLR. This decision has been followed by other judges of the High Court in *GSA v ASA* (2014)eKLR and *AAI v HAD* (2018)eKLR.

<sup>66</sup> TSJ (n 32) [41].

<sup>67</sup> Ibid.

<sup>68</sup> Adesina Bello, 'Arbitration as a Template for Resolving Family Disputes' (2018) 84 *International Journal of Arbitration, Mediation, and Dispute Management*,240.

<sup>69</sup> Vini Singh, 'Compulsory Mediation for Family Disputes' (2010) 2 *The Indian Institute of Arbitration and Mediation*,2.

<sup>70</sup> John-Paul Boyd, 'Collaborative Settlement: Resolving Disputes After Separation or Divorce' (2015) 45*The Vanier Institute of Family Law*,3.

<sup>71</sup> Joan Kelly and Robert Emery, 'Children's Adjustment Following Divorce: Risks and Resilience Perspectives' (2003) 52 *National Council on Family Relations*, 353.

<sup>72</sup> Ibid 4.

<sup>73</sup> Bello (n 68) 240.



each spouse to disclose all information about their health, sex life, financial problems, and the children to the public.<sup>74</sup> Given the need to keep such information and private, arbitration is preferred to litigation in settling family disputes because courts hold their hearings in public and publish their judgements.<sup>75</sup> This privacy provided by arbitration helps quell feelings of embarrassment and inadequacy on the part of parents.<sup>76</sup>

Arbitration can significantly speed up the process thus reducing the tension associated with lack of certainty.<sup>77</sup> The frustration that families experience after breakups is sometimes exacerbated by judicial delays.<sup>78</sup> This is due to the fact that resolving disputes through litigation takes a longer time. An arbitration session, on the other hand, can be held as soon as everyone is available and can also be a documents-only procedure.<sup>79</sup> As a result, adopting arbitration in family disputes relieves the overburdening of courts.<sup>80</sup> In Kenya, for example, the number of pending cases has been increasing over time. The number of pending cases increased by 8% from 569,859 cases at the end of 2018/2019 to 617,582 cases in 2019/2020.<sup>81</sup> In 2017/2018, the backlog stood at 327,928 cases<sup>82</sup>; in 2018/2019, it stood at 341,056 cases<sup>83</sup>; and lastly, in 2019/2020, the backlog stood at 359,347 cases<sup>84</sup>. From these statistics, it is evident

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<sup>74</sup> Ibid.

<sup>75</sup> Linda Elrod, 'The need for confidentiality in Evaluative Processes: Arbitration and Med-Arb in Family Law Cases' (2020) 58 *Family Court Review*, 27.

<sup>76</sup> Joseph Zammit and Janet Maleson, 'Mediation-Arbitration: A Proposal for Private Resolution of Disputes between Divorced or Separated Parents' (1976) 1 *Duke Law Journal*, 919.

<sup>77</sup> Madelene De Jong, 'Arbitration of Family Separation Issues – A Useful Adjunct to Mediation and Court Process' (2014) 17 *Potchefstroom Electronic Law Journal*, 2367.

<sup>78</sup> Antonio Calabrese, 'The Enforceability of Arbitration Clauses in Virginia Marital Separation Agreements' (1985) 19 *The University of Richmond Law Review*, 339.

<sup>79</sup> Boyd (n 70) 5.

<sup>80</sup> De Jong (n 77) 2369.

<sup>81</sup> The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report*, 2019/2020, 26.

<sup>82</sup> The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report*, 2017/2018, 22.

<sup>83</sup> The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report*, 2018/2019, 24.

<sup>84</sup> The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report*, 2019/2020, 47.



that courts are overburdened which poses a threat to access justice because justice delayed is justice denied.<sup>85</sup>

Arbitration allows parties to have control over the arbitral process. Spouses and their lawyers can choose the arbitrator whose skills suit the family dispute in question.<sup>86</sup> Since divorcing parties choose their arbitrators, they have a much greater incentive to abide by the terms of the resultant arbitral award.<sup>87</sup> Parties can also agree to a documents-only procedure, face-to-face meetings, or can conduct the process through email and telephone.<sup>88</sup>

Parties may also benefit from the psychological training of certain arbitrators whose determinations would reflect substantial professional expertise in the area of family law.<sup>89</sup> This is not to say that judges do not have expertise in family law matters. However, they presumably do not have a professional grounding in its emotional implications like experienced and professional arbitrators in family matters have.<sup>90</sup> Furthermore, once an arbitrator is nominated and accepts an appointment, the arbitrator must see the arbitration through to the end.<sup>91</sup> This certainty gives parties legitimate expectation and satisfaction that their dispute will be handled and completed by an arbitrator of their choosing.<sup>92</sup> In courts, however, the judges may be transferred before a decision is reached on the matter.<sup>93</sup>

### **3.2 Disadvantages and challenges of using arbitration in family disputes**

Spouses may be unwilling to co-operate. The question remains whether spouses experiencing a matrimonial breakdown can co-operate sufficiently and agree upon an

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<sup>85</sup> The Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2017/2018*, 61. A case is classified as backlog if it remains unresolved for over one year since its date of filing.

<sup>86</sup> Boyd J (n 79).

<sup>87</sup> Calabrese (n 78) 339.

<sup>88</sup> Sir Hugh B, 'Family Law Arbitration' Lecture at the Inner Temple on 30 March 2015 [21].

<sup>89</sup> Bello (n 73).

<sup>90</sup> Thomas Carbonneau, 'A Consideration of Alternatives to Divorce Litigation' (1986)6 University of Illinois University, 1166.

<sup>91</sup> Blackaby and others (n 2) 31.

<sup>92</sup> Ibid.

<sup>93</sup> Sir Hugh B (n 88) [34].

ADR process like arbitration.<sup>94</sup> There is a high temptation to act on emotions and simply resort to frustrating the process by turning to courts.<sup>95</sup>

Arbitrators may lack expertise and experience in family law. An arbitrator can be anyone: a mental health professional, psychologists, or family therapists so long as they have undergone training in arbitration.<sup>96</sup> These professionals may encounter challenges in interpreting the law on the matters before them. Worse still, any failure to follow due process requirements may lead to the setting aside of an arbitral award.<sup>97</sup> Additionally, unlike judges who follow precedent, arbitrators do not follow precedent and are not required to apply past decisions. This stems from the fact that awards delivered by arbitrators are private and not published.<sup>98</sup> As a result, the failure to rely on precedent may lead to uncertainty and unpredictability of the outcome.<sup>99</sup>

Third, judicial substitution is a practical benefit that courts have. Cases can be transferred to another judge if a judge who was handling them, is transferred. When it comes to arbitration, an arbitrator cannot delegate or transfer cases when they get very busy.<sup>100</sup> Therefore, arbitrators may end up being not fully invested in the matter. Closely related to this, arbitration has a limited right of appeal. This is because arbitral awards are final and binding on the parties which implies that a party aggrieved by the arbitrator's decision may have no recourse to courts. In most cases, a party can only appeal on points of law.<sup>101</sup>

Fourth, there is limited relief available to arbitrators in case of non-compliance. Where a spouse fails to comply with an arbitral award, an arbitrator has no authority to decide that a party's conduct amounts to contempt or purport to impose penalties for such

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<sup>94</sup> Carbonneau (n 90)1165.

<sup>95</sup> Ibid.

<sup>96</sup> Bello (n 89) 248.

<sup>97</sup> Carbonneau (n 94) 1161.

<sup>98</sup> Bello (n 96)250.

<sup>99</sup> Carbonneau (n 97).

<sup>100</sup> Centre for Socio-Legal Studies, *An Overview of the use of Arbitration in England*, 2014,29.

<sup>101</sup> Dylan Chaplin-Burch, 'Family Law Arbitration may not be the answer' <<https://www.aiken.com.au/family-law-arbitration-is-not-always-the-answer/#:~:text=In%20determining%20whether%20a%20family%20law%20dispute%20is,b%20the%20arbitrator%E2%80%99s%20decision%20may%20have%20no%20recourse>>> accessed on 29 April 2021.

contempt.<sup>102</sup> Since arbitrators lack coercive powers, they cannot impose penalties or compel a spouse to do something.<sup>103</sup>

Fifth, arbitration may become costly in the long run. This is because parties must pay for the arbitrator's time, the fee of the arbitration forum and the usual litigation fees and related costs.<sup>104</sup> Moreover, there have been concerns about the increasing costs of arbitration. This may discourage parties from using family arbitration. The cumulative cost may end up being more than costs incurred in litigation.<sup>105</sup>

Lastly, obtaining disclosure from third parties may be difficult. Where parties are in arbitration and disclosure is required from third parties, for instance, the trustees of a trust of which one of the spouses is a beneficiary, the arbitrator cannot compel the disclosure.<sup>106</sup> This is because an arbitration agreement is only binding on the parties unless the third party signed the arbitration agreement.<sup>107</sup>

### **3.3 Parens Patriae and child-related matters in family disputes**

The majority of family disputes can be divided into two distinct categories. First, disputes concerning the resolution of property between the divorcing spouses such as maintenance and property division.<sup>108</sup> The second category concerns disputes that affect the children of the dissolving marriage like child support and child custody.<sup>109</sup> The first category is often viewed as contractual in which adults should be allowed discretion to privately settle their differences. While child matters are fraught with public concern and are safeguarded by the state.<sup>110</sup>

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<sup>102</sup> Laurie Pawlitza, 'Family Law arbitration has advantages, but it's no guarantee you'll stay out of court'

<<https://www.lexology.com/library/detail.aspx?g=671def84-ef2-4dde-9591-5e4649c0ce8b>>  
Accessed on 29 April 2021. Also see *Woronowicz v Conti* (2015), The Supreme Court of Justice of Ontario. In *Kaplan v Kaplan* (2015), the Ontario Supreme Court held that arbitrators do not have the powers of a court to compel directions through contempt or other means.

<sup>103</sup> Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, Cambridge 2008) 5.

<sup>104</sup> Blackaby and others (n 91) 36.

<sup>105</sup> Kariuki Muigua, *Alternative Dispute Resolution* (Glenwood Publisher Limited, Nairobi 2015) 40.

<sup>106</sup> Pawlitza (n 102).

<sup>107</sup> *Ibid.*

<sup>108</sup> Bello (n 98) 243.

<sup>109</sup> Calabrose A, (n 87) 342.

<sup>110</sup> *Ibid.*

When spouses are distributing their property and maintenance, the parties are allocating their rights. However, in child support and custody, it is the primary rights of the children that are at stake. As a result, states have retained a substantial role in protecting the best interests of children through the doctrine of *parens patriae*.<sup>111</sup> This is because the marriage relationship can involve innocent and non-contracting third parties; the children, whose rights and welfare are automatically implicated by the relationship.<sup>112</sup>

The *parens patriae*, Latin for “parent of the nation” asserts that the family is an autonomous self-sustaining institution and that child raising is the responsibility of parents alone.<sup>113</sup> However, the state is entitled to intervene in the place of parents where the family has failed in its responsibilities towards children.<sup>114</sup> Philosophers have also differed on who should control the children. Aristotle believed that children are the property of their parents.<sup>115</sup> Plato, in the Republic, regarded children to be the property of the state.<sup>116</sup> The doctrine considers the welfare of the child as the court’s paramount concern and that courts should step in and enforce parental responsibilities for the welfare of the child.<sup>117</sup>

As *parens patriae*, the state promotes and defends the best interests of all children.<sup>118</sup> The best interests of the child principle requires that due attention and priority be given to the economic, intellectual, physical, and social interests of the child whenever policies, laws, and decisions are made concerning children.<sup>119</sup> The *United Nations Convention on the Rights of the Child (CRC)* outlines the principle of the best interests

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<sup>111</sup> Ibid 345.

<sup>112</sup> Carbonneau (n 99) 1129.

<sup>113</sup> George Curtis, ‘The Checkered Career of Parens Patriae: The State as Parent or Tyrant’ (1976) 25 *DePaul Law Review*, 895.

<sup>114</sup> David Labaree, ‘Parens Patriae : The Private Roots of Public Policy Towards Children’ (1986) 26 *History of Education Quarterly*, 112.

<sup>115</sup> Aristotle, *Nicomachean Ethics*, 1134b.

<sup>116</sup> Plato, *Republic*, 423e6-424a2.

<sup>117</sup> Elchanan Stern, ‘Parens Patriae and Parental Rights: When Should the State Override Parental Medical Decisions’ (2019) 33 *Journal of Law and Health*, 91.

<sup>118</sup> Jason Blokhuis , ‘Parens Patriae: A Comparative Study of Sovereign Authority and Public Education Policy in the Province of Ontario and the State of New York’ (Doctor of Philosophy, University of Rochester 2009) 289.

<sup>119</sup> Aron Degol A and Shimelis Dinku , ‘Notes on the Principle of Best Interest of the Child: Meaning, History, and its Place of Ethiopian Law’ (2011) 5 *Mizan Law Review*, 319.

of the child.<sup>120</sup> The CRC provides that this principle must be a primary consideration in all actions concerning children whether undertaken by public or private institutions as well as courts and administrative bodies.<sup>121</sup>

According to the *Committee on the Rights of the Child*, the best interest of the child is a threefold concept: a substantive right, a fundamental interpretative legal principle, and a rule of procedure.<sup>122</sup> It is a substantive right in that a child has a right to have their best interests considered in reaching a decision. Furthermore, assurances must be provided that this right will be considered anytime a decision is to be made concerning a child.<sup>123</sup> The best interest of the child is a key interpretative principle. When a legal provision can be interpreted in several ways, the interpretation that best serves the interests of the child should be chosen.<sup>124</sup> Lastly, the principle is a rule of procedure. Whenever a decision that will affect a specific child or children must be made, the decision-making process must include an evaluation of the possible impact (positive and negative) of the decision on the child or children involved.<sup>125</sup>

There is no legal definition of what constitutes a child's best interests. This is due to the fact that the best interests of each child will vary depending on the circumstances of each case at a particular time.<sup>126</sup> Nonetheless, there are some minimum requirements that comprise the best interests of the child. The child, for example, has a right to medical care, shelter, food, clothing, and education.<sup>127</sup> The child is also entitled to parental guidance which shall be provided by both parents where possible.<sup>128</sup>

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<sup>120</sup> Article 3 of the United Nations Convention on the Rights of the child (UNCRC) adopted by Resolution 44/25 of the UNGA on 20 November 1989 and entered into force 2nd of September 1990.

<sup>121</sup> Ibid

<sup>122</sup> Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (Article 3), 2013, [6].

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Pamela Laufer-Ukeles Pamela, 'Introduction: Custody Through the Eyes of the Child' (2011) 36 *University of Dayton Law Review*, 300

<sup>127</sup> *MA v ROO* (2013) eKLR.

<sup>128</sup> Article 53(1)(d), *Constitution of Kenya* (2010) provides that every child has the right to parental care and protection, which includes equal responsibility of the mother and father to provide for the child whether they are married or not.

### **3.4 Limitation of the Parens Patriae Doctrine**

When a marriage ends, a state acting through its courts, assumes the role of *parens patriae*, deciding who will have custody of the children and under what circumstances. Where the divorce involves bitterness between the spouses that even a modest level of cooperation is impossible, the state's intervention in the child's best interest is certainly justified.<sup>129</sup> However, the requirement of state paternalism is less evident if there is a remnant of goodwill and trust between the parents on child matters, or at least a prevailing determination to make their own decisions about such matters.<sup>130</sup> In such situations, the parents have often executed a separate agreement providing for custody, visitation, and support.<sup>131</sup>

Parents have family autonomy over their children. Parents have and should have the primary responsibility of raising their children.<sup>132</sup> Judges as a group possess no qualities that make them inherently more capable than parents to make intelligent decisions as to a child's best interests after the termination of a marriage.<sup>133</sup> Despite the breakdown in the marital relationship, the preservation of family autonomy requires that parents retain the right to make decisions affecting the upbringing of their children. Where the parents fail to agree between themselves on what is best for their children, they should at least have the right to choose a decision-maker and should not be compelled to accept an individual judge whose values may significantly differ from their own.<sup>134</sup>

## **4. Arbitrability of family disputes in England and Wales**

The English Family Procedure Rules law oblige courts to encourage and facilitate the use of ADR.<sup>135</sup> The court must consider whether ADR is appropriate at any stage.<sup>136</sup> In the United Kingdom, matters on property and children can be submitted to arbitration through the Institute of Family Law Arbitrators (IFLA) and the Institute of Family Law Arbitrators Scheme (IFLA Scheme). IFLA and the IFLA Schemes were created after a collaboration between the Resolution, the Family Law Bar Association, the Chartered

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<sup>129</sup> Zammit (n 76) 911.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid 912.

<sup>132</sup> Ibid 918.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid 919.

<sup>135</sup> Rule 3.1, *Family Procedure Rules of England* (2010).

<sup>136</sup> Rule 3.2, *Family Procedure Rules of England* (2010).

Institute of Arbitrators, and the Centre for Child and Family Law Reform.<sup>137</sup> The IFLA scheme was intended to align family arbitration procedures as closely as possible with commercial arbitrations governed by the English Arbitration Act.<sup>138</sup>

The IFLA Schemes are divided into two categories: the Financial Scheme, which was established in 2012, and the Children Arbitration Scheme launched in 2016. Any financial and property disputes arising from family relationships are covered under the Financial Scheme. However, the Scheme does not include the status of individuals or their relationship or any arrangements regarding children except for financial arrangements.<sup>139</sup> The Children Arbitration Scheme, on the other hand, covers matters on the education of the child, child visitations, where a child should live, and any issue concerning the child's welfare between parents or those holding parental responsibility.<sup>140</sup>

Parties to a dispute under the Financial Scheme refer the matter to arbitration by signing Form ARB1.<sup>141</sup> After the reference, parties may agree to nominate a particular arbitrator from a pool of qualified family law practitioners. Alternatively, they may agree on a shortlist of arbitrators from the panel any one of whom would be acceptable to them, and ask the IFLA to choose one of the arbitrators on the list.<sup>142</sup> The arbitration commences when the nominated arbitrators accept the appointment.<sup>143</sup> It should be noted that an arbitrator nominated by the parties must refer the nomination to the IFLA before accepting an appointment. This is aimed at facilitating the completion of Form ARB1 to commence the arbitration.<sup>144</sup>

Similar to regular arbitration, parties may agree on the procedure and may adopt a documents-only procedure for expedition purposes.<sup>145</sup> After hearing the parties, the arbitrator renders a final and binding award on the parties.<sup>146</sup> The parties can then apply

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<sup>137</sup> <http://ifla.org.uk/what-is-arbitration/faqs/>

<sup>138</sup> *DB v DJ* (2016), The High Court of England and Wales, para 4.

<sup>139</sup> Article 2, *The IFLA Arbitration Rules of England and Wales* (2015).

<sup>140</sup> Article 2, *Family Law Arbitration Children Scheme Arbitration Rules of England and Wales* (2021).

<sup>141</sup> Rule 4.1, *IFLA Arbitration Rules of England and Wales* (2015).

<sup>142</sup> Rule 4.3.2, *IFA Arbitration Rules of England and Wales* (2015).

<sup>143</sup> *Ibid.*

<sup>144</sup> Rule 4.3.1, *IFA Arbitration Rules of England and Wales* (2015).

<sup>145</sup> Rule 9, *IFA Arbitration Rules of England and Wales* (2015).

<sup>146</sup> Rule 13.1, *IFA Arbitration Rules of England and Wales* (2015).

to the court for an order on the same or similar terms as the arbitral award subject to any challenge of the award under the English Arbitration Act.<sup>147</sup>

Regarding the Children Arbitration Scheme, parties may refer a dispute to the Children Scheme by making an agreement to arbitrate through signing Form ARB1CS and Safeguarding Questionnaires.<sup>148</sup> The parties may choose their arbitrator from a panel of arbitrators comprising members of the Chartered Institute of Arbitrators who are experienced in children matters.<sup>149</sup> Alternatively, the IFLA may appoint an arbitrator for the parties. The same rules of notification to the IFLA about the nomination before acceptance of appointment apply.<sup>150</sup> The arbitrator is barred from meeting with the child at any stage of the proceedings. However, the arbitrator may appoint an independent social worker to ascertain the wishes and feelings of the child.<sup>151</sup>

Unlike the Financial Scheme which issues an award, an arbitrator in the Children Arbitration Scheme delivers a determination within a reasonable time after the conclusion of proceedings.<sup>152</sup> Once made, a determination is final and binding on the parties subject to any challenge under the English Arbitration Act's established mechanisms of appeal or review of arbitral awards. The determination made is also subject to any subsequent determination or order of the Family Court.<sup>153</sup> Nonetheless, parties can apply to the Family Court for an order in the same or similar terms as the determination.<sup>154</sup>

Under the *Practice Guidance Directions*, the Family Court is mandated to stay any financial remedy proceedings and children-related proceedings pending the delivery of

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<sup>147</sup> Rule 13.4, *IFA Arbitration Rules of England and Wales* (2015).

<sup>148</sup> Rule 4.1, *Family Law Arbitration Children Scheme Arbitration Rules of England and Wales* (2021).

<sup>149</sup> Rule 4.3.2, *Family Law Arbitration Children Scheme Arbitration Rules of England and Wales* (2021)

<sup>150</sup> Rule 4.3.1, *Family Law Arbitration Children Scheme Arbitration Rules of England and Wales* (2021).

<sup>151</sup> Rule 8.3, Article 2, *Family Law Arbitration Children Scheme Arbitration Rules of England and Wales* (2021).

<sup>152</sup> Rule 13.1, *Family Law Arbitration Children Scheme Arbitration Rules of England and Wales* (2021).

<sup>153</sup> Rule 13.3(c), *Family Law Arbitration Children Scheme Arbitration Rules of England and Wales* (2021).

<sup>154</sup> Rule 13.4, *Family Law Arbitration Children Scheme Arbitration Rules of England and Wales* (2021).



an arbitral award.<sup>155</sup> Moreover, under the English Civil Procedure Rules, the courts must directly enforce awards.<sup>156</sup>

#### **4.1 Drawing lessons from England and Wales on the arbitrability of family disputes**

Party autonomy should be respected because it has gained a sacred status.<sup>157</sup> In family justice, party autonomy translates to a limited state role of assisting parties to reach agreements and educate parties on how to make their own best decisions.<sup>158</sup> Individuals should have the right to make their choices and take responsibility for the consequences of such decisions.<sup>159</sup> Where the parties have agreed to resolve their family disputes through arbitration, that choice should be respected.<sup>160</sup>

Kenyan Courts should be supportive of family arbitration. Since the establishment of the IFLA Scheme, English Courts have been supportive of family arbitration and the Children Arbitration Scheme. They have been categorical that disputes on distributing finances, child custody and maintenance are arbitrable and not contrary to public policy.<sup>161</sup> Additionally, the English Courts have rejected the argument that every award arising from family law arbitration needs to be incorporated into a court order, which requires the approval of the court.<sup>162</sup>

The Chartered Institute of Arbitrators-Kenya Branch (CIArb) should spearhead and advocate for family arbitration in Kenya. This can be achieved through consultations with other stakeholders in family law and practice. The Chartered Institute of Arbitrators-England considered the training of family law arbitrators as a project falling within the object of its Royal Charter, which is, *‘to promote and facilitate worldwide the determination by arbitration and alternative means of private dispute*

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<sup>155</sup> Sir James Munby (President of the Family Division), *Arbitration in the Family Court: Practice Guidance*, 2015. (England and Wales).

<sup>156</sup> Section 3, *English Civil Procedure Rules* (Specifically Rule 62.17 and Rule 62.18) (2010).

<sup>157</sup> Sunday Fagbemi, ‘The Doctrine of Party Autonomy in International Commercial Arbitration: Myth and Reality?’ (2015) 6 *Afe Babalola University Journal of Sustainable Development and Policy*, 228.

<sup>158</sup> Alison Diduck, ‘Autonomy and Family Justice’ (2016) 28 *Child & Family Law Quarterly*, 144.

<sup>159</sup> *Ibid.*

<sup>160</sup> Farrah Ahmed and Senwung Luk, ‘Religious Arbitration: A Study of Legal Safeguards’ (2011) 77 *The International Journal of Arbitration, Mediation, and Dispute Management*, 292.

<sup>161</sup> *S v S* [2014] EWHC 7 (Fam) (EWHC).

<sup>162</sup> *BC v BG* [2019] EWFC 7 (EWFC).

resolution other than resolutions by the court'.<sup>163</sup> CIArb-Kenya can draw inspiration from its parent organisation.

The President of the Family Court in England drafted practice directions on the enforcement of awards arising from the IFLA Scheme. Under Kenyan law, the Chief Justice is empowered to issue practice directions and written guidelines to harmonize the judicial and administrative functions of the courts.<sup>164</sup> The Chief Justice can work with the Principal Judge<sup>165</sup>, and the Presiding Judge<sup>166</sup> of the family division of the High Court in Kenya to issue practice directions. This will guide the family division of the High Court when presented with awards arising from family arbitration.

## 5. Recommendations

The Court of Appeal's reasoning in *TSJ v SHSR* (2019) eKLR shows that family disputes are arbitrable despite the lack of express mention in the Act and adequate practice that such disputes are arbitrable. The paper presents the following proposals for achieving a clear and defined settlement of family disputes through arbitration:

First, arbitrators should have specialised training in family disputes and child-related matters. Such training would equip arbitrators with knowledge on the best interests of the child and the principles on the division of matrimonial property. The training should be open to those who have experience in the field of family law to ensure that they are competent to determine family disputes.<sup>167</sup> In addition, there should be extensive training of judges to promote supportive attitudes towards family arbitration and the expeditious resolution of family disputes while safeguarding the welfare of children.

Second, a task force should be appointed by the Chief Justice tasking it to evaluate the suitability or unsuitability of settling family disputes using arbitration in Kenya. While the Court of Appeal found that family disputes are arbitrable, the *TSJ case* was based

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<sup>163</sup> Jonathan Ripley-Evans, 'Arbitration: Family Law- A New Path' (2011) 1 *Kluwer Law International*,12.

<sup>164</sup> Article 16, *High Court Organisation and Administration Act* (Act No 27 of 2015).

<sup>165</sup> Under Section 6 of the *High Court Organisation and Administrative Act*, the Principal Judge is responsible for the overall administration and management of the High Court.

<sup>166</sup> Under Section 7 of the *High Court Organisation and Administrative Act* (Kenya), a Presiding judge is tasked with the efficient functioning of a station or division of the High Court. A Presiding Judge is appointed by the Chief Justice, in consultation with the Principal Judge.

<sup>167</sup> Evans (n 163).

on family disputes under faith-based arbitration of the Ismaili Muslims. The task force should interrogate the suitability or unsuitability of using arbitration in family disputes across all persons. The report should also clearly outline the laws that need to be amended if the task force finds arbitration suitable for settling family disputes. Furthermore, the task force can advise whether child-related matters should be submitted for arbitration and if so, the guarantees on how the best interests of the child will be realised.

Third, Section 6 of the *Matrimonial Property Act* should be amended to allow for the use of arbitration in settling property and financial disputes between spouses. This section empowers partners to enter into agreements before their marriage to determine their property rights.<sup>168</sup> This section could be amended to allow parties to use arbitration to resolve such disputes after a marriage has ended. Similarly, Section 73 of the *Children's Act* can also be amended to expressly provide that Children's Courts do not have exclusive jurisdiction on child-related matters. Such an amendment would permit the submission of child custody, child maintenance, and other child-related matters to arbitration. The option of seeking redress from the Children's court should be left open such that parties can choose their preferred forum of redress.

Fourth, there should be co-operation between *CIArb-Kenya* and the *National Council for Children's Services* in organising and drafting arbitration courses to incorporate matters on child welfare. The National Council is in charge of overseeing and controlling the planning and co-ordination of children's welfare and activities.<sup>169</sup> The Council is also in charge of coordinating public education programmes related to children's wellbeing.<sup>170</sup> This collaboration will ensure that family arbitrators are well trained in children matters, and both organisations will be able to agree on the minimum qualifications for child-related family arbitrators.

Additionally, the *Director of Children's Services* and *CIArb-Kenya* should work together. The Director conducts investigations and assessments needed by courts and enforces orders under the *Children's Act*.<sup>171</sup> This collaboration is necessary because family arbitrators may require assessment reports on children's welfare and the best

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<sup>168</sup> Section 6, *Matrimonial Property Act* (Act No 49 of 2013)

<sup>169</sup> Section 32(1), *Children's Act* (Chapter 141).

<sup>170</sup> Section 32(2)(d), *Children's Act* (Chapter 141).

<sup>171</sup> Section 38(2)(g), *Children's Act* (Chapter 141).

interests of the child during proceedings and in their subsequent arbitral awards.<sup>172</sup> Moreover, family arbitrators should pay special attention to the principles that have been outlined by courts in matters concerning child custody<sup>173</sup> and maintenance. For instance, children of tender years, absence of exceptional circumstances, ought to be with their mothers. Some exceptional circumstances may include being unsettled, disgraceful, and disgraceful conduct.<sup>174</sup>

Furthermore, in order to guarantee that the best interests of the child are recognised, the Arbitration Act may impose an initial burden on a party seeking to set aside an arbitrator's decision. If no challenge is made, the award remains in place. When the arbitral award is contested, however, the burden of proof shifts to the supporters of the award to show that the award could not actually or materially harm the child's welfare and interests. If the supporters of the arbitral award fail, the court can conduct a *de novo* review and make orders that best guarantee a child's best interests.<sup>175</sup> This mechanism would ensure that the welfare of the child is considered in all proceedings.

Finally, the Arbitration Act should be amended to distinguish between arbitrable and non-arbitrable disputes. This will provide certainty when courts are presented with applications for setting aside and enforcement of arbitral awards on grounds of non-arbitrability. It is this ambiguity that has precipitated the discussion in the paper.

## 6. Conclusion

Kenyan Courts have a constitutional obligation to promote ADR mechanisms, such as arbitration. This mandate, according to the *TSJ v SHSR* (2019) eKLR decision, broadens the scope of arbitrability to encompass family disputes. Nonetheless, this paper has cautioned that the child's best interests should be prioritized even in family arbitration. Children deserve special attention because they are seen as helpless victims of the country's past and as the only hope for its future.<sup>176</sup> Overall, the Court of Appeal

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<sup>172</sup> Section 4(4), *Children's Act* (Chapter 141) provides that in procedural matters affecting the child, the child shall be accorded the opportunity to express his/her opinion and that opinion shall be taken into account as may be appropriate taking into account the child's age and degree of maturity. Nonetheless, the wishes and feelings of a child must be treated with a lot of caution. Sometimes the wishes of children may not be in their best interests. See *BK v EJH* (2012) eKLR and *MAA v ABS* (2018) eKLR.

<sup>173</sup> Section 83, *Children's Act* (Chapter 141) outlines the principles to be considered by courts in making a custody order.

<sup>174</sup> *MAA v ABS* (2018) eKLR.

<sup>175</sup> *Faherty v Faherty* (1984), The Supreme Court of New Jersey.

<sup>176</sup> Labaree (n 114) 111.

decision suggests that the correct term to use in the context of arbitrability is not ‘*incapable of being settled by arbitration*’ but rather ‘*not permitted to arbitrate*’. This is because almost all disputes whether personal law or commercial disputes, can be resolved through arbitration. The state only prohibits citizens from using arbitration to resolve certain disputes. However, because of the increasing backlog of cases in courts, there is a need to expand the scope of arbitrability to enhance access to justice.<sup>177</sup>

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<sup>177</sup> Kariuki (n 6) 179.

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## Case Review: Consolidation of Multiparty Contracts: The Indian Experience

By: *Wilfred Mutubwa\**

### Libra Automotives Private Limited vs BMW India Private Limited & Another

Court: **The High Court of Delhi at New Delhi**  
Case Number: **ARB.P. 163/2019**  
Parties: **Libra Automotives Private Limited (Petitioner) vs BMW India Private Limited & BMW India Financial Services Private Limited (Respondents)**  
Judge: **Justice Sanjeev Narula**

Date of Delivery/Pronouncement: 9th July, 2019

The Petitioner approached the court by way of a petition praying for appointment of a Sole Arbitrator for adjudication of the disputes that have arisen between the Petitioner and the Respondent No. 1 and 2 in relation with the Agreements.

### Facts

The Petitioner was appointed as a dealer of the BMW Group Products in terms of various agreements executed between the Petitioner and the first and 2<sup>nd</sup> Respondents, including (the Principal dealership agreement) dated 1<sup>st</sup> January 2018) executed between the Petitioner and Respondent No. 1 ("Dealership Agreement"). In addition to the Dealership Agreement, the Petitioner also executed other ancillary agreements with the 1<sup>st</sup> Respondent. In addition, the Petitioner had also entered into financing agreements with the 2<sup>nd</sup> Respondent, separate and distinct from the agreements with the 1<sup>st</sup> Respondent, for the purposes of carrying out its exclusive business of dealership in BMW Group products.

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Disputes and differences arose between the parties resulting in claims relating to encashment of the Bank Guarantee and the termination of the Dealership Agreement. The Petitioner contended that the Respondents acted in a totally unfair and whimsical manner in the performance of the Agreements and had committed breaches having failed to adhere to the terms of the Agreements. The Petitioner further contended that demands raised by Respondents were unreasonable and unsubstantiated.

The Petitioner invoked the arbitration clause under the Agreements, vide letters dated 24<sup>th</sup> January 2019 and 28<sup>th</sup> January 2019 and requested the Respondents to either agree to appointment of a common Arbitrator to decide all the disputes in a tripartite arbitration or approach the Delhi International Arbitration Centre for appointment of a sole Arbitrator. Despite the receipt of the notice, the Respondents failed to convey their consent/objection for the appointment of the Arbitrator, thereby constraining the Petitioner to approach the Court by way of petition.

### **Issue in Dispute**

Therefore, the issue for the court to determine was whether the prayer in the petition can be allowed in the facts and circumstances of the case?

The Petitioner contended that they requested the Respondent to agree to a common Arbitrator for deciding all the disputes; because the clauses appearing in all the Agreements are different and thus relegating the parties to different Tribunals for adjudication of the same dispute would create an anomalous situation. The Petitioner further contended that there are interconnecting and overlapping disputes in relation to the various agreements with the Respondents who are group companies and therefore there is a need for a composite tripartite Arbitration. Further, the Petitioner contended that conducting multiple arbitrations would not be feasible, practical or cost effective and is likely to cause multiplicity of proceedings.

Lastly, the Petitioner contended that conducting separate arbitrations against the two Respondents for the interconnected issues could possibly lead to conflicting awards. Furthermore, they argued it would cause difficulty for the Petitioner to lead evidence on its stand of conspiracy between the Respondents and it would be constrained to pursue the two cases separately. The Petitioner relied on the case of P.R. Shah, Shares & Stockbroker (P) Ltd. v. B.H.H. Securities (P) Ltd (2012) 1 SCC 594 in its submissions.

The Respondents argued that the petition is wholly misconceived and untenable in law. Thus, the court found that because of the nature of the Dealership arrangement and the finance arrangement between the Petitioner and the Respondents, there's no doubt that the agreements were interlinked and interconnected. Even the disputes arising under the Agreements could possibly include the interconnected contractual violations. However, the court noted that, the fact that the agreements are interconnected, cannot be the sole ground for the Court to direct the parties to go for a composite arbitration.

Further, the court found that under the Floor Plan Financing Agreement, which was the principal agreement for the financing scheme was only between the Petitioner and the 2<sup>nd</sup> Respondent, the 1<sup>st</sup> Respondent was not a party to it. Whereas, the Dealership Agreement was only between the Petitioner and the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent was not party to it. Since the arbitral clauses in the two agreements had different provisions for the constitution of the Tribunal; the court found that directing the parties to go for a composite arbitration under a sole Arbitrator would amount to rewriting the terms of the dealership agreement agreed between the parties.

The court also found the invocation contrary to the contract and wholly misconceived as it was unspecific and not as per any of the procedures prescribed under the arbitration agreement. The Petitioner had rather called upon the Respondents to agree to an arbitration mechanism contrary to the agreed procedure prescribed under the Agreement. The court emphasized that as a fundamental feature of an arbitration agreement, there is an understanding between the parties to adopt alternate mechanism for the adjudication of the future disputes that arise between them. The court further noted that since law does not prescribe any standard form of arbitration agreement, parties are free to agree, through consensus ad idem, upon a procedure and designate the private forum where the parties would like to go in case the disputes and differences arise between them.

In relying on jurisprudence from the Supreme Court, Justice Narula held that where an application is filed, concerning the procedure for appointment of an arbitrator prescribed in the agreement, the Court ought not to appoint an independent arbitrator without resorting to the inbuilt mechanism as agreed between the parties. Thus, the Petitioner's actions of requesting the Respondents to tow their line and agree to the Arbitral Tribunal contrary to what has been provided in the Contracts, should not be permitted. Therefore, the court found no merit in the petition and proceeded to dismiss it with no order as to costs.

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## **Statute**

### **a) Statutory Provisions**

Section 11(6) of the Arbitration and Conciliation Act, 1996



## **Environmental Disputes: Is Mediation the Solution?**

By: ***Kenneth Wyne Mutuma\****

### ***Abstract***

*The primary focus of this paper is to discuss and shed more light on the concept of environmental mediation. Owing to the unique reliance that human beings have on the environment, there is a need to effectively resolve disputes pertaining to it. Environmental disputes manifest themselves in an array of ways, for instance, waste management, management and use of natural resources, ownership and disposal among others. To effectively address this, the paper will proffer the use of mediation as a best environmental disputes' resolution mechanism, owing to its invaluable advantages that will be enumerated herein below. Several legal provisions, both domestic and international on environmental mediation, will be instructive in this paper. In tandem to this, the paper will assess the jurisprudential development on environmental disputes mediation and whether, so far, mediation has been successful in environmental dispute resolution. Emerging issues will no doubt be addressed herein. Industrialization and globalisation which pose an imminent threat to the environment will be addressed as well as the changing world paradigms with regards the environment.*

### **1.0. Introduction**

The role of the environment to humanity cannot be overstated. The environment serves a unique economic role; it is a source of livelihood and cultural heritage. Through its physical elements, it also offers critical factors of production such as land, solar heat, wind or water. The environment is defined as the compound of elements and physical factors surrounding humans such as, land, water, air, soil, flora and fauna, ecosystems and others.<sup>1</sup> When these elements and resources are left at the disposal of the public, various fundamental issues crop up in respect of ownership, management, utilisation

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<sup>1</sup> See, Environmental Management and Coordination Act, Act No. 8 of 1999, s 2.

among others. This often leads to conflicts which may have long-term repercussions.<sup>2</sup> Owing to the unique reliance that humans have on the environment, there is a need to resolve environmental disputes in a frugal, time-conscious, effective and expeditious manner. To dispense on this mandate, there have been different forms of dispute resolution mechanisms proffered within the Constitution of Kenya 2010 as well as international instruments. For the purpose of specificity of focus and critical analysis of the legal framework in regard to environmental disputes, this paper will specifically focus on the concept of mediation as a dispute resolution mechanism.

Different scholars define the concept of mediation in various ways. For instance, Dr Kariuki Muigua defines mediation as advanced negotiation where two or more parties involve a neutral third party to facilitate the negotiation process.<sup>3</sup> Section 2 of the Civil Procedure Act conceptualises 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.”<sup>4</sup> Further on, the Kenya Mediation Bill 2020 defines the term mediation as “a facilitative and confidential structured process in which parties attempt, on a voluntary basis, to reach a mutually acceptable settlement agreement to resolve their dispute with the assistance of an independent third party called a mediator.”<sup>5</sup> A conceptual analysis of the above definitions reveals that mediation involves attempts to settle disputes outside the mainstream judicial system, through which the warring parties attempt to reach an acceptable compromise, through the assistance of a neutral umpire.

Having established and conceptualised the concept of mediation, it is paramount to analyse the importance of recourse to mediation as a dispute resolution mechanism. At the very heart of it is the fact that mediation creates capacity to maintain and foster relationships between the disputing parties.<sup>6</sup> This is key for disputants in environmental disputes, based on the fact that the environment is a commonly shared resource that

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<sup>2</sup> Karman Khan, Syed Hussainy and Yumna Iqbal, ‘Causes, Effects, and Remedies in Conflict Management’ (2017) *The South East Asian Journal of Management*

[https://www.researchgate.net/publication/323484651\\_Causes\\_Effects\\_and\\_Remedies\\_in\\_Conflict\\_Management/citation/download](https://www.researchgate.net/publication/323484651_Causes_Effects_and_Remedies_in_Conflict_Management/citation/download) accessed on 3 June 2021.

<sup>3</sup> Kariuki Muigua, *Resolving Environmental Conflicts through Mediation in Kenya* (PhD Thesis, University of Nairobi, 2011).

<sup>4</sup> The Civil Procedure Act, Revised Edition 2012 [2010], Cap 21 Laws of Kenya, s 2.

<sup>5</sup> The Mediation Bill, 2020.

<sup>6</sup> M Liebmann, *Mediation in context*. (Jessica Kingsley Publishers, 2000).

the parties will rely on, whether their dispute is resolved or not. Therefore, where the parties mediate over their dispute, they will maintain the relations.<sup>7</sup>

Closely related to the aforementioned is the fact that mediation affords the parties autonomy and decision-making authority in the proceedings.<sup>8</sup> Here, the parties are subject to mediation on their own rules and applicable laws without superimposition from other parties. Again, they engage freely and voluntarily partake in the mediation process which buttresses the party's autonomy. It also enhances convenience of the parties, which is paramount if the success of the outcome-commonly referred to as a mediation settlement agreement- is anything to go by. This is because they choose the juridical seat, the mediator to facilitate the negotiations and the procedures to be followed.

The third importance is based on the fact that the dispute is also solved expediently and on reduced costs. Compared to having the matter settled in court, mediation hastens the resolution of the dispute in question. This is because the process, among other things, is devoid of a backlog that mars courts in their role of dispensing justice. Again, legal costs are at the very minimal, compared to having the dispute resolved in court. From the above stated benefits, this paper proffers the use of mediation in resolution of environmental disputes.

## **2.0. Environmental Conflicts**

As illustrated above, the enjoyment of the environment may in certain instances pit one party as against the other. This owes to the competing interests of the parties to the dispute in relation to the environment. An environmental dispute can be conceptualised as "a misunderstanding, disagreement or argument, either competitive or opposing action of incompatibles:<sup>9</sup> antagonistic state or action (as of divergent ideas, interests, or persons) encompassing and or relating to the ecosystem and the environmental change."<sup>10</sup> According to the Swiss Peace Foundation, environmental conflicts manifest themselves in the following ways; political, socioeconomic, ethnic or territorial or conflicts over natural resources especially leading to degradation, overexploitation of

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<sup>7</sup> B H Brummans et al., 'Making Sense of Intractable Multi Party Conflict: A Study of Framing in Four Environmental Disputes' (2008) 75(1) Communication Monographs 25.

<sup>8</sup> S Roberts and M Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-making* (Cambridge University Press, 2005).

<sup>9</sup> S Libiszewski 'What is an Environmental Conflict' (1991) 28(4) Journal of Peace Research 407, 422.

<sup>10</sup> Peter Naibei, *Dispute, Conflict and Causes of Environmental Conflict in Kenya* (2014).

renewable resources and straining the environment, hence sinking its reproductive capacity.<sup>11</sup> Thus, a key theme regarding environmental conflicts is that they manifest, more or less, over natural resources.

This paper identifies the following as some of the environmental disputes; conflicts over ownership, management and use of natural resources. Owing to this, the paper considers the following as mediatable issues in the aforementioned environmental conflicts: water rights, air quality standards, hazardous waste facilities and material, mine reclamation, protection of endangered species and cultural properties.

### **3.0. Comprehending Mediation as a Process**

This part of the paper is critical in that it will come in handy for those unfamiliar with the process of mediation as well as the nascent practitioners to enhance their comprehension of the general outline of the mediation process, the roles and obligations of each of the players. Bercovitch Jacob correctly asserts that for there to be a mediation process the following factors are key; the conflicting parties, a mediator(s), the process of mediation and the context of mediation or the dispute.<sup>12</sup>

These elements are critical for the mediation process as well as its outcomes. In Kenya, the Constitution 2010 embodies the use of mediation as an alternative dispute resolution mechanism, by dint of Article 159.<sup>13</sup> The Civil Procedure Act also embodies mediation as a set of special proceedings in civil matters, under which, arguably, most matters with regards to environmental disputes fall under.<sup>14</sup> Kenya has also proposed a Mediation Bill 2020, that is yet to be assented into law but it is instructive as to the milestones the State is taking in regulating mediation.<sup>15</sup> The Kenyan Judiciary had also adopted the Mediation (Pilot Project) Rules, 2015 as a pilot project on the application of mediation in courts through the Court Annexed Mediation (CAMP).<sup>16</sup>

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<sup>11</sup> S Libiszewski 'What is an Environmental Conflict' (1991) 28(4) Journal of Peace Research 407.

<sup>12</sup> J Bercovitch, 'Mediation Success or Failure: A Search for the Elusive Criteria' (2005) Cardozo Journal of Conflict Resolution 290, 291.

<sup>13</sup> Constitution of Kenya 2010, Article 159.

<sup>14</sup> Civil Procedure Act 2012, Cap 21, Part VI.

<sup>15</sup> See, Mediation Bill 2020,

[http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2020/TheMediationBill\\_2020.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2020/TheMediationBill_2020.pdf)  
accessed on 4 June 2021

<sup>16</sup> See, Legal Notice No. 197 of 2015, Kenya Gazette Supplement No. 170, 9<sup>th</sup> October 2015. (Government Printer, Nairobi, 2015)

[https://lsk.or.ke/Downloads/mediation%20\(pilot\)%20Rules.pdf](https://lsk.or.ke/Downloads/mediation%20(pilot)%20Rules.pdf)> accessed 4 June 2021.

### **3.1. Preliminary Stage**

The first stage of the mediation process is the pre-negotiation step. Here, the parties begin by negotiating on whether to submit the dispute to mediation or redo their failed negotiations.<sup>17</sup> Where they agree on mediation, they undertake the following activities. First, they identify and choose the mediator. Secondly, they decide on the place to conduct mediation sessions. Thirdly, they agree on the parties to be present during the proceedings, for example, advocates, witnesses among other persons, who may play an integral role in the proceedings. Fourthly, they agree on details as to the dates and times of meeting at the agreed location. In the preliminary stage, parties also give the mediator some background information on the dispute. Towards the end of this stage- the pre-mediation conference- the mediator prepares the parties for mediation by: explaining the objectives of the mediation process, elaborating the role of the mediator, particularly outlining that the mediator does not super impose decisions or give final orders to the parties, but merely undertakes a facilitative role.<sup>18</sup>

### **3.2. The Substantive Mediation Stage**

The parties set the parameters and strategies for the mediation sessions.<sup>19</sup> This is necessary because it outlines and lays out the agreed ground rules to be adhered to by the parties in the mediation sessions. Having agreed on the strategies, the parties make their opening remarks followed by the opening statement from the mediator. This step lays the foundation of the parties' dispute by allowing them to express their case as well as affording the mediator an opportunity to get the parties' general outlook on the dispute. The mediator's statement on the other hand builds the parties' confidence.

Substantively, the parties then engage in a discussion and identify the issues. Here, the parties are afforded the opportunity to give proposals that potentially resolve the identified issues. It is noteworthy that the mediator can lead the negotiations in the same room or in caucuses moving from different rooms receiving ideas, proposals, and counter proposals.<sup>20</sup> The mediator here maintains a facilitative role of aiding the parties

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<sup>17</sup> M M Urtiga, and D C Morais, 'Pre-Negotiation Framework to Promote Cooperative Negotiations in Water Resource Conflicts Through Value Creation Approach' (2015) 3(3) EURO Journal on Decision Processes 339.

<sup>18</sup> C W Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*. (John Wiley & Sons, 2014).

<sup>19</sup> Peter J Carnevale and Dean G Pruitt, 'Negotiation and Mediation' (1992) 43 Annual review of psychology 531.

<sup>20</sup> Ibid.

in the negotiation without sidestepping their mandate.<sup>21</sup> This is guided by the principle of autonomy and voluntariness in the mediation process. The mediator also has a role of assisting parties to move from positions to interests. Towards the end, the parties either reach an agreement as to their issues or fail to do so.

### **3.3. Post Negotiation Stage**

This is the final but most fundamental stage of the process. Here, the parties have either agreed on a solution to their dispute or not.<sup>22</sup> Where they have done so, we turn to its enforceability. The mediator conducts a reality check to ensure that all the parties are on the same page as to the substance of the agreement. The parties then agree on an enforcement strategy of the agreement.<sup>23</sup> For instance, where an agreement is to be performed, the parties agree on an oversight authority such as the mediator and set clear times for the enforcement of the agreement. Parties then may reduce the agreement into writing and sign it for ease of execution.

Kenyan practice regarding enforceability is marred by ambiguity as evidenced by the Supreme court decisions (although these dealt with arbitration).<sup>24</sup> The assumption is that the same determination would be made in regard to mediation. The author herein asserts that when parties refer their decision to the mediation, they do it voluntarily and are willing to be bound by the outcome. Justice Cheronu in *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others* ruled on this and stated that the agreement by the parties to refer the dispute for mediation is synonymous to a gentleman's agreement.<sup>25</sup> Therefore, since the parties mutually agree to refer their dispute to mediation, there are no by laws or any enforcement mechanisms to ensure a party remains in that mediation process or be bound by its decision once made. As such, each party should engage in the enforcement of the mediation agreement on a voluntary basis. This approach is, however, inadequate as there might be justifiable

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<sup>21</sup> J B Stulberg, 'Facilitative Versus Evaluative Mediator Orientations: Piercing the Grid Lock' (1996) 24 Fla. St. UL Rev.985.

<sup>22</sup> Kariuki Muigua, 'Making Mediation Work for All: Understanding the Mediation Process' Alternative Dispute Resolution 120.

<sup>23</sup> Ibid.

<sup>24</sup> See, *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR and *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR.

<sup>25</sup> *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others* [2018] eKLR.

reasons for seeking courts redress in staying the agreement. The proposed Mediation Bill stipulates that an agreement can be appealed on limited grounds. They include:

*(i) a party to the mediation process was incapacitated; (ii) the settlement agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the settlement agreement was made; (iii) the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the reference to mediation, or it contains decisions on issues beyond the scope of the reference to mediation, provided that if the decisions on issues referred to mediation can be separated from those not so referred, that part of the settlement agreement which contains decisions on issues referred to mediation may be recognized and enforced; (iv) the appointment of the mediator or the mediation process was not in accordance with the mediation agreement or this Act or the law of the country where the mediation took place; (v) the settlement agreement has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which that settlement agreement was made; or Grounds for refusal of recognition or enforcement of a settlement agreement. (vi) the making of the settlement agreement was induced or affected by fraud, bribery, corruption or undue influence; (b) if the High Court or the court finds that — (i) the subject-matter of the dispute is not capable of settlement by mediation under the law of Kenya; or (ii) the recognition or enforcement of the settlement agreement would be contrary to the public policy of Kenya.”<sup>26</sup>*

#### 4.0. Mediating Environmental Conflicts in Kenya

One of the natural resources issues that degenerate to environmental conflicts are technical or practical problems, value laden where (a) people (disputants) agree on the nature of the problem but not how to resolve it and (b) people (disputants) disagree on both the nature of the dispute and how to resolve it.<sup>27</sup> Matthew and Harmon argue that the technical disputes relate to “the how to” of the problem.<sup>28</sup> For instance, how to reduce pollution or protect endangered species or waste management. These types of

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<sup>26</sup> Mediation Bill, Kenya 2020, Section 39.

<sup>27</sup> Kariuki Muigua, *Resolving Environmental Conflicts through Mediation in Kenya*, (PhD Thesis, University of Nairobi, 2011).

<sup>28</sup> Matthew McKinney and Will Harmon, ‘Governing Nature, Governing Ourselves: Engaging Citizens in Natural Resource Decisions,’

<<http://www.cnrep.org/documents/Governing/Nature.pdf>> accessed on 6 June 2021.



problems require reason and are easy for the disputing part(ies) to develop a raft of solutions that a mediator can assist the parties to settle on.

Dr Muigua argues that the value laden disputes are where people (disputants) agree on the nature of the problem but not how to resolve it and thus face the disagreement in finding a solution to the dispute but acknowledge its presence.<sup>29</sup> For instance, in Nairobi, there is general consensus that Nairobi River is quite polluted and needs to be addressed but there is no agreement as to how the pollution will be reduced or addressed.

Kenya has a robust and progressive framework governing environmental management primarily under the Environmental Management and Coordination Act.<sup>30</sup> Other Acts are sector specific, for instance governing fish, forestry, wildlife,<sup>31</sup> among others. However, Kenya does not have a solid framework governing mediation save for the Bill mentioned above and inferences within various Acts of Parliament. This notwithstanding, there has been reliance on international instruments to develop several rules on mediation with emphasis on environmental disputes. Practically, mediation has been used informally to resolve environmental disputes such as conflicts over community boundaries.<sup>32</sup>

There are several key institutions that can come in handy in mediation of environmental disputes, and to deal with matters relating to the environment.<sup>33</sup> The first institution for consideration are the county governments that are mandated to carry out various functions.<sup>34</sup> In relation to the environment, county governments are majorly mandated to control air pollution, noise pollution, waste management and implement national governments policies on natural resources and environmental conservation.<sup>35</sup> The question therefore, is what role the county governments can play as regards mediating environmental disputes. This is discussed in particular connection to

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<sup>29</sup> Muigua (n 27).

<sup>30</sup> Environmental Management and Coordination Act 1999.

<sup>31</sup> The Forest Conservation and Management Act 2016.

<sup>32</sup> Patricia Kameri-Mbote, 'Towards greater access to justice in environmental disputes in Kenya: Opportunities for intervention' (2004).

<sup>33</sup> See, for instance, Environmental Management and Coordination Act, 1999, section 9 in reference to NEMA which states that "to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of Government in the implementation of all policies relating to the environment." (Emphasis mine).

<sup>34</sup> Constitution of Kenya 2010, Article 6.

<sup>35</sup> Ibid, Fourth Schedule.



infrastructural development in counties within the context of green construction.<sup>36</sup> During such construction, environmental degradation is eminent. This has often pitted county governments against contractors in a bid to manage the environment without jeopardising developmental projects.

To effectively mediate this, instrumental environmental dispute resolution bodies can be instituted at the county level to mediate the issues between county governments and contractors. Here, professionals and experts from both sides can constitute a bench, where they lack conflict of interest and steer forth the mediation process. As regards pollution and quality standards, awareness ought to be enhanced to the contractors to mitigate any such disputes.<sup>37</sup> For instance, they ought to develop a construction that meets green construction standards. The following are some of the components of green construction;<sup>38</sup>

- Life cycle assessment.
- Structure design efficiency.
- Energy and water efficiency.
- Construction materials efficiency.
- Indoor environmental quality enhancement.
- Operations and maintenance optimization.
- Waste reduction.

Another approach could be the selection of a disputes resolution panel of ‘mediator(s)’ for any future disputes, upon the award of a contract. Here, the county government and contractors can get into the afore-discussed preliminary stage of negotiation.

The Environmental Management and Coordination Act creates the National Environmental Management Authority (NEMA).<sup>39</sup> The authority’s main mandate is to exercise general supervision and coordination over all matters relating to the environment and to be the principal instrument of Government in the implementation

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<sup>36</sup> Bon-Gang Hwang, & Wei Jian Ng, ‘Project management knowledge and skills for green construction: Overcoming challenges. *International journal of project management*,’ (2013) 31(2), 272-284.

<sup>37</sup> Grace K, Ding, ‘Sustainable construction—The role of environmental assessment tools. *Journal of environmental management*,’ (2008) 86(3), 451-464.

<sup>38</sup> Jane Anderson, David Shiers, & Kristian Steele, ‘The green guide to specification’ 3<sup>rd</sup> edn, John Wiley & Sons.

<sup>39</sup> Environmental Management and Coordination Act 1999, Section 7.

of all policies relating to the environment.<sup>40</sup> This organisation, therefore, interacts with many stakeholders in its day-to-day activities. They include; the consumers, manufacturers, contractors among others. These interactions more often than not yield conflicts. A prevalent source of conflict with its stakeholders has been the policy directions made by NEMA with regard to environmental management. Recently, for instance, NEMA passed a policy framework banning the use and manufacture of polythene bags in Kenya which caused dissatisfaction among manufacturers and retailers of the said product.<sup>41</sup>

NEMA has also been at loggerheads with stakeholders on the issuance of the Environmental Impact Assessment (EIA) Licence. An environmental impact assessment is a procedure for evaluating the likely impact of a proposed activity or project on the environment.<sup>42</sup> It provides decision-makers with information about the possible effects of a project or activity before authorising it to proceed. This tool is necessary for enhancing environmental management. However, the challenge is how to mediate disputes arising out of it.

Environmental impact assessment has been quite controversial in Kenya. This, for instance, is illustrated in the case of *KM & 9 others v Attorney General & 7 others "Uhuru-Owino case."*<sup>43</sup> Here, NEMA had licensed a lead acid battery factory to recycle batteries in the Mikindani area in Mombasa County. The court factually found that NEMA had allowed the factory to continue with its operations and project without EIA.<sup>44</sup> The upshot of the judgement was that the court awarded the plaintiffs damages for reparation and a declaration of their rights. This is a *locus classicus* case of environmental disputes between NEMA and other environmental stakeholders.

A major cause for concern is the need for a third party to facilitate the negotiations between NEMA and the stakeholders. Here, the best practice is to appoint a member from the National Environment Tribunal instituted under the Act,<sup>45</sup> as a mediator. The Tribunal is deemed to be the most appropriate forum for the settlement of

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<sup>40</sup> Ibid, Section 9.

<sup>41</sup> 'Ban on Manufacture, Importation, Supply, Distribution, and Use of Non-woven Polypropylene bags in Kenya'  
<[https://www.nema.go.ke/index.php?option=com\\_content&view=article&id=102&Itemid=121](https://www.nema.go.ke/index.php?option=com_content&view=article&id=102&Itemid=121)> accessed on 8 June 2021.

<sup>42</sup> Kariuki Muigua, 'Environmental Impact Assessment (EIA) in Kenya,' (2012).

<sup>43</sup> *KM & 9 others v Attorney General & 7 others* [2020] eKLR.

<sup>44</sup> Ibid, see para. 150.

<sup>45</sup> Ibid, Part XII

environmental disputes in Kenya, in light of alternative dispute resolution mechanisms discussed above. That notwithstanding, the disputants, can still opt to appoint their own mediator for the purpose of mediation, as juxtaposed with having a member of the Tribunal act as the mediator.

Additionally, the management of natural resources is also gaining dominance, especially between manufacturers and the public. This is informed by the need for manufacturers to minimise potential negative environmental impacts of their products and operations. Manufacturers, through their factories, are the greatest contributors of pollution of the environment. This is done through illegal dumping of contaminated or untreated sewage water, poisonous or greenhouse gases, heavy metals or radioactive materials into major waterways, which in the long run causes damage to marine life and the environment as a whole.

It is noteworthy that disputes involving the public are at best public interest disputes.<sup>46</sup> As a consequence, an inference can be made that the government is the custodian of public interest. Therefore, through institutions mandated to adjudicate on disputes by the government, the same should be adopted to enhance mediation between manufacturers and the public. Such institutions include the Court Annexed Mediation program by the judiciary. It could also entail professional bodies such as the Law Society of Kenya or alternative dispute resolution mechanisms institutions like the Kenyan Chartered Institute of Arbitrators<sup>47</sup> and the Dispute Resolution Centre<sup>48</sup> and Mediation Training Institute.<sup>49</sup>

### **5.0. The Successes, Failures and Applicability of Environmental Disputes**

The use of mediation in resolving environmental disputes is not a new concept, whether in law or practice. Communities have traditionally mediated disputes with the help of elders, such as disagreements over grazing fields and water rights. For instance, the Modogashe Declaration exemplifies this practice; where the members of Garissa, Mandera and Wajir counties agreed to resolve the problems of banditry, trafficking of

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<sup>46</sup> Barbara Ashley Phillips & Anthony C. Piazza ‘The Role of Mediation in Public Interest Disputes,’ (1982) *Hastings LJ*, 34, 1231.

<sup>47</sup> ‘CI Arb Kenya – Kenya Branch’ <<https://ciarbkenya.org/>> accessed 6 January 2022.

<sup>48</sup> ‘SDRC Hosts Seminar on Alternative Justice Systems – Strathmore University’ <<https://strathmore.edu/news/sdrc-hosts-seminar-on-alternative-justice-systems/>> accessed 6 January 2022.

<sup>49</sup> ‘Mediation Training, Mediation Certification | MTI East Africa’ <<https://www.mtieafrica.org/>> accessed 6 January 2022.

arms, livestock movements, socio economic problems, identifying role of peace committees among others.<sup>50</sup>

There have thus been relatively high rates of success with using mediation as a dispute resolution mechanism both nationally and internationally. To better grasp this, six key indicators of success in a mediation process are considered: the reaching of an agreement, the stability of the agreement, the parties' satisfaction with the process, the efficiency of the process, the value of the process and its fairness.<sup>51</sup>

At the onset, it is noteworthy that litigation has been the most preferred and utilised environmental conflict resolution mechanism in Kenya. It has, however, proven not to be effective because, despite numerous court orders issued on all kinds of environmental disputes, the conflicts have not been fully resolved and parties are still wrangling over the use and access to the said resources.<sup>52</sup> Alternative means of conflict resolution, especially mediation, with all its positive aspects discussed earlier, could be better utilised in managing or resolving these intractable conflicts.

The Amboseli National Park conflict is one example of an intractable environmental conflict, which has applied litigation and the coercive force of law and State, and yet no tangible and amicable result has been achieved. The conflict involved tensions between various groups with competing interests relative to wildlife conservation and land use within the National Park. The groups are local communities, Olkejuado County Council, Conservation Groups and the Government of Kenya through the Kenya Wildlife Service. The British colonial powers had officially created the Southern Game Reserve in 1906, allowing the Maasai to remain in the area and coexist with wildlife. In 1948, the Amboseli National Reserve was created but the boundaries did not prohibit movement by the Maasai.

In 1961 The Amboseli was declared a County Council game reserve under the administration of the Kajiado County Council which launched a plan to carve out slightly over 500 square kilometres from the Maasai Amboseli Game Reserve for the exclusive use of wildlife. The Maasai, in protest and frustration, began to kill rhinos

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<sup>50</sup> Ibid.

<sup>51</sup> Elaine Smith Danger, 'Inequality of Resources Present: Can Environmental Mediation Process Provide an Effective Answer?' (1996) 2 *Journal of Dispute Resolution* 379.

<sup>52</sup> See for instance the foregoing discussion on the Amboseli Case.

and other wildlife. The area was subsequently reduced to appease the Maasai.<sup>53</sup> The President then decreed that 390 square kilometres of the Amboseli would be set aside exclusively for wildlife and tourism.<sup>54</sup> The alternative water sources for the Maasai cattle were only completed by 1977, although they proved to be defective in design and not cost-effective, thus forcing the Maasai to frequently re-enter the park for water. The most essential improvements made in order to gain local support failed.

## **6.0. International Instruments Providing for Mediation of Environmental Matters**

Owing to the numerous advantages of mediation in environmental matters, the international community has recognized it in several conventions that it has adopted. The conventions set a path for mediation on environmental issues and obligate that it is the first go to dispute resolution mechanisms. The use of adjudication has not been preferred amongst states and even by the International Court on Administration of Justice. This is because the court cannot hear unilateral applications as it calls for state consensus in submitting a dispute before it for determination. Again, in the absence of an overarching policing and oversight authority, there is extreme reliance on cooperation and consent of states to enforce judgements and decrees.<sup>55</sup>

In the international space, Article 27 (2) of the Convention on Biological Diversity (CBD) provides that “if the parties to a dispute cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.”<sup>56</sup> The good offices in this case are mostly the international organisations like The United Nations Environmental Programme (UNEP), The Food and Agriculture Organisation of the United Nations (FAO) among others. The United Nations Charter is the first to go instruments as the other charters are hinged upon it. For instance, at Article 33, it provides for the pacific settlement of disputes.<sup>57</sup> The pacific means encompass; “negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”<sup>58</sup>

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<sup>53</sup> L Talbot and P Olindo, ‘The Maasai Mara and Amboseli Reserves.’ In: A Kiss (ed.) *Living with Wildlife - Wildlife Resource Management with Local Participation in Africa*, (World Bank Technical Paper 130, 1990).

<sup>54</sup> Kenya Gazette Notice Number 2641 of 1st September 1972.

<sup>55</sup> Patricia Birnie and Alan E. Boyle, *International Law and the Environment* (New York: Oxford Press, 1992).

<sup>56</sup> The Convention on Biological Diversity, Article 27(2).

<sup>57</sup> The Charter of the United Nations, Article 33.

<sup>58</sup> *Ibid*, Article 33(1).

The table hereunder outlines some of the conventions and the provisions on mediation.

**Table 1**

<b>Convention or Treaty</b>	<b>Mediation Provisions</b>
The 1993 Convention on Biodiversity (CBD)	Article 27
The 1992 United Nations Conference on Environment and Development: Agenda 21	Chapter 8.20
The 1988 Vienna Convention for the Protection of the Ozone Layer	Article 11 (2)
The 1975 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)	Article XVIII
The 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes	Article 22
The 1992 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.	Article 20
The 1992 United Nations Framework Convention on Climate Change	Article 14

From the foregoing, the question that arises is whether mediation has been used effectively despite it being either directly or impliedly provided in the conventions and if not, how best can they be incorporated and transformed into the national policy.

To begin with, the provisions on mediation call for adequacy and unambiguity. The current status of the conventions is that they only lightly mention mediation. There is a need for clarity and elaboration, through protocols or annexures. The conventions can even go further and advocate for mediation as a mandatory recourse in resolution of environmental disputes. Each convention can also adopt annexures shedding more light on mediation, the preferred mediator, if necessary, timelines for mediation among others. Such endeavours will increase the prospects for success when recourse is made to mediation as a dispute resolution mechanism.

## **7.0. Mediation and Sustainable Development Goals**

The Sustainable Development Goals (SDGs) are a set of global goals aimed at achieving global objectives such as fair and sustainable health at every level.<sup>59</sup> The aim of the goals is to end poverty, protect the planet and ensure that all people enjoy peace and prosperity, now and in the future.<sup>60</sup> It is important to note that the attainment of the 17 SDG objectives is a commitment not only bestowed on governments, states, international organisations and public institutions, but also on civil society and all its actors. This is key because it calls for participation of all stakeholders in their implementation. The question, however, is what role mediation can play towards their attainment.

Goal 16 unequivocally outlines that it is aimed at Promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.<sup>61</sup> This means that all means of pacific attainment of peace and access to justice should be explored, mediation being one of them. Access to justice in the context of the SDGs entails being at the reach of the justice system and engaging in a manner that upholds the rules of natural justice.

Mediation is proffered here because it falls squarely within the ambit of SDG 16. Research illustrates that mediation has been used more often than not to amicably resolve violent situations. This owes to its advantages enumerated elsewhere above in this paper. For precision, mediation preserves the parties to a dispute relationship. This is key to mitigate possible future conflicts that would affect posterity and sustainable development.

Owing to its theoretical foundation, mediation can also be used as a collaborative tool to achieve goal number 16 in the following ways;

1. The function of conflict prevention and construction of a non-confrontational relational dynamic.

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<sup>59</sup> J D Sachs, 'From Millennium Development Goals to Sustainable Development Goals' (2012) 379(9832) *The Lancet*, 2206.

<sup>60</sup> United Nations General Assembly. 'Sustainable Development Goals. SDGS Transform Our World, 2030' (2015) <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> accessed 5 June 2021.

<sup>61</sup> *Ibid.*

2. Role of conflict resolution through dialogue, the search for common interests and the achievement of satisfactory agreements for all parties involved.
3. Educational function for people, organisations, and society in general, in the culture of respect for different points of view, nonviolent communication, collaboration, and peacebuilding

The nexus between mediation and SDGs is the concept of sustainable development.

## **8.0. Mediation and Emerging Issues**

Several emergent trends are evident and taking shape in the contemporary world today. They include, political climate, individual values, world views. Mediation as a sociological phenomenon is open for influence and impact from other intervening external factors.

### **8.1. Political climate**

Political climate refers to the aggregate mood and stability of a state depending on its political activities. A key indicator of political climate within a state is the stability or instability of the State. Chaos and conflicts, for example in the horn of Africa illustrate an uncondusive political climate. The question then is how does mediation interplay with this?

Mediation is itself dependent on a conducive political climate. This is because it enhances parties coming from their positions to perception of their interests within a dispute. In conjunction to this, implementation and enforcement of a mediation agreement is also hinged on a conducive climate.

### **8.2. Individual values**

Values occupy a prominent place in the social and humanitarian discourse at a number of levels. They have a substantial influence on the affective and behavioural responses of individuals to other social phenomena. Individual values respect a culture of the people in relation to a particular phenomenon, say the environment. Among others, they include the following; needs, interests, motivations, personal goals, utilities and attitudes.

In relation to the environment, the individual values can broadly be referred to as environmental values. They have an impact on how individuals respond to environmental conflicts, environmental management and the use of natural resources.



This raises the antithetical concepts of anthropocentrism and ecocentrism. Whereas anthropocentrism is human centred, arguably owing to individual values of self enhancement and superiority (egoism and hedonism), ecocentrism gives precedence to the environment and nature.

Individual values affect environmental mediation as people decide on what avenues they prefer for the resolution of the conflict. In Kenya for example, Kariuki argues that most Kenyans prefer taking their matters for determination in court rather than adopting alternative avenues like mediation.<sup>62</sup> Individual values also affect how individuals are responsive to the mediation process and outcome. Where the individuals are sceptical about mediation then they too will be sceptical about the process and value challenges will be experienced in enforcing the mediation agreement.

### **8.3. World Views**

Globalisation and the rise of the internet has reduced the world into a global village. In the contemporary world, information and ideas flow freely and seamlessly. This therefore means that different global trends emerge and are adopted or influence different paradigms on a general perspective.

With regards to mediation, there has been a global trend advocating for its adoption in dispute resolution. This is evident in various conventions that have been adopted globally as discussed above. As such, there has been a push from the international community and influential world views on the use of alternative dispute resolution mechanisms with emphasis on mediation. Proponents argue in its favour owing to the numerous advantages, precisely the principle of voluntariness and consensus between the disputing parties. This is further buttressed by the principle of state sovereignty that calls for jurisdictional integrity amongst states. Therefore, no state or organ can enter into judgement against another state without its consent.

### **9.0. Conclusion**

In conclusion, this paper has highlighted that the practice of mediation is dependent on several factors. Like a pendulum it seems to flow from side to side and depending on how favourable or unfavourable the influencing factor is. This can however be viewed from a positive sense. It illustrates that mediation as a dispute resolution tool is

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<sup>62</sup> Kariuki Muigua, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya,' (2018).

amenable and flexible to different emerging environmental trends. This is a noteworthy observation that can be used for mediation, unlike the court and its stringent rules.

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## **Reforming Criminal Law in Kenya to Enhance Conflict Resolution and Realization of Justice in Kenya through Alternative Dispute Resolution Mechanisms**

By: *Peter Mwangi Muriithi\**

### **Abstract**

*This paper seeks to challenge the status quo in so far as conflict resolution and realization of justice under the umbrella of criminal law in Kenya is concerned. In doing so the paper questions whether any provisions of criminal law inhibit conflict resolution and realization of justice in Kenya alternative methods of dispute resolution.*

*The paper avers that there exist provisions in criminal law that unjustly limit the use of alternative methods of dispute resolution. This to a great extent limits conflict resolution and realization of justice through alternative methods of dispute resolution.*

*As such this paper opines that extricating the negative limitations under criminal law, which exists without any justification would enhance conflict resolution and realization of justice through alternative methods of dispute resolution. In doing so, this discourse shall; offer a brief introduction, outline the necessary reforms in criminal law to enhance conflict resolution and realization of justice through alternative methods of dispute resolution, and give a conclusion.*

### **1.0 Introduction**

In his wisdom, *John Rawls* opined that: “...Justice is the first virtue of social institutions, as truth is of systems of thought.... Laws, and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.”<sup>1</sup>

This paper adopts this theoretical perspective on justice by ‘*John Rawls*’. Indeed, it is on this basis this paper insists on reforming the criminal law to purposefully eradicate

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<sup>1</sup> John Rawls, A Theory of Justice (1971; 1975; 1999), Chapter I, Section 1, page 3-4

traits that still exist and inhibit conflict resolution and realization of justice in Kenya, especially through alternative methods of dispute resolution.

The correlation between conflict resolution and justice is that it is through effective conflict resolution, disputes can be resolved in a manner that promotes the realization of justice to the disputants. The definitions of these two vital terms manifest this apparent correlation. Conflict resolution can be defined as the informal or formal process that two or more parties use to find a peaceful solution to their dispute.<sup>2</sup>

The term ‘justice’ is not easy to define as it is very wide. However, ‘*justice*’ widely defined may refer to a concept of moral rightness based on ethics, rationality, law, natural law, religion, equity, and fairness, as well as the administration of the law, taking into account the inalienable and inborn rights of all human beings and citizens, the right of all people and individuals to equal protection before the law of their civil rights, without discrimination on the basis of race, gender, sexual orientation, gender identity, national origin, color, ethnicity, religion, disability, age, wealth, or other characteristics, and is further regarded as being inclusive of social justice.<sup>3</sup>

## **2.0 Reforming Criminal law to enhance conflict resolution and realization of justice in Kenya**

The following are the most apparent provisions of criminal law that need to be reformed to promote the use of alternative dispute resolution mechanisms to enhance conflict resolution and realization of justice:

### **A. The Repugnancy Clause**

The repugnancy clause is captured under *Article 159(3) (b)* of the Constitution<sup>4</sup> and *Section 3(2) of the Judicature Act*<sup>5</sup>. To this end, Article 159 (3) (b) of the Constitution<sup>6</sup> verbatim provides:

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<sup>2</sup><<https://www.pon.harvard.edu/daily/conflict-resolution/what-is-conflict-resolution-and-how-does-it-work/>> accessed on 1/29/22

<sup>3</sup><<https://www.sciencedaily.com/terms/justice.htm>> accessed on 1/29/22

<sup>4</sup> Constitution of Kenya 2010

<sup>5</sup> Cap No.8 of the laws of Kenya

<sup>6</sup> Under Chapter Ten of the Constitution of Kenya 2010 (Judicial Authority)

“...Traditional dispute resolution mechanisms shall not be used in a way that is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality.”

On the other hand, the repugnancy clause finds its refuge statutorily under *Section 3(2) of the Judicature Act*<sup>7</sup> which verbatim provides that:

“..The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and undue delay.”

In essence, the import of *Article 159(3) (b)* of the Constitution and *Section 3(2) of the Judicature Act* is that Traditional dispute resolution mechanisms (*herein TDRMs*) are applicable in Kenya as modes of dispute resolution provided that they are not repugnant to justice and morality.

In the pre-colonial era communities in Kenya had their ways of dealing with day-to-day challenges. They relied on their customs and practices to resolve their disputes.<sup>8</sup> However, during colonization, the colonial masters deliberately suppressed customs and practices allowing them to be applied ‘only if they were not repugnant to justice and morality’.<sup>9</sup>

This formed the origin of the *repugnancy clause*<sup>10</sup> as currently constituted in the Kenyan legal framework. Subsequently, the repugnancy clause has since been retained in Kenya’s legal framework for example the *Judicature Act, Cap 8*, and the *Constitution of Kenya 2010* as a limitation to the application of *TDRMs* in Kenya.<sup>11</sup>

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<sup>7</sup>Cap No.8 of the laws of Kenya

<sup>8</sup>Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* page 59

<sup>9</sup>Kariuki Muigua, *Alternative Dispute Resolution and Access to Justice in Kenya* page 59

<sup>10</sup>Repugnancy Clause - ‘...only if they were not repugnant to justice and morality or results in outcomes that are repugnant to justice or morality’

<sup>11</sup>The clause is retained under *Section 3(2) Judicature Act, Cap 8* and *Article 159(3)* of the *Constitution of Kenya 2010*



It is fair to state that, the *repugnancy clause* as stipulated under Article 159 (3) (b) of the Constitution and Section 3(2) of the *Judicature Act* reflects the continuing conflict between African legal systems and legal systems which began in the colonial era. Consequently, TDRMs and in general customary law, has gone through a period of expropriation, suppression and subversion. Indeed, the consistency with which the *repugnancy clause* has been retained in various laws is living proof.<sup>12</sup>

However, there is a need to question the relevance of the *repugnancy clause* in the 21<sup>st</sup> century, especially where Kenya as a country seeks to promote the application of *alternative dispute resolution mechanisms in all cases including criminal matters*.<sup>13</sup> It is also apparent that the *repugnancy clause* as a limitation only surprisingly and discriminatorily exists against TDRMs in exclusion of all the other formal modes of dispute resolution. Such a discriminatory application approach exhibited by the law makes it absolutely *necessary* to scrape off the *repugnancy clause* in the current legislation. Indeed, the existence of the *repugnancy clause* in the law is a clear demonstration of the need to deliberately ‘*decolonize the law*’ to enhance conflict resolution and realization of justice through *alternative dispute resolution mechanisms* like TDRMs.

The *repugnancy clause* inhibits the use of TDRMs in resolving conflicts in Kenya as it limits the application of TDRMs. The removal of this *repugnancy clause* would to a great extent widen the scope of application of TDRMs in conflict resolution in Kenya. This will ultimately result in many disputes that would ordinarily not be resolved using TDRMs due to the existence of the *repugnancy clause*, being resolved through TDRMs. This is because parties involved in a conflict who deliberately adopt a particular TDRM as a mode of conflict resolution will no longer contend with the possibility of the settlement agreement entered into and/or decision arrived at, through their preferred TDRM, being arbitrarily set aside by courts of law premised on the *repugnancy clause*.

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<sup>12</sup>Okoth- Ogendo, “The Tragic African Commons: A Century of Expropriation, Suppression and Subversion” (2010) <<http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/8098/The%20Tragic%20African%20Commons.pdf?sequence=1>> accessed on 1/29/22)

<sup>13</sup> The Emeritus Chief Justice Dr Willy Mutunga stated as follows in his keynote speech during the judicial marches week “*Let me reiterate our main aims in undertaking the judicial marches: We want to encourage the public to use alternative dispute resolution mechanisms, including traditional ones, as long as they do not offend the Constitution.*” <<http://kenyalaw.org/kenyalawblog/commencement-of-the-judicial-marches-week-countrywide/>>accessed 19/01/22)

This will ultimately enhance conflict resolution and the realization of justice through *alternative dispute resolution mechanisms* like TDRMs in Kenya.

**B. The Felony limitation of use of alternative dispute resolution mechanisms under Section 176 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.**

Once an accused person is charged in court with any criminal offence, then automatically the applicable procedural law is the *Criminal Procedure Code Cap 75 of the Laws of Kenya*.

As such, to withdraw any charges against the accused persons it has to be in accordance with the salient provisions of the *Criminal Procedure Code Cap 75*. It is then paramount that in order to promote the use of alternative dispute resolution mechanisms /out-of-court settlement in criminal matters the law that limits its use be amended/ reformed accordingly. In our case, it is *Section 176 of the Criminal Procedure Code Cap 75*.

*Section 176 of the Criminal Procedure Code Cap 75 provides for the promotion of reconciliation.* However the provision out rightly recognizes that such reconciliation or use of alternative dispute resolution mechanisms has a limitation *Section 176 of the Criminal Procedure Code Cap 75* verbatim opines that; “...*In all cases, the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.*”

*Section 4 of the Penal Code<sup>14</sup> defines a “felony” as an offence which is declared by law to be a felony or, if not declared to be a *misdemeanour*, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more.* This definition of what constitutes a *felony* makes for example murder as *an offence as prescribed by Sections 203 & 204 of the Penal Code Cap 63 to be a felony.*

This means that any offence punishable by imprisonment for more than 3 years is a felony and the law as codified by *Cap 75 of laws of Kenya* does not encourage or

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<sup>14</sup> Cap No.63 of the laws of Kenya

contemplate *out-of-court settlement* or use of *alternative dispute resolution mechanisms* in such criminal matters.

Only offences which are punishable by less than 3 years (i.e *misdemeanours*) *alternative dispute resolution mechanisms* or *out-of-court settlement* will be applicable and/or amenable to. Consequently, the use of *alternative dispute resolution mechanisms* in criminal matters as envisaged by Section 176 of the Criminal Procedure Code Cap 75 expressly excludes *felony offences* e.g murder, robbery with violence e.t.c

The interpretation of Section 176 of the *Criminal Procedure Code Cap 75* was offered in the salient case of:

*Republic v. Abdulahi Noor Mohamed (alias Arab) [2016] eKLR, Lesiit J. Judge* in making the decision opined as follows verbatim:

*‘The Criminal Procedure Code under Section 176 provides: ‘In all cases, the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any other offence of a personal or private nature not amounting to felony, and not aggravated in degree, on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.’. From the reading of the aforementioned statutory provisions, it is quite evident that the application of alternative dispute resolution mechanisms in criminal proceedings was intended to be very limited. The Judicature Act in fact only envisages the use of the African customary law in dispute resolution only in civil cases that affect one or more of the parties that are subject to the particular customary law. It is also evident that even where the alternative dispute resolution mechanisms are to be used in the criminal matters, it is limited to misdemeanors and not on felonies. The accused herein has been charged with the offence of murder, which has been classified as a felony and therefore, among the crimes that section 176 of the Criminal Procedure Code prohibits the courts from adopting reconciliation as a form of justice.’*

Amending Section 176 of the *Criminal Procedure Code Cap 75* and removing the “*felony limitation*” would go a long way in enhancing conflict resolution and realization of justice through the use of *alternative dispute resolution mechanisms*. Rather than distinguishing felony and misdemeanors when it comes to the application and use of *alternative dispute resolution mechanisms* in criminal matters, the

judge/magistrates should be given the discretion to decide which criminal matter can or cannot be subject to the use of *alternative dispute resolution mechanisms*.

It is observable that failure to amend *Section 176 of the Criminal Procedure Code Cap 75* has resulted in parties to criminal cases (accused person and complainant in the case) inventing other alternative ways to settle cases involving a felony out of court. For example; Deliberate refusal by the complainants to attend court and give evidence against the accused person.

### **3.0 In Conclusion**

*St Augustine* once said; “...*Unjust Law is not Law at All*”. To this end, time is ripe to amend *Article 159(3) (b)* of the Constitution, *Section 3(2) of the Judicature Act*, and *Section 176 of the Criminal Procedure Code Cap 75* in order to enhance conflict resolution and realization of justice through the use of *Alternative Dispute Resolution Mechanisms*.

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## **Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects**

By: **Kariuki Muigua\***

### **Abstract**

*Land resources are considered an important part of the social, economic and cultural aspects of the lives of many Kenyan communities, especially in the rural areas. However, these resources are finite in nature while the population of these people is growing by the day. This, coupled with other challenges such as poverty and climate change, often leads to conflicts arising from the threatened access and control of the land and its resources. The resultant threat to peace and instability means that these conflicts should be effectively managed. However, due to the sensitive nature of the conflicts, Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms have often been proposed as some of the most viable means of managing the conflicts as their perceived advantages are believed to be capable of balancing the delicate nature of the interests involved. This paper discusses the challenges and prospects involved in the application of these mechanisms in the management of land conflicts in Kenya. The author argues that unless these challenges are dealt with first, these mechanisms may not achieve the desired outcome.*

### **1. Introduction**

The land is considered to be one of the most important economic resources in Kenya.<sup>1</sup> However, it has not only economic importance attached to it but also has social, cultural and even sentimental value to many people in the country. The fact that Kenya is largely an agricultural based economy with many communities still relying on land to take care of their livelihoods.<sup>2</sup> This means that the ownership and control of land

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<sup>1</sup> See Hermunen, T., "Land use policy in Kenya: Experiences from Taita Taveta district," *University of Helsinki, Department of Geography* (2004). Available at [http://www.helsinki.fi/science/taita/reports/Land\\_use\\_policy\\_Kenya\\_Taita\\_Hermunen.pdf](http://www.helsinki.fi/science/taita/reports/Land_use_policy_Kenya_Taita_Hermunen.pdf) [Accessed on 5/10/2019].

<sup>2</sup> Ibid; see also Quan, J., Tan, S., & Toulmin, C., "Land in Africa: market asset or secure livelihood?" (2004), *Proceedings and summary of conclusions from the Land in Africa*

often comes with conflicts owing to the fact that such land is also a finite resource especially with the ever growing population with non-corresponding national economic growth figures.<sup>3</sup> If not well managed, these conflicts are likely to not only lead to instability in the country but also may result in casualties as disagreeing factions resort to unorthodox means of dealing with these conflicts.<sup>4</sup> The law has thus set out mechanisms that should be used in managing these conflicts. The Constitution envisages formal and informal mechanisms to address land conflicts. Chapter Ten (Article 159) of the Constitution designates Judiciary as the main arm of the Government to address civil and criminal matters in the country to ensure that justice is done to all.<sup>5</sup>

The Constitution requires that, in exercising judicial authority, the courts and tribunals must be guided by the principles of, inter alia— promotion of alternative forms of dispute resolution including *reconciliation, mediation, arbitration and traditional dispute resolution mechanisms*, subject to clause (3) (emphasis added).<sup>6</sup> It is noteworthy that these mechanisms form part of the traditional knowledge since when they are applied in the community setting, they mostly rely on such knowledge for their effectiveness.<sup>7</sup>

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*Conference held in London, November 8-9, 2004.* Available at <https://pubs.iied.org/pdfs/12516IIED.pdf> [Accessed on 5/10/2019].

<sup>3</sup> Kennedy Jr, B., "Environmental scarcity and the outbreak of conflict," *Population Reference Bureau* (2001). Available <https://www.prb.org/environmentalscarcityandtheoutbreakofconflict/> [Accessed on 5/10/2019]; Republic of Kenya, *Kenya Population Situation Analysis*, (National Council for Population and Development (NCPD), July, 2013). Available at [https://www.unfpa.org/sites/default/files/admin-resource/FINALPSAREPORT\\_0.pdf](https://www.unfpa.org/sites/default/files/admin-resource/FINALPSAREPORT_0.pdf) [Accessed on 5/10/2019].

<sup>4</sup> See Alao, A., *Natural resources and conflict in Africa: the tragedy of endowment*, Vol. 29, University Rochester Press, 2007; Muigua, K., 'Managing Natural Resource Conflicts in Kenya through Negotiation and Mediation,' Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Volume 4, No 2, (2016), pp. 1-63; Humphreys, M., "Natural resources, conflict, and conflict resolution: Uncovering the mechanisms," *Journal of conflict resolution*, vol.49, no. 4 (2005): 508-537.

<sup>5</sup> 159. Judicial authority

(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.

<sup>6</sup> Ibid, Art. 159(2) (c).

<sup>7</sup> Castro, A.P. & Ettenger, K., 'Indigenous Knowledge And Conflict Management: Exploring Local Perspectives And Mechanisms For Dealing With Community Forestry Disputes,' *Paper Prepared for the United Nations Food and Agriculture Organization, Community Forestry*

In addition to this, Article 60 of the Constitution also provides that one of the principles of land holding in the country is encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.<sup>8</sup> The other principles on how land in Kenya should be held, in addition to being used and managed in a manner that is equitable, efficient, productive and sustainable, are— equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; and elimination of gender discrimination in law, customs and practices related to land and property in land.<sup>9</sup>

These principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation.<sup>10</sup> In addition to the foregoing, the functions of the National Land Commission include, inter alia: to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress; and to encourage the application of traditional dispute resolution mechanisms in land conflicts.<sup>11</sup> This is a significant provision considering that land conflicts form the bulk of natural resource conflicts reported in the country, and the land issue is an emotive one.<sup>12</sup>

This paper mainly focuses on the edict of encouraging communities to settle land disputes through recognised local community initiatives consistent with this Constitution.<sup>13</sup> The paper discusses the viability of this approach to management of

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*Unit, for the Global Electronic Conference on "Addressing Natural Resource Conflicts Through Community Forestry," 2000.*

<sup>8</sup> Article 60 (1)(g), Constitution of Kenya 2010 (Government Printer, Nairobi, 2010).

<sup>9</sup> *Ibid*, Article 60 (1).

<sup>10</sup> Article 60(2).

<sup>11</sup> *Ibid*, Art. 67(2) (f).

<sup>12</sup> Government of Kenya, *Report on the Commission of Inquiry into Land Law Systems in Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer Nairobi, 2002); See also Akiwumi, A.M., et al, *Report of the Judicial Commission Appointed to Inquire into Tribal Clashes in Kenya*, 31st July, 1999.

<sup>13</sup> 60. Principles of land policy

(1) *Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—*

(g) ***encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.***



land disputes in Kenya and the practical and legal challenges that are likely to arise in the implementation of these provisions. Considering that these constitutional provisions may be given force by the proposed *Alternative Dispute Resolution (ADR) Bill, 2021*<sup>14</sup> (*ADR Bill, 2021*), this paper makes reference to the Bill in an attempt to point out not only the inconsistencies in the Bill but also to highlight the challenges that arise in applying Alternative Dispute Resolution (ADR) and Traditional Dispute Resolution (TDR) mechanisms in management of land conflicts and disputes in the country.

## **2. Land Conflicts in Kenya**

As already pointed out, land ownership and control is an emotive subject in Kenya which means different things to different people hence more often results in conflicts over control and ownership.<sup>15</sup> People may perceive land ownership and control in accordance with social, cultural, ethnic, class and family dimensions. To farmers and pastoralists land is a source and a key element of living while to the elite land is a marketable commodity and access to profits.<sup>16</sup> The implication of this is that land disputes that arise may take different forms according to the underlying causes.

In many African cultures, the tribe is at the top of the hierarchy of traditional African communities' socio-political organization. It is the custodian of the community land, resources and customary law. It also brokers inter-community peace pacts, negotiate for peace, grazing land, water and other resources and in compensation arrangements.<sup>17</sup>

Despite the existence of the formal conflict management mechanisms, there has been perennial land and natural resource conflicts in the country, hence the need to explore

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67. National Land Commission

(2) The functions of the National Land Commission are—

(f) ***to encourage the application of traditional dispute resolution mechanisms in land conflicts;***

<sup>14</sup> Senate Bills No. 34 of 2021 (Government Printer, Nairobi, 2021).

<sup>15</sup> See Hermunen, T., "Land use policy in Kenya: Experiences from Taita Taveta district," *University of Helsinki, Department of Geography* (2004), p. 1. Available at [http://www.helsinki.fi/science/taita/reports/Land\\_use\\_policy\\_Kenya\\_Taita\\_Hermunen.pdf](http://www.helsinki.fi/science/taita/reports/Land_use_policy_Kenya_Taita_Hermunen.pdf) [accessed on 30/9/2019].

<sup>16</sup> *Ibid*, p.1.

<sup>17</sup> See generally, Rabar, B. & Karimi, M. (Eds), *Indigenous Democracy: Traditional Conflict Resolution Mechanisms: The Case of Pokot, Turkana, Samburu and Marakwet communities*, (ITDG, Nairobi, 2004), p.45; See also Kenyatta, J., *Facing Mount Kenya: The Tribal Life of the Gikuyu*, (Vintage Books, New York, 1965).

the use of ADR and TDR mechanisms in the management of these conflicts in peaceful way owing to the importance of these resources to majority Kenyan communities.

### **3. Management of Land Conflicts in Kenya**

Land conflicts management may either be managed through formal mechanisms such as courts and tribunals or through informal mechanisms which include Alternative Dispute Resolution Mechanisms (ADR) and Traditional Dispute Resolution Mechanisms (TDRMs).

Natural resource based conflicts can, arguably, involve three broad themes: actors (or stakeholders, groups of people, government structures and private entities), resource (land, forests, rights, access, use and ownership) and stakes (economic, political, environmental and socio-cultural).<sup>18</sup> As a result, it is contended that conflicts can be addressed with the actor-oriented approach, resource-oriented approach, stake-oriented approach or a combination of the three.<sup>19</sup> Despite this, there are key principles such as, inter alia, participatory approaches<sup>20</sup>, equitable representation, capacity building, context of the conflict and increased access and dissemination of information, that must always be considered.<sup>21</sup>

This section explores both the formal mechanisms and the informal mechanisms.

#### **3.1 Management of Land Conflicts through Courts and Tribunals**

The Constitution envisaged the establishment of an 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.<sup>22</sup> In order to give effect to Article 162(2)(b) of the Constitution, the Environment and Land Court Act 2011<sup>23</sup> to establish

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<sup>18</sup> Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' *Annex C - Summary of Discussion Papers*, (FAO), available at <http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed on 2/10/2019].

<sup>19</sup> Ibid.

<sup>20</sup> Participatory approaches are defined as institutional settings where stakeholders of different types are brought together to participate more or less directly, and more or less formally, in some stage of the decision-making process. (Hove, SVD, 'Between consensus and compromise: acknowledging the negotiation dimension in participatory approaches,' *Land Use Policy*, Vol. 23, Issue 1, January 2006, PP. 10–17.

<sup>21</sup> Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' op cit.

<sup>22</sup> Article 162 (2) (b).

<sup>23</sup> Act No. 19 of 2011, Laws of Kenya.

a superior court to be known as the environment and land court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes.

Under the Environment and Land Court Act 2011, the jurisdiction of the Court which has and exercises jurisdiction throughout Kenya includes: original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.<sup>24</sup> In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court has power to hear and determine disputes: relating to environmental planning and protection, climate matters, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; relating to compulsory acquisition of land; relating to land administration and management; relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.<sup>25</sup> In addition to this, the Act provides that nothing in the Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.<sup>26</sup>

Apart from the matters referred to in subsections (1) and (2), the Court is empowered to exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.<sup>27</sup>

Furthermore, in exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—interim or permanent preservation orders including injunctions; prerogative orders; award of damages; compensation; specific performance; restitution; declaration; or costs.<sup>28</sup> Notably, courts have held that ‘under Section 13(7) (a) of the Environment and Land Court Act, this court has jurisdiction to issue preservative orders relating to both

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<sup>24</sup> Sec. 13(1), Environment and Land Court, 2011.

<sup>25</sup> Sec. 13(2), Environment and Land Court, 2011.

<sup>26</sup> Sec. 13 (3).

<sup>27</sup> Sec. 13 (4).

<sup>28</sup> Sec. 13 (7).

civil and criminal processes. That jurisdiction is however limited to matters relating to environment and the use and occupation, and title to land.<sup>29</sup>

The *Community Land Act 2016*<sup>30</sup> which was enacted to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes<sup>31</sup> also specifically provides for judicial proceedings in community land disputes alongside other mechanisms, though as the last resort. Section 42(1) thereof provides that ‘Where all efforts of resolving a dispute under this Act fail, a party to the dispute may refer the matter to court’. The Court may- confirm, set aside, amend or review the decision which is the subject of the appeal; or make any order in connection therewith as it may deem fit.<sup>32</sup>

### **3.2 Management of Land Conflicts through Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms**

Although the Environment and Land Court Act 2011 establishes the environment and land court, it also provides for the use of ADR in management of land disputes. It provides that ‘nothing in the Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2)(c) of the Constitution.<sup>33</sup> In addition, where alternative dispute resolution mechanism is a condition precedent to any proceedings before the Court, the Court should stay proceedings until such condition is fulfilled.<sup>34</sup>

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<sup>29</sup> Para 10, *National Land Commission v Afrison Export Import Limited & 10 others* [2019] eKLR, ELC Reference No. 1 of 2018; Regarding the possibility of concurrence of High Court and the Environment and Land Court jurisdictions, see *Ifdid Ole Tauta & others vs Attorney General (2015) eKLR*; *Patrick Musimba vs. National Land Commission & 4 others (2015) eKLR*; and *Christopher Ngusu Mulwa & 28 others v County Government of Kitui & 2 others [2017] eKLR*.

<sup>30</sup> *Community Land Act, No. 27 of 2016*, Laws of Kenya.

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

<sup>32</sup> *Ibid*, sec. 42 (2).

<sup>33</sup> Sec. 20 (1).

<sup>34</sup> Sec. 20 (2).

The use of ADR mechanisms in managing land disputes is also provided for under the *Land Act, 2012*<sup>35</sup>. The Act provides that in the discharge of their functions and exercise of their powers under this Act, the National Land Commission and any State officer or public officer shall be guided by some values and principles which include—encouragement of communities to settle land disputes through recognized local community initiatives; and alternative dispute resolution mechanisms in land dispute handling and management.<sup>36</sup>

The applicability of ADR and TDR mechanisms in community land disputes is envisaged under the *Community Land Act 2016*<sup>37</sup>. Section 39(1) thereof provides that ‘a registered community may use alternative methods of dispute resolution mechanisms including traditional dispute and conflict resolution mechanisms where it is appropriate to do so, for purposes of settling disputes and conflicts involving community land’.

Indeed, the Act requires that ‘any dispute arising between members of a registered community, a registered community and another registered community should, at first instance, be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws’.<sup>38</sup> Where a dispute or conflict relating to community land arises, the registered community should give priority to alternative methods of dispute resolution.<sup>39</sup>

In addition, subject to the provisions of the Constitution and of this Act, a court or any other dispute resolution body should apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution.<sup>40</sup>

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<sup>35</sup> No. 6 of 2012, Laws of Kenya.

<sup>36</sup> *Ibid*, sec. 4 (2) (g)(m).

<sup>37</sup> *Community Land Act, No. 27 of 2016*, Laws of Kenya.

<sup>38</sup> *Ibid*, sec. 39 (2).

<sup>39</sup> *Ibid*, sec. 39 (3).

<sup>40</sup> *Ibid*, sec. 39 (4).

Apart from the applicability of TDRMs, the Community Land Act 2016 also has specific provisions for the application of mediation<sup>41</sup> and/or arbitration<sup>42</sup>.

The *Draft Alternative Dispute Resolution Policy 2019*<sup>43</sup> was meant ‘to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans. It is intended to create a well-coordinated, well capacitated and cohesive ADR system that is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system and providing quality justice services to Kenyans across the country’ (emphasis added).<sup>44</sup>

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<sup>41</sup> Ibid, sec. 40.

#### **40. Mediation**

(1) Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to mediation.

(2) The mediation shall take place in private or in informal setting where the parties participate in the negotiation and design the format of the settlement agreement.

(3) The mediator shall have the power to bring together persons to a dispute and settle the dispute by—

(a) convening meetings for the hearing of disputes from parties and keep record of the proceedings;

(b) establishing ground rules for the conduct of parties;

structuring and managing the negotiation process and helping to clarify the facts and issues; and

(c) helping the parties to resolve their dispute.

(4) If an agreement is reached during the mediation process, the agreement shall be reduced into writing and signed by the parties at the conclusion of the mediation.

<sup>42</sup> Ibid, sec. 41.

#### **41. Arbitration**

(1) Where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.

(2) Where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of the Arbitration Act (No.4 of 1995) relating to the appointment of arbitrators shall apply.

<sup>43</sup> Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at [https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY\\_P.pdf](https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf)

<sup>44</sup> *Draft Alternative Dispute Resolution Policy 2019 (Zero draft)*, p.7. Available at [https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY\\_P.pdf](https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf)

This Draft ADR Policy 2019 together with the ADR Bill, 2021 are meant to formalize the use of ADR and TDR mechanisms in Kenya in management of conflicts including natural resources and land conflicts.

#### **4. Challenges and Prospects**

##### **4.1 Recognition and Enforcement of Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms Outcomes**

Considering the diversity of ADR and TDR mechanisms based on the different communities as well as the informality that comes with the, enforcement of their outcomes is going to prove difficult. This is also likely to be complicated by the non-binding nature of these mechanisms such as mediation. For instance, in the case of *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others [2018] eKLR*<sup>45</sup>, the ELC Court at Garissa was called upon by the defendant/applicant to determine an application seeking orders that the proceedings be stayed and that the dispute be referred to the local community elders for resolution.<sup>46</sup> The Court observed that ‘*Under Article 159 (2) (c) the courts and tribunals are to ensure that there is promotion of Alternative Dispute Resolution mechanism, mediation reconciliation, arbitration and traditional dispute resolution as a means of bringing cohesion and co-existence amongst the people. However, parties have to consent and be willing to be bound by the decision of the decision makers. In this case, the parties had initially agreed to refer the dispute to a panel of elders but the plaintiff later abandoned the process and elected to bring the dispute for resolution to this court*’ (emphasis added). This case illustrates the first challenge that arises when applying ADR and TDR mechanisms in land disputes; the unenforceability of the outcomes of mediation outcomes in land matters.

It is therefore to be seen how outcomes in land matters, are to be enforced by the courts. The only exception would be where both parties mutually agree on the outcome under the law of contract or under some other agreed arrangements and then approach the

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<sup>45</sup> *Sahara Ahmed Hillow (Suing as administrator ad litem of the Estate of the late Ahmed Hillow Osman (Deceased) v Mohamed Hassan Jillo & 2 others [2018] eKLR*, Environment and Land Case 30 of 2017 (Formerly 77 of 2017, Embu).

<sup>46</sup> *Ibid*, para. 1.

court to record it as consent. In such instances, it would be easier for the courts to record and adopt such agreed outcomes as an order of the court.<sup>47</sup>

## **4.2 Recourse to Court and Recognition and Enforcement of Settlement Agreement**

Clause 32 of the proposed *Draft ADR Bill, 2021*<sup>48</sup> provides that all the parties and their advocate(s) should file a certificate with the Court for confirmation that ADR has been considered. While this provision is drafted in broad terms, it is silent on what would be the effect of any of the parties or their advocates failing to file the relevant certificate(s) at the appropriate time. It fails to clarify on whether the Court would send them back in order to comply or whether it would invoke clause 28 (2) (a) of the Bill. Considering that land matters are sensitive, it is critical that it is clarified on what the Courts would do in such instances as the one described above in order to avoid an outcome that one of parties/groups consider invalid.

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<sup>47</sup> See Law of Contract Act, Cap 23, Laws of Kenya, sec. 3(3); see also Civil Procedure Rules 2010, Order 13, rule 2.] Judgment on;

*“2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”*

Civil Procedure Rules 2010, Order 25, rule 5;

[Order 25, rule 5.] Compromise of a suit.

*5. (1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.*

*(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.*

<sup>48</sup> Draft Alternative Dispute Resolution Bill, 2021, Senate Bills No. 34 (Government printer, Nairobi, 2021). Available at <http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf>



Clause 33 of the Bill that provides for resort to judicial proceedings is not clear on whether the decision of the High Court or the Court that referred the dispute for resolution through ADR is final or whether the dissatisfied party may move to Court of Appeal. It is important to clarify this since any party or group losing some rights to what they consider their land may resort to other unconventional and non-peaceful means if they feel that justice was not served by the courts.

Notably, clause 36 of the Bill which outlines the grounds for referral of recognition or enforcement of settlement agreement provides that:

*The recognition or enforcement of a settlement agreement may be refused where—*

*(a) at the request of the party against whom it is invoked, that party furnishes to the High Court or the court referring the dispute to alternative dispute resolution proof that—*

*(i) a party to the alternative dispute resolution process was under some incapacity;*

*(ii) the settlement agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the country where the settlement agreement was made;*

*(iii) the party against whom the settlement agreement is invoked was not given proper notice of the appointment of a conciliator, mediator or traditional dispute resolver;*

*(iv) the party against whom the settlement agreement is invoked was not given proper notice of the alternative dispute resolution process or was otherwise unable to present its case;*

*(v) the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution, provided that if the decisions on issues referred to alternative dispute resolution can be separated from those not so referred, that part of the settlement agreement which contains decisions on issues referred to alternative dispute resolution may be recognized and enforced;*

*(vi) the appointment of the conciliator, mediator or traditional dispute resolver was not in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;*

*(vii) the alternative dispute resolution process was not conducted in accordance with the alternative dispute resolution clause, this Act or any other law or the law of the country where the alternative dispute resolution took place;*

*(viii) the settlement agreement has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which that settlement agreement was made; or*

*(ix) the making of the settlement agreement was induced or affected by fraud, bribery, corruption or undue influence;*

*(b) if the High Court or the court finds that—*

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

*(ii) the recognition or enforcement of the settlement agreement would be contrary to the public policy (emphasis added).*

The underlined portions raise a number of concerns. To begin with, it is notable that in the definitions/interpretation section, the definitions of the terms ‘conciliation’ ‘mediation’ and ‘traditional dispute resolution’ do not mention anything on the potential international nature of these processes. Unlike the Arbitration Act which defines arbitration to include both domestic and international arbitration, the current ADR Bill 2021 is quiet on this as far as the said processes are concerned. It is therefore questionable whether the given definitions should be inferred to include the international aspects of these processes, especially conciliation and mediation. Secondly, the scope of the Bill as envisaged under clause 4(1) is that Bill shall apply to certain civil disputes including a dispute where the National government, a county government or a State organ is a party. What is not clear is whether this includes disputes involving foreign parties transacting with the National government, a county government or a State organ. Considering that there may be other laws that may oust the jurisdiction of this Bill in as far as resolving disputes with foreign parties is concerned, the Bill should not include the international aspects of the processes in question. Thirdly, it is an established fact TDR mechanisms *are highly subjective and unique to communities and cultures* (emphasis added). It is therefore not viable to contemplate an international TDR decision under the Bill. It may be imperative to reconsider these provisions to avoid the obvious challenges in attempting to enforce such decisions, even assuming that they may exist.

In ADR or TDR referrals which were done by the Court and/or parties filed their respective certificates as contemplated under clause 32 of the Bill, it is not clear as to whether a party would still have the liberty to challenge the decision under some grounds such as “*the settlement agreement deals with a dispute not contemplated by or not falling within the terms of the referral to alternative dispute resolution, or it contains decisions on issues beyond the scope of the referral to alternative dispute resolution*”. The Bill is also silent on what happens where the referring court and the parties in their certificates agreed that the dispute in question could be referred for ADR or TDR. It does not address the question on whom the error, if any, is to be revisited. Arguably, it is possible for a ‘losing’ party to avoid filing the certificate or challenging the decision to refer the same for ADR or TDR at the relevant stage and wait until the outcome and use these provisions to delay the process of recognition and enforcement. Again, the Bill does not have any provisions on how these issues are to be reconciled.

Again, even though the outcome of ADR and/or TDR process is binding on the parties, where parties challenge the enforcement and recognition, clause 36 of the Bill is silent on whether a dissatisfied party may appeal the decision of enforcement and recognition to a higher court. This may present challenges as has been the case with arbitration outcomes.

### **4.3 Determination of the Expertise of the ADR and TDR Practitioners**

The formal recognition of traditional dispute resolution mechanisms in the *Draft ADR Bill, 2021* is commendable as these mechanisms have often faced challenges in their application as they mostly depend on particular and differing customs of the different communities. Having a formal basis for their application as envisaged in the Constitution is thus to be lauded.

However, TDR mechanisms still have to face one more hurdle: determination of the expertise of the practitioners. It is assumed that it is under the provisions of this Bill, once enacted that the constitutional provisions on application of ADR and TDR mechanisms to land disputes will be applied.

Clause 27 of the Bill which provides for the competence of a traditional dispute resolver provides at sub clause (1) that “A person shall not act as a traditional dispute resolver unless acquainted with the customary law to be applied in resolving the dispute”. Sub clause (2) (ought to be corrected on the bill to read (3) provides that “the

Committee may, in as far as is reasonably practicable, prepare and maintain a list of traditional dispute resolvers”. These provisions may present a challenge to the Committee. For instance, it is not clear on the criteria to be used when determining whether the potential candidate is acquainted with the customary law to be applied in resolving the dispute. The law has been that anyone who seeks to rely on customary law especially in African customary marriages has the onus of proving the same as was held in the celebrated case of Kimani v. Gikanga [1965] EA 735, where *Duffus JA* explained the position thus:

*“To summarize the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case” (emphasis added).*

The question that arises therefore is how, under the above provisions of the Bill, the Committee will decide that an applicant is competent and acquainted with the customary law to be applied in resolving the dispute. It is possible that in the Committee, there may be nobody acquainted with the customary law in question. In ensuring that the Committee does not face challenges in coming up with the register, these clauses may need to be reconsidered. The other potential risk is locking out potential candidates where the process and criteria of selection is too formalized. It is possible that the most qualified candidates may not have the formal education or the ‘requisite papers’ to put in during application. It is not clear how the Committee will overcome this potential hurdle. What makes TDR mechanisms attractive is their informality and this ought to be preserved as much as possible in legislating on these processes. It should also not be lost on the drafters that TDR mechanisms include a number of processes just as is the case in ADR mechanisms and various communities may use different approaches or processes in dealing with diverse cases.

This process of determining the applicability of TDR mechanisms may also arise under Clause 28 (2) (a) which provides that “A court before which a dispute is filed or pending may refer a dispute for resolution through a traditional dispute resolution process at any time where— (a) the court determines that traditional dispute resolution will facilitate the resolution of the dispute or a part of the dispute”. Again, the Bill is silent on what procedure or evidence the Court will rely on to assist it in making this decision. It is not yet clear whether the communities involved, in the case of community land under *Community Land Act 2016*<sup>49</sup>, will have a chance to appoint the preferred experts in such TDR process.

Clause 29 (2) of the Bill provides that the traditional dispute resolver must submit to the court a written down settlement agreement as well as a report at the conclusion or termination of the TDR process. Considering that some of the customary experts (mostly elders) may not have formal knowledge of reading and writing, it is debatable as to whether there should be a provision for them to work with an assistant or a court appointed clerk to assist them in coming up with the settlement agreement or the report. Alternatively, they can appear in open court to ‘report’ on the outcome and the magistrate or judge puts it down in writing and records it as the decision of the Court. In other words, such settlements or reports can be treated the same way as provided under clause 29 (3) which states that “Except where a dispute was referred for resolution through traditional dispute resolution or at the request of the parties, a settlement agreement need not be in writing”. The drafters and policy makers may include other viable options to address such challenges. The Bill can include court appointed assistant(s) to work with the resolvers in order to capture in writing what the dispute resolvers conclude.

## **5. Making Traditional Dispute Resolution Mechanisms work in Managing Land Conflicts in Kenya**

ADR and TDR mechanisms when applied in management of disputes and conflicts can create viable channels for public participation in meaningful decision-making processes. Notably, the objects of the devolution of government are, inter alia— to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; to recognise the right of communities to manage their own affairs and to further their

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<sup>49</sup> Act No. 27 of 2016, Laws of Kenya.

development; and to protect and promote the interests and rights of minorities and marginalised communities.<sup>50</sup>

While the foregoing provisions are laudable in view of the fact that they have envisaged traditional knowledge in terms of traditional dispute resolution mechanisms within the legal framework, the real task lies in implementing these provisions and creating opportunities for incorporation of such knowledge in decision-making and conflict management as far as land is concerned. There is a need to move beyond the formality of the proposed Bill to come up with procedures that can actually work. This is especially important in the application of traditional dispute resolution mechanisms in land conflicts (Art. 67) as well as dealing with the inter-community and intra community conflicts that are mostly natural resource based.

Traditional conflict resolution practices reflect principles of reconciliation based on long-standing relationships and values.<sup>51</sup> They tend to be effective in addressing intra-community and even inter-community conflict, where relationships and shared values are part of the reconciliation process.<sup>52</sup>

However, there is a need to integrate traditional and formal approaches to conflict management in a way that ensures that the informality of these mechanisms is not lost. Including communities and the affected parties in appointment of these traditional dispute resolvers may help in not only lending credence to the process but also may help in repositioning the traditional authority especially as far as resolution of land conflicts within communities, as contemplated under Article 60(1) (g) of the Constitution, is concerned.

There is also a need to consider and carefully capture the spirit of the *Alternative Dispute Resolution Policy (Zero Draft), 2019*<sup>53</sup> which may be useful in capturing the spirit of the Constitution, ADR and TDR mechanisms as well as the other relevant laws that deal with these mechanisms. The policy-makers are wary of the risks involved in formalization of ADR processes and the implementation of the ADR Policy which

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<sup>50</sup> Art. 174.

<sup>51</sup> Myers, L.J. & Shinn, D.H., 'Appreciating Traditional Forms of Healing Conflict in Africa and the World,' *Black Diaspora Review*, Vol. 2(1), Fall 2010.

<sup>52</sup> Ibid.

<sup>53</sup> Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at [https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY\\_P.pdf](https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf)

include: over-formalisation of the ADR sector which will undermine its utility as a more flexible, faster, informal mechanisms for justice; technology disruption of working models in ADR; resistance to change by stakeholders and users of ADR; inadequate resources to implement the policy; and competition between formal and ADR mechanisms, and legal and non-legal practitioners.<sup>54</sup> These precautions are necessary considering that the ADR and TDR mechanisms are perceived to be better off than formal approaches in managing some disputes due to the advantages that they have over the formal processes. Any formalisation approach that takes away these advantages thus defeats the very essence of their use in managing disputes.

In a bid to strengthen the legal framework for ADR in the country, the Draft ADR Policy recommends that there be enacted an Alternative Dispute Resolution Act, which shall be the framework legislation for ADR in the country. The Act should among other things: provide for establishment of mechanisms for linkage and coordination between the formal justice system and ADR system; sector governance; regulation; standards setting; enforcement of decisions; among other things.<sup>55</sup> The National Council (to be established under the Act) in liaison with stakeholders should promote the full implementation of existing laws that promote ADR, and advocate for similar legal provisions in other needy sectors.<sup>56</sup> The assumption is that various laws require different mechanisms as well as varying procedural needs. The Council is thus expected to work closely with other stakeholders to identify and address the special needs under each of the laws and approaches.

As a way of strengthening linkages, coordination and harmonisation in the ADR sector, the Draft Policy also: adopts the principle of subsidiarity in regard to linkage between the ADR systems and the formal court system. This is intended to stem the hegemony of the judiciary, and to allow autonomous operation and growth of ADR without the trappings of judicial conceptions of justice, procedures, retributive approaches, and the individual interests that underpin the method and goals of the formal justice sector; The linkage between the formal justice system and non-court ADR mechanisms are therefore meant to be in areas of mutual benefit such as enforcement, research, and accountability systems; mechanisms and modalities are also to be developed for promotion of coordination and harmonisation between the

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<sup>54</sup> *Alternative Dispute Resolution Policy (Zero Draft)*, 2019.

<sup>55</sup> *Ibid*, p. 41.

<sup>56</sup> *Ibid*, p.41.



formal justice system and the ADR sector, and also between actor in the ADR sector itself.<sup>57</sup>

As already pointed out, there is a need to ensure that the legislation process does not defeat the merits of the ADR and TDR processes thus rendering them inapplicable or ineffective when it comes to the specific disputes and conflicts. The drafters of the ADR Bill 2019 should thus revisit the above listed aims of the draft Policy to ensure that they capture these goals and aspirations.

Some of the above listed potential challenges in the application of TDR mechanisms in management of land conflicts can be overcome if these policy goals are well captured and implemented through the ADR Bill. It is important to ensure that the informality and potentially inexpensive and/or cost effectiveness of the ADR and TDR is preserved.

The purpose of the ADR policy is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans. It is intended to create a well-coordinated, well capacitated and cohesive ADR system that is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system and providing quality justice services to Kenyans across the country.<sup>58</sup> It is important that the legal framework on ADR and TDR mechanisms not only captures but also promotes this purpose of the policy framework. This is especially important in order to ensure that communities appreciate and remain in touch with the legal framework on the regulation and application of ADR and TDR mechanisms in management of their everyday disputes and conflicts such as the ones that relate to land and natural resources.

## **6. Conclusion**

ADR and TDR mechanisms are associated with many advantages when appropriately used in management of land and other natural resource conflicts. However, as discussed in this paper, while these processes may have many intrinsic values that make them preferable to the formal mechanisms in management of land conflicts and disputes, there are procedural and appropriateness challenges that should be addressed to make them legally and practically applicable. It is hoped that the challenges

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<sup>57</sup> Ibid, p.42.

<sup>58</sup> *Alternative Dispute Resolution Policy (Zero Draft)*, 2019, p. 7.



discussed in this paper will be considered by the Kenyan policy and decision makers in mainstreaming the use of ADR and TDR in management of land conflicts and disputes in the country.

Effective application of TDRMs in the management of land conflicts in Kenya is possible. However, a lot needs to be done before this goal is realised.

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## Facilitating Access to Justice Through Online Dispute Resolution in Kenya

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### Abstract

*The Internet has accelerated the ease with which both simple and complex disputes may be resolved. Online resolution of disputes is said to be convenient and a means to an end of achieving satisfactory justice in the cyberspace. The right of access to justice is a constitutionally guaranteed right which accrues to all and promoted through Online Dispute Resolution for internet-based disputes. It has gained traction due to the remarkable increase in internet connectivity and the resultant online disputes emerging from its widespread use.*

### Introduction

Online Dispute Resolution (ODR) is the application of computer network methods to resolve disputes<sup>1</sup>. It is simply the use of various methods of alternative dispute resolution methods to solve disputes online.<sup>2</sup> It is aimed at ensuring voluntary negotiation of the parties in the dispute while solving the dispute at hand, building consensus and finding the solution to the cause of the dispute electronically.<sup>3</sup>

The right of access to justice is provided for in the Constitution.<sup>4</sup> It envisions the right that accrues to all persons to have the application of law in the resolution of disputes that may concern them in a fair and public hearing. This also includes the entitlement

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<sup>1</sup> Optimal Life Histories a, 'Online Arbitration in The Social Network World; Mobile Justice On Iphones | Al Swelmiyeen, Ibrahim; Al-Nuemat, Ahmed; Kok, Andy | Download' (Artlib.org, 2022) <https://artlib.org/book/22716571/c99c48> accessed 8 February 2022

<sup>2</sup> Law.ox.ac.uk. 2021. [online] Available at:

[https://www.law.ox.ac.uk/sites/files/oxlaw/dr\\_pablo\\_cortes.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/dr_pablo_cortes.pdf) [Accessed 4 June 2021].

<sup>3</sup> Jeanne Brett, 'Attitudinal Structuring, ADR and Negotiation Strategy,' (2015) 31 *Journals of Negotiation*

<sup>4</sup> Constitution of Kenya 2010, Article 48

to an expeditious, efficient, lawful, reasonable and procedurally fair administrative action. This paper is divided into **four** parts;

**PART I** shows the viability of ODR in promoting Access to Justice. **PART II** contrasts the role of litigation to ODR in the effectiveness of promoting this constitutional right in Kenya. **PART III** demonstrates that despite the fact that the use of ODR promotes the right of access to justice, there is need for an elaborate legal framework to facilitate its operation in the management of both online and offline conflicts from case studies in the United Kingdom (UK) and the United States. **PART IV** illustrates the future of ODR in Kenya. It outlines what needs to be taken into account before doing so as well as what is likely to be the aftermath of the implementation.

## **PART I: ONLINE DISPUTE RESOLUTION & ACCESS TO JUSTICE**

### **The Scope of Online Dispute Resolution**

Since there is no universally recognized definition of Online Dispute Resolution (hereinafter ‘ODR’), legal scholars and authors emphasize that ODR is a form of alternative dispute resolution which basically utilizes Information Technology.<sup>5</sup>

ODR refers to ‘a form of alternative dispute resolution which takes advantage of speed and convenience of internet and ICT’.<sup>6</sup> It uses technology as a means of resolving disputes between parties and, may be construed to mean an online extension of alternative dispute resolution mechanisms as it can take place either fully or partly online for “disputes arising from cyberspace, brick & mortar disputes, e-disputes and offline disputes”.<sup>7</sup>

### **The Concept of Access to Justice**

Access to Justice involves the finding of effective solutions and remedies from an established judicial system and which must be accessible, flexible and involved in administering justice affordably, timely and fairly.<sup>8</sup> For example, the United Kingdom has incorporated ODR into its judicial system as further detailed herein.

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<sup>5</sup> Mercedes M A and Gonzalez N M, ‘Feasibility Analysis of Online Dispute Resolution in Developing Countries’, 44:1 *Inter-American Law Review* 2012, 44.

<sup>6</sup> Kallel S, ‘Online Arbitration’, 25 *Journal of International Arbitration* (2008), 345

<sup>7</sup> *Ibid*

<sup>8</sup> M.T. Ladan, ‘Access to Justice as A Human Right Under the Ecowas Community Law’ A Paper Presented at: The Commonwealth Regional Conference On the Theme: - The 21st Century Lawyer: Present Challenges and Future Skills, Abuja, Nigeria, 8 – 11 APRIL, 2010,

The Constitution enshrines the access to justice under Article 48. The state is obligated with the responsibility of ensuring access to justice to all and where a fee is required, it must be reasonable.<sup>9</sup> Therefore, an unreasonable fee is an impediment to one's right of access to justice. It is considered to be a basic and inviolable right which accrues to all persons.<sup>10</sup> The right not only ensures that justice is dispensed without delay but also guarantees that a person's case is heard and determined without delay.<sup>11</sup> Any delay occasioned thereof hinders one's right of access to justice.

The Constitution further recognizes the application of Alternative Dispute Resolution (hereinafter 'ADR') mechanisms in line with the promotion of the right of access to justice.<sup>12</sup> As further illustrated in this paper, the constitution does not limit the application of any method of dispute resolution so far as the method enhances the right of access to justice to the parties. So then, how does ODR promote Access to Justice?

### How ODR Promotes Access to Justice

Importantly, ODR facilitates cyber justice and it is the use of technology to enhance access to justice in the internet.<sup>13</sup> The methods of ADR and particularly, Online Alternative Dispute Resolution facilitates access to justice by providing an appropriate dispute resolution which matches the interests of the parties and the dispute at hand through the online space.<sup>14</sup>

Also, ODR is said to have emanated from traditional Alternative Dispute Resolution.<sup>15</sup> There are scholars who are of the view that "ODR is the application of traditional alternative dispute resolution mechanisms (TDRMs) in the cyberspace." Offline disputes may incorporate the use of ODR as a supplement to the traditional dispute

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Available at: <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAF>  
*OAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07/* [Accessed on 5<sup>th</sup> June, 2021]

<sup>9</sup> The Constitution of Kenya 2010, Article 48

<sup>10</sup> Kariuki Muigua (2014), "ADR: The Road to Justice," 3, 1-33; Access to Justice Advisory Committee, 'Access to justice: an action plan,' AGPS, Canberra, 1994

<sup>11</sup> Gichuhi, supra note 5

<sup>12</sup> The Constitution of Kenya, Article 159 (2) (c)

<sup>13</sup> Karim Benyekhlef and Fabien Gélinas (2005), 'Online Dispute Resolution'

<sup>14</sup> Anna Nylund (2013), 'Access to Justice: Is ADR a help or hindrance?' available at: [https://www.researchgate.net/publication/288390701\\_Access\\_to\\_Justice\\_Is\\_ADR\\_a\\_help\\_or\\_hindrance/](https://www.researchgate.net/publication/288390701_Access_to_Justice_Is_ADR_a_help_or_hindrance/) accessed 3rd June, 2021

<sup>15</sup> Nwandem Osnachi Victor, supra note 10

resolution mechanisms. The use of TDRMs unlike ODR is limited by the constitution.<sup>16</sup>

Access to Justice can either be promoted through courts or through the use of Alternative Dispute Resolution. It must be noted that ODR is an online alternative form of dispute resolution. ODR is commonly used in e-commerce, building the consumer's trust in the labour market, seeking remedies for grievances of the consumers, settling disputes of low value and high volume claims, cross border disputes and between internet users as well as describing telecommunication disputes.

## **PART II: THE ROLE OF ODR IN PROMOTING ACCESS TO JUSTICE**

The Constitution provides for the right of Access to Justice which shall be exercised by courts and tribunals to all.<sup>17</sup> It also states that judicial authority is derived from the people and vested in the courts and tribunals.<sup>18</sup> Such courts and tribunals shall do justice to all, ensure that justice is not delayed, and promote the use of alternative forms of dispute resolution.<sup>19</sup>

### **Comparing ODR and Litigation in Promoting Access to Justice**

While on the one hand ODR is the deployment of ADR methods in technology-based networks to resolve internet-based disputes<sup>20</sup>. On the contrary, Litigation is a formal process initiated through the courts.<sup>21</sup> The courts are however mired by challenges which make them weak links in promoting the right of access to Justice. Most litigants “suffer delay occasioned by cumbersome formalities and procedural technicalities hence undermining people's confidence in the judicial system”.

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<sup>16</sup> The Constitution of Kenya 2010, Article 159 (3)

<sup>17</sup> The Constitution of Kenya 2010, Article 48

<sup>18</sup> The Constitution of Kenya 2010, Article 159 (1)

<sup>19</sup> The Constitution of Kenya 2020. Article 159 (2)

<sup>20</sup> Van den Heuvel E. ‘Online Dispute Resolution as a Solution to Cross-border E-disputes: An Introduction to ODR.’ Paper presented at Building Trust in the online environment: Business to customer Disputer Resolution available at:

<http://www.oecd.org/dataoecd/63/57/1878940.pdf>

<sup>21</sup> Ana Isabel Blanco Garcia, “The ADR methods to settle Smes Disputes in Spain” (2017) 11 Culture, Media and Entertainment Laws



Most investment decisions in Kenya are influenced by case disposal rate.<sup>22</sup> The case disposal rate of the Kenyan courts has been found to be slow hence scaring away investors.<sup>23</sup> Slow court processes have also negatively affected economic growth due to pendency of commercial disputes leading to case backlog, crippling of small businesses and/or scaring away investors. Delayed determination of cases undermines the right of Access to Justice since Justice Delayed is Justice Denied.<sup>24</sup>

### **Advantages of ODR Over the Court-System**

Unlike the courts with strict rules of procedure and evidence, ODR promotes Access to Justice by being flexible and responsive to the needs of the parties.<sup>25</sup> It is relatively affordable as opposed to costs associated with proceeding of cases in litigation. ODR is convenient and accessible as it operates round the clock as compared to courts with have strict and formal working hours. It is also tailored for low value consumer claims which may arise online or offline. It also facilitates expeditious resolution of claims as it eliminates gamesmanship associated with the other ADR methods<sup>26</sup>.

### **Disadvantages of ODR Over the Court-System**

Online Dispute Resolution faces shortfalls which threaten its efficacy in Kenya while enhancing the right of Access to Justice as follows.<sup>27</sup> One of the main concerns has been the lack of regulation with the effect of lack of awareness of the online method of dispute resolution among customers and traders. In contrast, relatively many Kenyans are versed with litigation as a possible avenue for access to justice. In fact the

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<sup>22</sup> Collins Odote, 'Public Interest Litigation and Climate Change-An Example from Kenya' *Climate Change: (2013)*, 805-30 *International Law and Global Governance*

<sup>23</sup> *Ibid*

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

<sup>25</sup> Justice.gc.ca. 2021. *Online Dispute Resolution - Dispute Resolution Reference Guide*. [online] Available at:

[https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.html#:~:text=ODR%20may%20be%20the%20appropriate,mediation%20\(e.g.%20consumer%20disputes\)](https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.html#:~:text=ODR%20may%20be%20the%20appropriate,mediation%20(e.g.%20consumer%20disputes).). [Accessed 4 June 2021]

<sup>26</sup> ODR is convenient and accessible as it operates round the clock as compared to courts with have strict and formal working hours. It is also tailored for low value consumer claims which may arise online or offline. It also facilitates expeditious resolution of claims as it eliminates gamesmanship associated with the other ADR methods.

<sup>27</sup> Law.ox.ac.uk. 2021. [online] Available at:

[https://www.law.ox.ac.uk/sites/files/oxlaw/dr\\_pablo\\_cortes.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/dr_pablo_cortes.pdf) [Accessed 3 June 2021].

Judiciary continues to register high number of cases and causing delays due to inadequate human, physical and financial resources.<sup>28</sup>

Two, absence of legislation on Online Dispute Resolution hinders the growth of e-commerce and consumer confidence in it as a method of accessing justice. It is also exposes ODR to ineffectiveness in coming up with processes that suit the needs of the disputing parties. The use of some of the ODR methods may be too costly especially due to loss of income by consumers and suppliers in the midst of the COVID 19 Pandemic<sup>29</sup>.

Other Challenges may arise on jurisdiction, impartiality, privacy and cross-border disputes. In the case of *Bangoura v Washington* (2005), where it was considered that the online environment is bordered hence a problem of which jurisdiction may apply due to parties being of different countries.<sup>30</sup> Presence of cross border challenges like language barriers, costs of settlement, enforcement and complexity of conflicting laws also affect the efficacy and operation of ODR. Question on the partiality of ODR has arisen owing to the fact the platforms which consumers lodge their claims are funded by traders. It must also ensure that it upholds confidentiality, sensitivity and authenticity to protect the data and information that it may contain.<sup>31</sup>

ODR is largely founded and supported by technology. Poor systems of technology hamper the effectiveness of the online method of dispute resolution such as the people living in remote areas. Hacking may expose users to violation of the right of privacy<sup>32</sup>. It poses imminent danger to internet users and eventually, ODR.<sup>33</sup> The variations of internet connection speeds in African countries which may be a problem in online dispute resolution because of circumstances where the connections become weak and

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<sup>28</sup> John Gichuhi, 'Revisiting Article 159 (2) (c) of the Kenyan Constitution: How the Judges see it' (2018) SSRN Electronic Journal

<sup>29</sup> (Oecd.org, 2022) <https://www.oecd.org/digital/consumer/1878940.pdf> accessed 8 February 2022

<sup>30</sup> 5RB Barristers. 2021. *Bangoura v Washington Post & Others - 5RB Barristers*. [online] Available at: <https://www.5rb.com/case/bangoura-v-washington-post-others/> [Accessed 4 June 2021].

<sup>31</sup> Eisen J B, 'Are We Ready for Mediation in Cyberspace?', 1305, 1322

<sup>32</sup> Article 36 of the Constitution, 2010.

<sup>33</sup> Saghar E, and Desmedt Y, Exploiting the Client Vulnerabilities in Internet E-voting Systems: Hacking Helios 2.0 as an Example, EVT/WOTE 10, 2010, 1-9

end up affecting the process.<sup>34</sup> Difficulty in getting details of a dispute through a regulatory body due to the source of information not being clarified<sup>35</sup>.

The recognition of Alternative Dispute Resolution mechanisms in the Constitution was meant to mitigate the challenges mired by the court system. They include reconciliation, mediation, arbitration and traditional dispute resolution mechanisms<sup>36</sup>. These methods of ADR may be conducted electronically through the following methods of ODR;

**a. Online Negotiation/Online settlement using an electronic system**

Online Negotiation uses an expert system which enables the resolution and settlement of monetary claims automatically through various platforms such as blind-bidding.<sup>37</sup> It is only suitable where the amount to be paid in compensation leads to a dispute between the parties.<sup>38</sup> Other websites which offer online negotiation of monetary settlements may include; Cybersettle, ClickNsettle and SettlementOnline.

This is entirely automated cyber mediation or negotiation. The settlement is fully online and the neutral third party is fully automated. In this case, the software does not foster any interaction between the disputing parties and only asks the latter for settlement proposals. The software makes it conducive for both parties by determining suitable neutral offers for settlement.

**b. Online mediation and arbitration with aid of an electronic system**

The technology acts as a neutral third party. It helps the parties reach a solution by asking questions and coming up with possible answers. It also sends reminders to

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<sup>34</sup> How bad is Africa's Internet? available at ><http://spectrum.ieee.org/telecom/internet/how-bad-is-africasinternet>< accessed on 4 June 2021]

<sup>35</sup> 1 Eisen J B, 'Are We Ready for Mediation in Cyberspace?', Brigham Young University Law Review 1998, 1305, 1322.

<sup>36</sup> Article 159 of the Constitution, 2010.

<sup>37</sup> Van den Heuvel E. 'Online Dispute Resolution as a Solution to Cross-border E-disputes: An Introduction to ODR.' Paper presented at Building Trust in the online environment: Business to customer Disputer Resolution available at: <http://www.oecd.org/dataoecd/63/57/1878940.pdf>

<sup>38</sup> Hornle, J., 2002, 'ODR in Business to Consumer E-commerce Transactions.' Journal of information Law and Technology, No.2. p. 5. Available at <http://www2.warwick.ac.uk/fac/soc/law/elj/> (Last visited on 3<sup>rd</sup> June, 2021).

the parties regarding their settlements. The main use of this technology is to ensure the possibility of a settlement between the parties.

Examples of the platforms and websites include:

1. Internet neutral
2. Square Trade
3. WebMediate
4. WebSettlement
5. Online Mediators

They mainly rely on online technologies like emails, chat rooms, listservs and they incorporate more traditional methods of communication in settlement.

### **c. Online mediation and arbitration with the aid of a neutral third party**

The main difference between this method and the other two is that the neutral third party in this case is human. It is similar to other ADR methods except for in this case, the face to face settlement is via videoconferencing or Skype. Examples of these websites include:

1. OneAccord
2. Juripax.com
3. Modria.com
4. Themediationroom.com
5. WIPO
6. ICANN

### **Online Mediation**

It involves the use of online technologies to facilitate the negotiation of the dispute at hand between the parties.<sup>39</sup> Online mediation involves articulation of issues leading to the dispute, the interests of the disputants to the claim and evaluation of possible outcomes through e-mails, chat rooms, electronic, video and telephone conferencing.<sup>40</sup> A complainant in an online mediation procedure fills a confidential form on the ODR provider's website which then selects a mediator who reaches out to the other party to

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<sup>39</sup> Petrauskas F and Kybartiene E. 2011, Online Dispute Resolution in Consumer Disputes. Available at [http://www.mruni.eu/en/mokslo\\_darbai/jurisprudencija/](http://www.mruni.eu/en/mokslo_darbai/jurisprudencija/) (last visited on 3rd June, 2021). Pg. 927

<sup>40</sup> Manevy I, 2001, Online dispute resolution: What future? P.14. Available at <http://ithoumyre.chez.com/uni/mem/17/odr01pdf>. (Last visited on 5th June, 2021)

participate in the procedure, which if he/she agrees to, responds through email or fills a subsequent form<sup>41</sup>.

### **Online Arbitration**

Online arbitration is the process through which a neutral third-party (an arbitrator) hears the dispute and makes a binding but final determination through the internet.<sup>42</sup> It may also be referred to as cybitration, virtual arbitration or electronic arbitration.<sup>43</sup> It facilitates access of justice to the disputants in both online and offline commercial disputes.

Where the arbitration involves an offline dispute, online arbitration providers may allow parties to access claim forms and submission of documents through email or other online platforms.<sup>44</sup> And as shown, the above methods of ODR promote access to justice in the resolution of domain name and e-commerce disputes as well as consumer complaints.

It is also applicable in solving business disputes related to consumers as much as it is not very popular as a result of a poor means of undertaking the resolution of those disputes. This is very detrimental to the consumers due to being denied access to justice by means of courts and ability to file action suits to be compensated. The online arbitrations conducted on disputes pertaining domain names are legally binding which is seen evidently in the Hong Kong Domain Name Dispute Resolution Policy<sup>45</sup>. Article 4 of the Policy requires state parties to give a submission of a compulsory arbitration proceeding not subject to appeal by any court<sup>46</sup>.

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<sup>41</sup>Shonk <, 'Types of Mediation: Choose The Type Best Suited to Your Conflict' (*PON - Program on Negotiation at Harvard Law School*, 2022) <https://www.pon.harvard.edu/daily/mediation/types-meditation-choose-type-best-suited-conflict/> accessed 8 February 2022

<sup>42</sup> (*Oecd.org*, 2022) <https://www.oecd.org/digital/consumer/1878940.pdf> accessed 8 February 2022

<sup>43</sup> Schultz, T. 2002. Online Arbitration: Binding or Non-Binding? (Interactive). ADR Online Monthly. UMASS. (Last visited on the 5<sup>th</sup> June, 2021)

<sup>44</sup> Ibid

<sup>45</sup> 'Domain Name Dispute Resolution Policies - Hong Kong Internet Registration Corporation Limited' (*Hkirc.hk*, 2022) [https://www.hkirc.hk/en/our\\_support/domain\\_dispute\\_policies\\_and\\_procedures/domain\\_name\\_dispute\\_resolution\\_policies/](https://www.hkirc.hk/en/our_support/domain_dispute_policies_and_procedures/domain_name_dispute_resolution_policies/) accessed 8 February 2022

<sup>46</sup> Yeoh D and others, 'Is Online Dispute Resolution the Future of Alternative Dispute Resolution?' - *Kluwer Arbitration Blog* (*Kluwer Arbitration Blog*, 2022)

### Domain Name disputes

Online arbitration is the best at settling disputes relating to domain names.<sup>47</sup> Such disputes are done through online submission using an e-mail or a web related complaints form. With regards to ICANN's Policy and ICANN's rules, an arbitrator handles the parties' claims upon which he allows them to present their cases after which the arbitrator comes up with a legally binding decision.

The Internet Corporation for Assigned Names and Numbers (ICANN) was the first organization to adopt an e-dispute resolution policy and rules on domain name disputes involve a trademark holder against a domain name owner.<sup>48</sup> In 1999 ICANN adopted the dispute resolution policy and rules which are applicable to all domain name owners for example '.com', '.net' and '.org.', it solves related disputes through its Uniform Domain-Name-Dispute-Resolution-Policy.<sup>49</sup>

WIPO also handles claims with respect to domain names. The case of *Funzi Furniture v UEFA* (2000), where there was an issue of a domain name being registered in bad faith.<sup>50</sup> However in 2000, ICANN accredited eResolution to become the certified body to hear domain name disputes as an effort to deprive World Intellectual Property (WIPO) from its exclusive control in domain name dispute resolution processes. WIPO through its final report of the First WIPO Internet Domain Name Process wanted to retain monopoly over arbitration and mediation in Online Dispute Resolution.<sup>51</sup>

### E-Commerce

ODR is best suited for online disputes involving commercial transactions as opposed to litigation due to its cost-effective nature. It is used by disgruntled or aggrieved customers who transact business online with an online seller. For instance, in 1996 the

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<<http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/>> accessed 8 February 2022

<sup>47</sup> (*Oecd.org*, 2021) <<https://www.oecd.org/digital/consumer/1878940.pdf>> accessed 4 June 2021

<sup>48</sup> See <http://www.icann.org/udrp/> (last visited on 5 June 2021)

<sup>49</sup> (2021) <http://www.icann.org/udrp/udrp-policy-24oct99.html> accessed 4 June 2021

<sup>50</sup> Center, A., 2021. *WIPO Domain Name Decision: D2000-0710*. [online] Wipo.int. Available at <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0710.html> [Accessed 4 June 2021].

<sup>51</sup> World Intellectual Property Organization, "The Management of Internet Names and Addresses: Intellectual Property Issues - Final report of the WIPO Internet Domain Name Process", April 30, 2021, available at: <http://arbitrator.wipo.int/processes/process1/report/pdf/report/> (last visited on June 3, 2021)

CyberTribunal project formally launched the use of both online mediation and online arbitration to resolve disputes between consumers and online sellers.

Further, the scope of ODR entails the use of efficient technology to facilitate the resolution of an e-commerce dispute and the consumer's right of access to justice.<sup>52</sup> Technology is referred to as the 'fourth party' in the management of a dispute by enabling communication between the parties and reaching an amicable solution without or with the aid of human intervention.<sup>53</sup>

It is also particularly effective especially where the disputants are located at a distance.<sup>54</sup> Online Dispute Resolution is an appropriate form of dispute resolution of e-commerce disputes by utilizing technology to ensure speedy and expeditious settlement of the disputes even when there is a huge geographical space between the disputants.<sup>55</sup>

The lack of an elaborate legislation on Online Dispute Resolution has had a negative effect on the growth of E-Commerce in Kenya. This paper recommends the enactment of an appropriate legislation which will not only promote E-commerce but also increase consumer confidence in ODR.

### **Consumer complaints**

Online Dispute resolution can also be used in cases where consumers make complaints. This method mostly revolves around a corporation known as BBBOnline, which is actually one of the branches of Central Better Business Bureau (CBBB) which is mandated to come up with a method of handling consumer related complaints in the USA. BBBOnline upon receiving a consumer complaint, will first of all come up with a simple conciliation by going to the right person in a company. As a result, the problem is normally solved instantly<sup>56</sup>. Cases where conciliation fails, the use of a

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<sup>52</sup> Petrauskas F and Kybartiene E. 2011, Online Dispute Resolution in Consumer Disputes. Available at [http://www.mruni.eu/en/mokslo\\_darbai/jurisprudencija/](http://www.mruni.eu/en/mokslo_darbai/jurisprudencija/) (last visited on 14th June, 2021). p.922

<sup>53</sup> Katsh, E and Rifkin, J. 2001, Online Dispute Resolution: Resolving conflicts in cyberspace. Jossey-Bass: San Fransico at p. 93-117.

<sup>54</sup> Nwandem Osnachi Victor, " Online Dispute Resolution: Scope and Matters arising," available at: <http://ssrn.com/abstract=2592926> accessed 3<sup>rd</sup> June, 2021

<sup>55</sup> Sara Parker, 'Online Dispute Resolution (ODR) and New Immigrants: A Scoping Review' (British Columbia Ministry of Labour, Citizens' Services and Open Government 2010) 7

<sup>56</sup> Page J, and Bonnyman L, 'DR and ODR—Achieving Better Dispute Resolution for Consumers in The EU' (*Infona Portal*, 2022)

simplified mediation procedure saves the day through the use of an e-mail correspondence as well as telephone. If the two processes don't work out, then BBB has more formal options on the table that are offline dispute resolution mechanisms which are many arbitration programs or a face-to-face mediation. It can be effected in Kenya in line with the principle of consumer protection.

### **PART III: REGULATION OF ODR IN KENYA AND OTHER COUNTRIES**

ODR has neither been fully implemented in Kenya nor integrated into the legal framework. This can be attributed to the dependency on other forms of alternative dispute resolution mechanisms hence it is generalized because of the technological aspects involved in its processes. There is no presence of a legal and institutional framework of ODR in Kenya.<sup>57</sup>

There have been efforts by various International instruments and statutes to aid in the implementation of the use of ODR such as:

- a) The UN Commission for International Trade Law (UNCITRAL) is developing procedural rules for settling disputes relating to e-commerce through ODR;
- b) The European Commission is also drafting a publication on the Directive on Consumer ADR and Regulation on Consumer ODR;
- c) National Information & Communications Technology (ICT) Policy seeks to come up with a platform for citizens to solve their disputes online in Kenya.

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In Kenya, the following laws allow the implementation Alternative Dispute Resolution mechanisms;

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<[https://www.infona.pl/resource/bwmeta1.element.springer-doi-10\\_1007-S12027-016-0424-5](https://www.infona.pl/resource/bwmeta1.element.springer-doi-10_1007-S12027-016-0424-5)> accessed 8 February 2022

<sup>57</sup> Kariuki J, 'Embracing Online Dispute Resolution as an Avenue to Justice in Kenya' (*Hdl.handle.net*, 2021) <http://hdl.handle.net/11071/5264> accessed 4 June 2021

<sup>58</sup> Press.strathmore.edu. 2021. [online] Available at: <https://press.strathmore.edu/uploads/journals/strathmore-law-journal/SLJ1/1-SLJ-1-KMuigua-FKariuki-Alternative-Dispute-Resolution.pdf> [Accessed 4 June 2021].



### **i. The Constitution of Kenya, 2010**

The Constitution of Kenya is the supreme law of the land thus has provisions on various aspects of the law. It also ensures justice is served to all the citizens of Kenya thus has incorporated and recognizes alternative dispute resolution mechanisms as one of the platforms to advocate for justice.

The key basis for ADR in Kenya is provided for in Article 159. It provides that in exercising judicial authority, both the courts and tribunals are to be in the guidance of alternative forms of disputes resolution mechanisms including arbitration, mediation, reconciliation and traditional dispute resolution mechanisms. In addition to, the only limitations placed on ADR mechanisms are that they should not be used in a way that contravenes the Bill of rights, is repugnant to justice and morality and should not be inconsistent with the Constitution or any written law. This means ODR can be deduced as a method of resolving disputes because there are no limits to the ADR methods expressly provided for<sup>59</sup>.

The State is also obligated to ensure every person gets access to justice at a reasonable fee without impediment as provided for in Article 48. The courts cannot escape the obligation of ensuring access to justice on grounds of procedural technicalities as they are compelled to minimize formalities in relation to proceedings based on the absence of formal documentation and no fee charged on the same during commencement of proceedings as stated in Article 22 of the Constitution. It is also clear that the Constitution includes a right to access to information on all the citizens as they are provided with knowledge on their rights as well as can seek redress from the court where aggrieved by a decision. This is provided for in Article 35 of the Constitution.

Article 47 of the Constitution outlines that every citizen has a right to fair administrative action. This upholds the access to justice as the administrative action is to be efficient, expeditious, lawful, reasonable and procedurally fair. Implementing fairness when hearing a dispute supplements Article 50 of the Constitution which provides a right to a fair and public hearing.

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<sup>59</sup> Chief Bayo Ojo, 'Achieving Access to Justice Through Alternative Dispute Resolution' Chartered Institute of Arbitrators (Kenya) Journal, 4 June 2021.

## ii. Civil Procedure Act(Cap 21)<sup>60</sup> and Civil Procedure Rules,2010<sup>61</sup>

Sections 1A & 1B of Civil Procedure Act provides that its main objective is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes under this Act through just determination of court proceedings, efficiency in disposing Court's duties and utilization of the available judicial and administrative resources. Courts have a responsibility to the parties to a dispute by ensuring the latter has access to alternative means of resolving their disputes.<sup>62</sup>

Rule 3(2)(h) of Order 11 of the Civil Procedure Act, provides rules before trial that compel the Courts to take into account the various forms of ADR before hearing a matter as well as adoption of any other means of solving disputes where appropriate upon request by the parties or even at the court's discretion.

In **Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 Others (2010)**<sup>63</sup>, where the case was referred back to the arbitrator upon being brought to the High Court. This is because the main objective was to ensure the parties accessed other alternative methods first before resulting to Court settlement.

## iii. Arbitration Act of 1995<sup>64</sup>

It is mainly concerned with practice of arbitration in Kenya since its encapsulates arbitral proceedings together with arbitral awards which are enforceable by the Kenyan courts as provided for in Section 36. The formation of an arbitration agreement is captured in Section 4 and it requires the agreement to be made in writing to mean:

- 1) It should be signed by the parties
- 2) It involves exchange of letters, telex, telegram, email, facsimile and other means of telecommunication with a record of the agreement

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<sup>60</sup> (Kenyalaw.org, 2021)

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CivilProcedureAct.PDF> accessed 4 June 2021

<sup>61</sup>(Kenyalaw.org, 2021) [http://kenyalaw.org/kl/fileadmin/pdfdownloads/151-CIVIL\\_PROCEDURE\\_RULES\\_\\_2010.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/151-CIVIL_PROCEDURE_RULES__2010.pdf) accessed 4 June 2021

<sup>62</sup> Musuli P, 'The Challenges of Implementing ADR as an Alternative Mode of Access to Justice in Kenya', Chartered Institute of Arbitrators (Kenya) Journal 4 June 21

<sup>63</sup> 'Civil Application 327 Of 2009 - Kenya Law' (Kenyalaw.org, 2021)  
<http://kenyalaw.org/caselaw/cases/view/66365> accessed 4 June 2021

<sup>64</sup> 'No. 4 Of 1995' (Kenyalaw.org, 2021)  
<http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No.%204%20of%201995> accessed 4 June 2021

3) Exchange of statements of claim and defence where the existence of the agreement is in allegiance by either party and not in denial

With the above provision of Section 4(3), this allows for online agreements to be incorporated as long as they exist within cyberspace and are valid hence there is a necessity for ODR to be implemented. This vouches for use of ODR as it is an online mechanism for solving disputes.

Section 19A makes it an obligation to parties to a dispute to do all the necessary things to ensure a proper and expeditious conduct of arbitral proceedings. This creates opportunities for the use of ODR in the arbitration process like maybe the use of email in cases there is a minimal chance of achieving arbitral proceedings, the information can be sent to the parties via email which are faster and more effective.

Section 20 grants the parties to a dispute the freedom of choosing the procedure to use in carrying out arbitral proceedings in an arbitral tribunal. This can create opportunities for use of ODR in the proceedings with the parties' discretion. It also gives provisions on situations where the courts can interfere with arbitration matters as stated in Section 10.

#### **iv. Consumer Protection Act of 2012<sup>65</sup>**

A supplier is required to disclose the required information to the consumer as well create discretion for the consumer to accept or decline an agreement or make changes to it when it comes to online disputes pursuant of Section 31(1) and (2). The agreement must be in writing and in case of any dispute it should be solved using any procedure applicable in law as mentioned in Section 32 and Section 88 respectively. This choice of procedure makes it suitable for parties to use ODR if they want to as much as it is not incorporated in the Kenyan law, the same can be done upon formal recognition by the law.

An example of where ADR has been applied is in Amazon Service. The latter provides for the resolution of disputes in the platform is binding through arbitration instead of litigation. This can root for the use of ODR to deal with online transactions involved in the business<sup>66</sup>.

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<sup>65</sup>(Parliament.go.ke, 2021) <http://www.parliament.go.ke/sites/default/files/2017-05/ConsumerProtectionActNo46of2012.pdf> accessed 4 June 2021

<sup>66</sup> Amazon Terms and Conditions available at

### **v. Small Claims Court Act of 2016<sup>67</sup>**

Article 16(1) (d) recognizes any court or local tribunal established by an Act of Parliament therefore, Small Claims Court is not an exception. This Act was established to settle or handle claims only thus reducing the burden on usual courts in terms of settlement of cases. This enhances faster and efficient settlement of disputes as the Act assures the simplicity of the procedure used together with, using the least expensive method of solving disputes as stated in section 3 of the Act. In choosing the least expensive method, ADR methods can be included with ODR not being an exception and such a decision made from the process will be binding.

The parties to a dispute can adopt the use of technology in solving small claims like the court allowing use of videophone or other electronic means in the proceedings as stated in Section 29(1). This shows the Act can allow for the use of ODR in solving small claims in the respective courts.

### **vi. Land Act of 2012<sup>68</sup>**

Section 4(2) (m) provides for application of alternative dispute resolution in land disputes and other related matters. It is however subjected to the guidance and discretion of the National Land Commission which is established under Article 67 of the Constitution. The application of ADR in land matters allows the use of ODR to ensure access to justice and this is visible in how land related documents have been digitalized including even data entry. The use of ODR here would be useful in solving disputes effectively, faster and reducing the transaction costs as well as transport costs.

### **Regulation of ODR in Kenya**

There is need to implement the use of ODR mechanisms due to the nature of online disputes as well matters concerning the regulation of internet activities.

In addition to, according to an analysis carried out pertaining the necessity to regulate the use of ODR mechanisms in Kenya 30% were down for a market-led approach, 15% chose a hybrid approach that rooted for the merger of both market-led approach as well

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[https://www.amazon.com/gp/help/customer/display.html/ref=footer\\_cou?ie=UTF8&nodeId=508088](https://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088) accessed on June 3, 2021.

<sup>67</sup>(Kenyalaw.org, 2021)

<[http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2016/No.\\_2\\_of\\_2016.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/2016/No._2_of_2016.pdf)> accessed 4 June 2021

<sup>68</sup> (Parliament.go.ke, 2021) <http://www.parliament.go.ke/sites/default/files/2017-05/LandAct2012.pdf> accessed 4 June 2021

as regulation-led approach with the UK regulation-led and USA market-led approach; while 55% which was the majority were rooting for a regulation-led approach.<sup>69</sup> The exception to the implementation of ODR in Kenya is that it should not be borrowed from other countries without considering the society in Kenya that needs to be regulated by that law.

### **Implementation of ODR in Other Countries**

As opposed to Kenya and other third world countries, developed countries such as the United Kingdom (UK) and the United States (US) have established means of solving disputes online.<sup>70</sup> In the USA, online platforms like eBay, Amazon inter alia online e-commerce websites have been formed to settle e-commerce disputes. Whereas in the UK, there has been an inclusion of the Judiciary in the ODR through use of judges, professionals and expert witnesses in disputes. This has brought about a sense of comfort to litigants and parties to a dispute that is similar to that of a court process.

### **ODR in England**

England being a former member of the European Union (EU), has been a beneficiary of ODR as a result since the EU was able to come up with an ODR platform to settle Consumer disputes and Amending Regulations<sup>71</sup>.<sup>72</sup> Such regulations come in handy when dealing with disputes arising from contracts regarding online sales and services between the suppliers and consumers as captured in Article 1 of the Regulation on Consumer ADR. Article 5(4)(d) of the same Act states the platform has an electronic case management tool for free for purposes of carrying out the online dispute resolution.

ODR Contact points have been established for purposes of spreading awareness to the public on all the nitty gritty of ODR before they decide to apply it in solving online disputes as well as connecting them to the EU. The contact points also support the resolution of disputes as stated in Article 7(2) of the Regulation on Consumer Act.

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<sup>69</sup>(*Erepository.uonbi.ac.ke*, 2021)  
[http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie\\_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20\(ODR\)%20InKenya.pdf?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/98426/Gachie_An%20Evaluation%20Of%20The%20Need%20For%20Regulation%20Of%20Online%20Dispute%20Resolution%20(ODR)%20InKenya.pdf?sequence=1) accessed 4 June 2021

<sup>70</sup> Kariuki J, 'Embracing Online Dispute Resolution as an Avenue to Justice in Kenya' (*Hdl.handle.net*, 2021) <<http://hdl.handle.net/11071/5264>> accessed 4 June 2021

<sup>71</sup> Regulation on Consumer ODR, Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

<sup>72</sup> Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

There is also the Civil Justice Council which is a public body tasked with the duty to oversee and coordinate a modernized system of civil justice<sup>73</sup>. Individuals are able to resolve disputes using ODR and upon failure of the latter to work, creation of files would be done in an electronic manner as well as documents for small claims<sup>74</sup>.

There is also a proposal for a new internet based court to be called Her Majesty's Online Court (HMOC) that would operate in England and Wales<sup>75</sup>. What would amount to a case of fewer disputes is if the development of law is proactive hence the use of ODR would be effective but if it's the contrary, i.e. the law being reactive then it would be hard to solve disputes as they would be high.

The UK left the EU on 31<sup>st</sup> January 2020. As a result, Part 5 of The Consumer Protection (Amendment etc.) (EU Exit) Regulations 2018<sup>76</sup> revoked the application of ODR in the UK. This has brought about the determent from accessing the ODR platform by consumers in the UK from 1 January 2021 but only limited to the use of ODR. The UK consumers however, can access other ADR entities in the EU countries in the exception of ODR. This exempts the UK online traders from giving out EU related information on ODR entity on their websites. The new agreement was approved by the European Parliament on 27<sup>th</sup> April, 2021 and officially entered into force on 1<sup>st</sup> May 2021<sup>77</sup>.

### **The regulation-led approach**

This is adduced from UK's approach of ODR. It is concerned with consumer protection issues and is encapsulated in the European Union (EU) ODR and ADR laws. There is also need to incorporate consumer protection in ODR just like is the case in dispute resolution systems that are offline. Keeping in mind that ODR is mostly used to solve

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<sup>73</sup> CJC Website, available at < <https://www.judiciary.gov.uk/related-offices-and-bodies/advisory-bodies/cjc/>> accessed on 3 June 2021.

<sup>74</sup> Lord Dyson, Delay Too Often Defeats Justice, April 2015 at The Law Society, Magna Carta Event

<sup>75</sup> CJC Online Dispute Resolution Advisory Group, Online Dispute Resolution for Low Value Civil Claims, 3 June 2021.

<sup>76</sup> 'The Consumer Protection (Amendment Etc.) (EU Exit) Regulations 2018' (*Legislation.gov.uk*, 2022) <https://www.legislation.gov.uk/uksi/2018/1326/contents/made> accessed 8 February 2022

<sup>77</sup> 'Brexit - New EU-UK Partnership: Where Do We Stand?' (*Government.nl*, 2022) <<https://www.government.nl/topics/brexit/brexit-where-do-we-stand>> accessed 8 February 2022

online disputes, it is highly necessary to adopt the regulation of businesses to make them more effective, faster, user friendly and better than how it would have been implemented by courts. Online businesses should be legally binding as well as upheld highly standard wise.

Kenya has a choice of coming up with their own ODR platform and develop a public institution to deal with such matters or the government can choose to hire the best applicants for solving such disputes like is the case in the UK. Laws that are already in existent can be amended to give provisions for the use of ODR like other ADR mechanisms like in the case of B2B and B2C disputes. Arbitrators should cooperate with arbitration bodies in Kenya to have a continuation of how to improve ADR and ODR by giving clear elaborations of ADR mechanisms that can be extensive to ODR upon making some adjustments to it.

Introduction of the concept of freedom of contract in ADR in the sense that it allows parties to a dispute to choose which aspect of ODR they would like to use to solve their disputes. This can be through making changes to the ADR rules in existence hence no need to come up with new regulations for ODR. There can also be provisions to specify where ADR can be applied online like in the case of B2B and B2C disputes. Amendments can also be made in court procedures to allow for conduction of hearings through video conferencing in court procedures.

The utmost advantage of regulation-led approach is that it prioritizes in ensuring consumer protection in the use of ODR. It ensures that the law safeguards consumers from unethical sellers by making sure any information shared by consumers through an ODR system is secure by use of a vast data protection framework. Section 88 of the Consumer Protection Act allows the consumer to gain access to justice by going to High Court if served with an unfair decision in arbitration though it puts limitations on arbitration. The only exception here is where ODR infringes compulsory consumer protection related laws like where a consumer would choose online arbitration. Where such outcomes from the latter violates compulsory consumer related laws, it could be challenged in court. Article 46 of the 2010 Constitution<sup>78</sup> protects consumer rights hence is in collaboration with section 88 of the Consumer Protection Act with an aim

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<sup>78</sup> About Us Mission 2 and others, '46. Consumer Rights - Kenya Law Reform Commission (KLRC)' (*Klrc.go.ke*, 2021) <https://www.klrc.go.ke/index.php/constitution-of-kenya/112-chapter-four-the-bill-of-rights/part-2-rights-and-fundamental-freedoms/212-46-consumer-rights> accessed 4 June 2021

to support the development of dispute resolution mechanisms hence promotion of ODR in Kenya.

#### **Part IV: Implementing ODR in Kenya**

A decision must be made pertaining which regulation should be put in place. This can be through:

- a) Use of independent legislations
- b) Issuing guidelines to encourage the upholding of specific legal standards
- c) Reference to ODR through the existing ADR laws

We can start by coming up with a framework and ensure swift operation of activities on the same then you implement in the country. You come up with a list of places it can be operated on and sell the idea to companies who develop new markets for its implementation.

In terms of reference to ODR via existing ADR laws, let's take a look at UK that has the:

1. Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 that acknowledges the use of the EU ODR platform. The platform is established through Article 5 of the above Act. This was done through an amendment of the ADR statute that was in place.
2. Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015; which gives provisions for approving ADR entities that have the competence to resolve ODR-related disputes
3. EU ODR Regulation that came into effect in January 2016 as well all EU laws that apply in the UK which will still be effective until establishment of separate Acts enacted to adopt the EU law.

Kenya can look into the lessons accrued from UK's experience with ODR as long as the methods it chooses to implement are in conformity with the local realities. It is also wise to look at the existing challenges in Kenya at present which are:<sup>79</sup>

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<sup>79</sup> Interview with Stephen Kiptiness, Lead Partner at Kiptiness & Odhiambo Associates, Lecturer at the University of Nairobi School of Law; Interview with John Walubengo, Lecturer at the Multimedia University of Kenya, Faculty of Computing and IT, Blogger at Daily Nation ([www.nation.co.ke/jwalu](http://www.nation.co.ke/jwalu)).



**1. Presence of weak ineffective legal provisions for e-commerce in Kenya**

This is because the law regarding e-commerce is drafted and hence a need to have an Act on electronic transactions. Look at how it has been such a long duration since 2009 when regulations had been put in place by the Communications Authority to license entities that would supply digital signatures on documents yet three years down the line it was not implemented. There are also extremely low levels of appreciation in terms of operation of the e-commerce based on B2C transactions. This ends up detaching the importance of putting laws in place because they are of no benefits in practice.

**2. Encouraging mutual adoption of ODR by parties to a dispute**

This happens where one party fails to agree with the other in terms of which method to use in solving their dispute. It becomes even harder trying to compel either party to agree with the other on the method to use.

**3. The issue of electricity being unreliable** due to power cuts or probably issues with electronic gadgets

**4. The current public infrastructure available is inadequate**

**5. Low levels of internet connection** in the country which is lower in comparison to other countries like the UK and USA. Take an example of the situation back in 2016 when only 16% of adult citizens in Kenya had a smartphone while only 18% had access to the internet at least once in a month<sup>80</sup>.

**Possible Outcomes of Implementing ODR in Kenya**

a) Effective resolution of B2C e-commerce disputes and in general through which is accessible and appealing to technoid citizens<sup>81</sup>.

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<sup>80</sup> Central Bank of Kenya, Kenya National Bureau of Statistics and Financial Sector Deepening (FSD) Kenya 19.

<sup>81</sup> Interview with Mark Lavi, Senior In-house Counsel, Safaricom; Interview with Frances SingletonClift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands

- b) There will be a reduction in the backlog of cases in court due to the resolution of both online and offline B2C disputes. This will ensure a greater percentage of people gets access to justice and saves the time to attend court sessions.
- c) The processing of information will be easier and more effective. This is because it reduces the time consuming method of collecting data and information related to parties to a dispute and secures the information pertaining the dispute for future use. It also helps parties reach an amicable decision faster instead of seeking a decision from the legal authorities like judges in a court system.
- d) There will be faster B2C dispute resolution processes like those already in existence by the Communications Authority of Kenya<sup>82</sup>.
- e) Preservation of the reputation of businesses as confidentiality and the privacy of the dispute resolution process is assured which is unlikely in court sessions where they are accessible to the public<sup>83</sup>.
- f) Creation of room for amicable solutions to a dispute because both parties mutually consent to it unlike in court sessions where there's some sense of division in terms of solving the dispute. One party ends up being on the losing end at the end of the day.<sup>84</sup>

## **Conclusion**

The demand for ODR is on the rise while e-commerce is taking great shape in most Kenyan households. Penetration of Information and Technology has also aided online transactions. Kenyans have as a result embraced technology not only in e-commerce but also in the pursuit of access to justice. Therefore, to give effect to the right of access to justice enshrined in the constitution, the Kenyan Judiciary should provide guidelines, while the executive aid in the formulation of policies, and the legislature in enacting relevant laws on ODR.

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<sup>82</sup> Interview with Mark Lavi, Senior In-house Counsel, Safaricom, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (10 June 2016)

<sup>83</sup> Ibid

<sup>84</sup> Interview with Frances Singleton-Clift, Justice Technology Advisor, The Hague Institute for Innovation of Law(HiiL), The Hague, The Netherlands, 'Legal Framework for Online Dispute Resolution in Kenya: LLM Thesis' (15 July 2016)

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## ADR in Land Conflicts: Back to Basics

By: *Stephen Waweru* \*

### 1.0 Introduction

Land conflict in Kenya is historical having been there even before the coming of the European. However, these conflicts intensified with the coming of the Europeans. Veit opines, “The history of land conflict dates back to its colonial period when first the Germans and then the British promulgated policies and practices that alienated people from their customary land and pitted one ethnic group against another, these policies were extended after independence<sup>1</sup>. Ethnic divisions, especially over traditional land, were exploited for short-term political ends.<sup>2</sup> Each ethnic groups had its own land dispute resolutions mechanisms which largely relied on customary law<sup>3</sup>. To ensure peaceful coexistence between individual and their community groups the system of land tenure was carefully laid down. “According to Gikuyu customary law of land tenure, every family unit had a land right of one form or another. While the whole tribe defended collectively the boundary of their territory, every inch of land within it had its owner”<sup>4</sup>.

However, with colonialism this collective defense to land faced imminent challenges. The Constitution of Kenya 2010 has laid out emphasis on revival of Alternative Dispute Resolution (ADR) Mechanisms. However, its application is yet to gain ground in modern land litigations. Kariuki Muigua, asserts, until recently there was no singly Kenyan documentary on arbitration.<sup>5</sup> With colonialism, the land tenure system

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<sup>1</sup> Peter Viet, History of Land Conflict in Kenya.

[www.focusonland.com/download/52076c59cca75/](http://www.focusonland.com/download/52076c59cca75/) Accessed 4 February 2022.

<sup>2</sup> Peter Viet, Brief: History of Land Conflict in Kenya.

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<sup>3</sup><https://www.accord.org.za/ajcr-issues/traditional-natural-resource-conflict-resolution-vis-vis-formal-legal-systems-east-africa/> Accessed 8 February 2022

<sup>4</sup> Jomo Kenyatta, *Facing Mt. Kenya with an Introduction by B. Malinowski*, Published in United State by Random House, Inc Newyork. October 1965, p22.

<sup>5</sup> Kariuki Muigua, *Settling disputes through arbitration in Kenya*, 2017 - [cadr.or.ke](http://cadr.or.ke)

changed and what used to be traditional land owned and management by communities came to be known as crown land.<sup>6</sup> By extension, crown land meant destruction of traditional legal system that embraced dialogue and arbitration.

Kenya won the battle for their independence from their colonial master on 1<sup>st</sup> June 1963 and became a Republic on 12<sup>th</sup> December 1964 with Mzee Jomo Kenyatta as the first President. The battle for independence was reclamation of land and self-governance; however, this was never adequately resolved. After independence the land question was still to haunt the newly formed government, a challenge that has persisted to date. Wekesa argues that with the new self-rule, the communities which suffered land alienation during colonialism and whose interest were not addressed after independence found themselves migrating into other areas<sup>7</sup>. Maina asserts, the new postcolonial phenomena was created where communities especially those from Central Kenya, the Kikuyus, displaced by the white settlers in their farms migrated to Coast and Rift Valley in search of land and better settlement<sup>8</sup>. The politician in these new hosts (Coast and Rift Valley) have since used the land question to create acrimonies between the areas natives and immigrant communities<sup>9</sup>. The land question has often been used by the political class on the local communities against the new settlers especially during electioneering period<sup>10</sup>. This has not only led to incitement, but has been a fertile ground for tribal clashes mainly centred on land and other historical injustices. This led to the infamous 1992, 1997, and 2007 communities / land clashes. Such land clashes have led to Internally Displaced Persons (IDP) in Kenya.

Wakoko asserts that land law in Kenya is one of the earliest divisions of law to exist.<sup>11</sup> However after independence the Constitution did not address the real issues of land tenure and disputes neither did the subsequent governments. Therefore, in the agitation of a new constitutional dispensation land became one of the central agenda which has since been addressed in Chapter five of the Constitution of Kenya 2010. This provides

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<sup>6</sup>[https://sustainabledevelopment.un.org/content/documents/dsd/dsd\\_aofw\\_ni/ni\\_pdfs/National\\_Reports/zambia/Land.pdf](https://sustainabledevelopment.un.org/content/documents/dsd/dsd_aofw_ni/ni_pdfs/National_Reports/zambia/Land.pdf) Accessed 8 February 2022

<sup>7</sup> <https://dumas.ccsd.cnrs.fr/dumas-01302492/document> Accessed February 8 2022

<sup>8</sup> Ngugi Josphat Maina, Colonial Legacy and Land Conflict in Kenya: A Case Study of the Rift Valley Province, University of Nairobi Institute of Diplomacy and International Studies (IDIS), November 2011.

<sup>9</sup>[https://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full\\_Report.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf) Accessed February 8 2022.

<sup>10</sup> Ibid.

<sup>11</sup> Valentine D.B. Wakoko, The Evolution of land law in Kenya <[www.academia.edu/8972722](http://www.academia.edu/8972722)> Accessed 4 February 2022.

a framework within which effectiveness of ADR mechanisms in land matters can be evaluated.

Mbondenyi opines, before declaration of the British East Africa Protectorate in 1895, Kenya had no formal legal system of government as recognized today, however, the local communities had their traditional form of government that relied on customary law to litigate disputes including those related to land.<sup>12</sup>

**Article 159 (2) (c)** states, “alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted .....”<sup>13</sup> In Subsidiary 31 of the Constitution of Kenya, “The court may refer a matter for hearing and determination by alternative dispute resolution mechanism.”<sup>14</sup> It is presumed that ADR will lessen the cost and time associated with the court legal system in settling disputes including those related to land.

This article evaluates how effective is ADR in land dispute in Kenya as opposed to lengthy court litigation process.

## 2.0 Historical events that shapes land law in Kenya

### 2.1 An era of tribal nations

As Kenyatta argues, before the coming of the Europeans in Kenya, each community had its own system of governance<sup>15</sup>: The customary law was used to arbitrate many disputes including those related to land. Owing to the importance attached to the land the system of land tenure was carefully and ceremonially laid down, so as to ensure peaceful coexistence. “According to Gikuyu customary law of land tenure every family unit had a land right of one form or another. While the whole tribe defended collectively the boundary of their territory, every inch of land within it has its owner”.<sup>16</sup>

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<sup>12</sup> Morris Kiwinda Mbondenyi, Steve O. Odero, Patrick L. O. Lumumba, *The constitution of Kenya: contemporary readings*. Imprint: Nairobi, Kenya: LawAfrica, 2011. ppXVII-VXIII.

<sup>13</sup> Article 159 (2)(c) *Kenya Law Where Legal Information is Public Knowledge, The Constitution for Kenya, 2010*, Published by the national Council for Law Reporting with the Authority of the Attorney General [www.kenyalaw.org](http://www.kenyalaw.org)

<sup>14</sup> Ibid.

<sup>15</sup> Jomo Kenyatta, *Facing Mt. Kenya with an Introduction by B. Malinowski*, Published in United State by Random House, Inc Newyork. October 1965.

<sup>16</sup> Ibid. p22.

### 2.1.1 Kenya invasion by the Portuguese and Arab traders/invaders

In 1498, the Portuguese explorer arrived in the East Africa coast with their main focus being on rich trade around the Indian Ocean. By 1593, Mombasa becomes the local centre of Portuguese power. Fort Jesus is constructed in Mombasa harbour to defend the city from the seaside and also against a growing resistance among the Swahili people<sup>17</sup>. In 1698, Fort Jesus and Mombasa are finally lost to the Arabs after 33 months of siege. After strong resistance from the Arab invasion, Portuguese finally left leaving the Arabs to rule across the East African coast. The Arabs alienated the Mijikendas and other coastal communities living along the coastal region from their land.

### 2.1.2 Precolonial regime

In 1847, the first European missionaries started traveling west and exploring more of Kenya with the first missionaries going all the way to Taita Hill, Mount Kilimanjaro and later toward Mount Kenya<sup>18</sup>. These explorations by the missionaries created even more appetite for Kenyans' land. In the year 1877, The Sultan offers the British East Africa Company a concession of administration in East Africa<sup>19</sup>. This concession gave the British a wider latitude of alienating the in-land communities especially the Kikuyus in Central Kenya and the Maasai from their land. The Arabs continued to perpetuate this land alienation of the Mijikendas in coast. The system of land grabbing shows the destruction of the African's traditional communities and their communal land system. The traditional land dispute resolution mechanisms were increasingly watered down.

### 2.1.3 British Crown Colony

In 1895 Kenya became a British East Africa Protectorate and this was followed by the British declaring all "waste and unoccupied land" within the region to be "Crown Land" in 1897<sup>20</sup>. In 1899, the colonial power declared that all land, irrespective of whether it was occupied or unoccupied, had accrued to the imperial power simply by reason of assumption of jurisdiction, making all land available for alienation to white settlers. The British government considered Africans to be "tenants

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<sup>17</sup> Ibid.

<sup>18</sup> Peter Viet, Brief: History of Land Conflict in Kenya.

< <http://www.focusonland.com/fola/en/countries/brief-history-of-land-conflicts-in-kenya/>>  
Accessed 4 February 2022.

<sup>19</sup> <https://www.britannica.com/place/Kenya/The-British-East-Africa-Company> Accessed February 8 2022

<sup>20</sup> <https://gatesopenresearch.org/documents/pdf> Accessed February 8 2022

at the will of the Crown.”<sup>21</sup> This affected the whole communal land tenure system across the region. The most affected being the communities in Coast, Central and Rift Valley.

#### **2.1.4 Construction of Kenya Uganda Railway and its impact on Kenya land system**

The construction of Kenya-Uganda railway from 1898-1901 opened the interior and more so the white highlands where Africans were forced into native reserves in their own land. The settlers established coffee, tea, pyrethrum and sisal plantations; they also used intimidation to acquire labour from the local communities to work in these plantations. The resultant land alienation and introduction of new land regime weakened not only the traditional individual and communal land ownership system but the inbuilt mechanisms for resolving related land disputes.

#### **2.1.5 Tenuous Land Rights**

In 1904, the British introduced a policy to settle Africans in ethnically defined administrative units. They also introduced Native Lands Trust Boards to administer land in the reserves<sup>22</sup>. However, this land still remained a reserve of Crown Land and available for alienation at any time. Customary land was left unregistered and vulnerable to grabbing by the settlers. This left many communities displaced in their own land leading to migration to other part of the country to look for available land. The most affected in this migration were communities in Central Kenya.

From 1921 immediately after the World War One, the local communities became conscious of their right and started agitating for both land and political rights<sup>23</sup>. This led to formation of different political movement in different regions to advance their rights. The first being the Young Kikuyu Association in 1921 established by Harry Thuku specifically to recover Kikuyu land<sup>24</sup>.

The agitation led to Devonshire Declaration of 1923, where the Colonial office declared that African interest must be paramount<sup>25</sup>. In 1925, the colonial government suppressed the Young Kikuyu Association, although its members quickly regrouped

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<sup>21</sup> Okoth-Ogendo, H.W.O., *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*. (African Centre for Technology Studies. Nairobi: ACTS Press 1991).

<sup>22</sup> <https://www.jstor.org/stable> Accessed February 8 2022

<sup>23</sup> [https://en.wikipedia.org/wiki/History\\_of\\_Kenya](https://en.wikipedia.org/wiki/History_of_Kenya) Accessed February 8 2022

<sup>24</sup> Ibid

<sup>25</sup> Ibid

as the Kikuyu Central Association (KCA). The formal education they had gone through helped them articulate the land issues. The British and the missionaries were not comfortable with the trend. In 1928, Jomo Kenyatta became the general secretary of the Kikuyu Central Association and the editor of its newspaper, Muigwithania (The Unifier)<sup>26</sup>. This helped to further articulate land rights for the Kikuyus.

During the 1930s, Kenyatta peacefully campaigned on a range of issues, including land rights, access to education, and respect for traditional customs and the need for African representation in the LEGCO<sup>27</sup>. It was hoped that the arbitration process that African had been used to in solving dispute would be applicable.

By 1934, about 30,000 white settlers had already settled in the country controlling about a third of the country's arable land. Many ethnic communities experienced land losses leading to massive displacements<sup>28</sup>. In 1938 a clear separation in colonial law demarcated "Crown Land" on which private title would be granted and native reserves were to be held in trust for African use.

In 1939 the labour movement begun to agitate for labour rights in the white owned farms. Beginning 1941, the British established settlement schemes for most of the affected communities. In 1944 Harry Thuku founded the Kenya African Study Union, the precursor of the Kenya African Union which continued to agitate for the Africa land rights<sup>29</sup>. The agitation led to the nomination of Eliud Mathu as the first African member of the Legislative Council (LEGCO) in the same year. In 1946, the Kenya African Study Union founded by Harry Thuku became the Kenya African Union (KAU) and in 1947, Jomo Kenyatta became its President<sup>30</sup>. Under Kenyatta, KAU continued with land agitation which show six Kenyan of African origin elected in the LEGCO in 1952. Mau Mau uprising started in the same year (1952) to reclaim their communal land. The British had to make a number of concessions in response to Mau Mau revolt. Such concession included allowing Africa to grow cash crop including coffee though under licence.

During the Lancaster House conferences, the British pressed Kenyans to accept a "willing buyer, willing seller" approach to distribute land from settler farms to

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<sup>26</sup> Ibid

<sup>27</sup> <[http://crawfurd.dk/africa/kenya\\_timeline.htm](http://crawfurd.dk/africa/kenya_timeline.htm)> Accessed 4 February 2022.

<sup>28</sup> <https://www.fidh.org> › IMG › pdf › Kenya\_engNB Accessed February 8, 2022

<sup>29</sup> <https://biography.yourdictionary.com> › harry-thuku Accessed February 8 2022.

<sup>30</sup> Opicit.

Africans, and provided a small load to assist in this effort. Many nationalists, former Mau Mau militants and communities opposed this, arguing that there was no justification for Kenyans to buy land that had been forcefully taken from them.

In December 1963, Kenya achieved independence with KANU winning the majority of the seats in the Parliament and Jomo Kenyatta as Prime Minister. A year later, under a new constitution, Kenya became a republic with Kenyatta elected as president and a one-party state established. Although considerable policy development occurred after independence, in practice, not much changed. The fundamentals of the colonial land tenure system remained in place, including the unequal relationship between statutory and customary tenure, the retention of de facto ethno-territorial administrative units, and the unaccountable powers of the executive branch over land.

Once in power, however, Kenyatta swerved from objectives of nationalism, including widespread restitution of land to Kenyans and communities<sup>31</sup>. Kenyatta maintained the system of freehold land titles and did not question how the land had been acquired; individual private ownership rights continued to derive from the sovereign—now the President—just as in colonial times. Government programs to systematically adjudicate rights and register land titles persisted and continued to undermine customary tenure systems<sup>32</sup>

By 1977, about 95% of the former White Highlands had been transferred to black mainly the African Kenyan elites. Kenyatta dies in 1978 and President Moi took over. The issue of land was not settled and it was to be used as an instrument of scoring political differences especially against those who didn't support the incumbent regime. Land conflict is historical and while provision for ADR has been introduced to litigate conflict, the paper evaluates the efficacy of ADR in addressing land conflict. Though the current constitutional dispensation attempts to address land matters, the question is whether Kenya needs more legislations to address land conflict or revival of traditional dispute resolution mechanism to effectively address these conflicts.

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<sup>31</sup> [https://gatesopenresearch.org > documents > pdf](https://gatesopenresearch.org/documents/pdf) Accessed February 8, 2022

<sup>32</sup> Peter Viet, Brief: History of Land Conflict in Kenya.

<<http://www.focusonland.com/foia/en/countries/brief-history-of-land-conflicts-in-kenya/>>  
Accessed 4 February 2022

### **3.0 The place of ADR in land disputes**

Alternative Dispute Resolution mechanisms have gained popularity in the land conflict resolution in the developing world<sup>33</sup>. Countries that have embraced ADR mechanisms include India, Bangladesh, Latin America countries and African states in the recent years<sup>34</sup>.

Despite the fact that the Article 159 (2)(c) of Kenya's Constitution has provided for Alternative Dispute Resolution (ADR) Mechanisms that would ideally arbitrate on matters of land, the reality on the ground is that the efficacy of the mechanisms has not been ascertained with many parties still preferring the ordinary court process. Arguably, ADR Mechanisms as tools for land litigation are highly cost effective, time saving and largely creates among the concerned parties a win-win as opposed to court litigation where there are winners and losers.

Under the normal court legal system, land in dispute is ordinarily put under caveat which also restrict its accessibility and usage. However, using ADR mechanisms the land will be made into use and therefore retain its productivity.

Kariuki Muigua postulates that abstract development is not feasible in a conflict situation. All conflicts and disputes must be managed effectively and expeditiously for development to take place.<sup>35</sup> His argument conforms to the reasoning that formal mechanisms for conflict management have not always been effective in managing conflicts. Kariuki further discusses the concept of empowerment in the context of the Constitution of Kenya 2010 with a view to demonstrating how Alternative Dispute Resolution (ADR) can be employed as a tool for the empowerment of the Kenyan People to boost their participation in the implementation of the new Kenya Constitution<sup>36</sup>. What Kariuki does, is to lay emphasis on how critical ADR is and this can be extended in land dispute resolution. Article 159 of the constitution promotes the use of traditional dispute resolution mechanism.

Shako proposes a programme that will support the application of alternative dispute resolution (ADR). Shako appreciates the fact that mediation has quite often been done

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<sup>33</sup> <http://land.igad.int/kenya/conflict-3/file> Accessed February 8, 2022

<sup>34</sup> <https://www.usaid.gov/sites/default/files/documents/1868/200sbe.pdf> Accessed February 8, 2022

<sup>35</sup> K Muigua and F Kariuki, ADR, Access to Justice and Development in Kenya, by Strathmore Annual Law Conference 2014 published by strathmore.edu,

<sup>36</sup> Kariuki Muigua, Empowering the Kenyan People through Alternative Dispute Resolution Mechanisms presented, Africa Region Centenary Conference 2015.



in an ad hoc manner and quite often need based. However, formalisation of this through well laid programme might give a framework where ADR can be applied in land disputes among other areas.

Kaarhus, Benjaminsen, and Kameri-Mbote, look at Land as a vital resource for rural livelihoods. Rural livelihoods are a key concern today as post-colonial countries in southern and eastern Africa actively propose changes in their natural resource policies and practices, including the regulation of land rights<sup>37</sup>. Given the centrality of land as key factor of production for women, it gives justification as to why litigation matter related to land should be as less exploitive as possible. Therefore, application of ADR in land dispute will play a very instrumental role in safeguarding women interest in the development front.

The history of land dispute dates back to the early 1800s when the Europeans explored East Africa for trade and later colonization. Viet expound this by arguing that the establishment of Crown land affected the Kenya land tenure system and ever since this has contributed to subsequent land disputes.<sup>38</sup> Apparently, the legal system inherited by Kenya government after independence perpetuated the land disparities introduced during colonialism. We have therefore witnessed cycles of conflicts centred on land. Quite often the issues surrounding land have resulted into tribal clashes and other communal conflicts.

Wakhungu, Nyukundi and Huggins asserts, land issues are a fundamental aspect of structural conflicts in Kenya but they have also often regenerated into physical violence.<sup>39</sup> The politics of general elections have therefore been so enter-twined with land dispute for decades in Kenya to a level where they have almost become inseparable. Notably, majority of those who suffered land clashes in the name of tribal clashes in 1992, 1997 and 2007/2008 are predominantly those who originated from areas where land was alienated from them by the colonial master and they had moved to Rift Valley and Coast region in search for land and livelihood. Equally, displacement of the local communities predominantly in Coast, Rift Valley, Central Kenya and parts of Western Kenya during and after colonialism has created a centre stage for conflict between

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<sup>37</sup> R Kaarhus, TA Benjaminsen, and Patricia Kameri-Mbote – 2005 look at Land as a vital resource for rural livelihoods.

<sup>38</sup> Peter Viet <http://www.focusonland.com/fola/en/countries/brief-history-of-land-conflicts-in-kenya/> Accessed 4 February 2022.

<sup>39</sup> In a report on Land Tenure and Violent Conflict in Kenya under the *The Vision of African Centre for Technology Studies (ACTS)* Nairobi 6 October 2008 at Hilton Hotel, Nairobi and compiled by Judi Wakhungu, Elvin Nyukuriand and Chris Huggins

various communities now residing. Arguably the politicians have always exploited this as a fertile ground to shift allegiance and support.

Okoth-Ogendo, in the *Tenants of the Crown*: argues that, the introduction of the Crown land policy and its legitimization has been a fertile ground for land conflicts.<sup>40</sup> He opines that, it is common for Africans to have an inherent internal mechanisms for the management of and determination of access to resources. Okoth-Ogendo postulates a pyramid, a complex hierarchy through which African communities are organised and structured with the base being the community, the middle, the clan and the tip being the family. The last two draw their synergy and power from their foundation which is the community. These are decision-making levels designed to respond to issues regarding allocation, use and management of resources comprised within the commons on the basis of scale, need, function and process.

Odendo Lumumba argues that, Zimbabwe is not the only country in Africa where the issue of land is of crucial importance. Across Africa, conflicts over land have been at the heart of centuries-old political struggles. In Kenya, resistance against colonial rule was crystallized through struggles over land<sup>41</sup>. Some of the communities including Kikiyus, Maasais, Pokots, Nandis, Luhyas and Giriama have in the past reacted violently to the colonial dispossession of their land. The struggle for land alienated from them continues to this day. He proposed that new land dispute mechanism needs to be put in place to save communities from conflicts related to land. However, this should be done without resorting to a multiplicity of land law system that are in themselves an obstacle to development.

Takashi Yamano argues that, land is increasingly becoming a source of conflicts in Africa and goes on to assert that, widows are about 13 percent more likely to experience pending land conflicts when their parcels are registered under the names of their deceased husbands than when titles are registered under their names<sup>42</sup>. This is a presupposition that land litigation will continue to be a common phenomenon and as such we need to put in place mechanism that is ideally simple to arbitrate land disputes, and that why ADR would bridge the gap.

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<sup>40</sup> H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, (African Centre for Technology Studies. Nairobi: ACTS Press, 1991)

<sup>41</sup> Odendo Lumumba, Land-related conflicts in Kenya: policy and legal implications. Mar 07, 2005. <https://www.pambazuka.org>. Accessed 4 February 2022.

<sup>42</sup>Takashi Yamano, *Land conflicts in Kenya: causes, impacts, (PDF Download Available)*.<https://www.researchgate.net/publication/228975980> [accessed Apr 26 2018]

Goetz, Shortle and Bergstrom opines that, “Fundamentally, land use becomes an important policy concern because it involves interdependencies among individuals and communities that have significant impacts on economic and social wellbeing. More often than not, one person’s land use decision affects the wellbeing of other individuals”<sup>43</sup>. This position suggests that, land conflict is not confined to Africa but US and other countries all over the world do experience some form of land conflict. Hence the need to think through the disputes resolution mechanism to ensure that relationship essential for co-existence are not destroyed.

Turan argues, people in conflict have a variety of means of resolving their disputes that include the informal traditional mechanism such as avoidance, informal discussion and problem solving, negotiation and mediation; formal resolution processes; legal proceedings and extra-legal actions including violence and coercion.<sup>44</sup> In all these Alternative Dispute Resolution (ADR) has received wider acceptance because of its voluntary nature and a process helps build consensus, joint problem solving and negotiation thus creating a win-win situation among the warring parties.

Alain De Janvry opines that, it is important to note that land is an often misallocated factor which entails incomplete user or property rights which may bring about disincentives.<sup>45</sup> However, macro-economic reforms to address such issues in terms of structural adjustment policies resulted in a weak supply response particularly in agriculture. However, land reform cannot take place without involvement of ADR mechanisms especially in Africa.

Francisca, research among the Alavanyo-Nkonya conflict in the Volta Region of Ghana confirmed that ADR was preferred by the people of the two communities compared to litigation. The community confirmed that normal litigation is full of delays. The research revealed that ADR operated under a three pronged structure; the mediation committee, the consultative committee and the community pacesetters culminate in the desired result of peace for the two communities. The communities are also better involved in peace process when ADR is used as opposed to litigation.

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<sup>43</sup> Stephan J.Goetz, James S.Shortle and John C.Bergstrom, *Land Use Problems and Conflicts Causes, consequences and solutions* (2005), Routledge 2 Park Square, USA

<sup>44</sup> S Turan - 1997 in an article, Alternative Dispute Resolution (ADR): A Different Framework for Conflict Resolution in Educational Settings, argues that Moore (1986).

<sup>45</sup> Alain De Janvry and others, *Access to Land and Land Policy Reforms*, (Published to Oxford Scholarship Online: October 2011)

Therefore, there is need to include ADR on land dispute resolution throughout the county.

To Mayiga, among the Buganda, land is the way of life as the kingdom's cultural aspirations are based on land hence titles like "Ssaabataka" for the Kabaka. Clan heads and elders in Buganda are known as "Abataka"<sup>46</sup>. His suggestion shows the importance of land not only among the Bugandas but also in the entire country since land is the major source of conflict throughout the country. However, through normal land litigation, there are various challenges including the police delays in land investigation and quite often the process being shoddy. With the population ever on the increase and with non-expansive nature of land, land dispute and conflict will continue being a central matter of litigation in Uganda. Therefore, ADR mechanism would be ideal in this case.

Quoting the former Chief Justice of Kenya, Willy Mutunga: "let us hope that the community of scholars responds to the challenge equally ... as people as "the last resort of the oppressed and bewildered. I hope that the courts of Kenya will truly be viewed as the courts for all Kenyans, and the salvation of the Kenyan oppressed"<sup>47</sup>. A position that shows his believe in the Supremacy of the Kenya Constitution which equally entrench ADR as a resolution mechanism.

Andrei argues, the only way to resolve existing conflicts, mitigate consequences and reduce risks of their reoccurrence is to have efficient instrument for justice delivering<sup>48</sup>. She views courts system globally as corrupts and the litigation process to be not only tedious bur expensive venture which leaves conflict parties with high possibilities of violence. As has been in the African societies and very practical in rural areas, the answer to land and other major conflicts lies in Customary Conflict Resolution (CCR) which advocates for ADR.

Jomo Kenyatta referring to Mugo Kibiro, the Kikuyu prophet who prophesied about the coming of the British argues, "But the great seer calmed them and told the warriors

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<sup>46</sup> Charles Peter Mayiga in his article, Reasons land conflicts are on the rise in Uganda Daily Monitor 27th June 2017

<sup>47</sup> Chief Justice, Kenya: a new constitution: Willy Mutunga on the culmination of almost five decades of struggles W Mutunga - Socialist Lawyer, 2013

<sup>48</sup> Lahunou, Andrei in the degree of Master advance level entitled, Role of state weakness in customary conflict resolution: Case of Kenya and Tanzania, Uppsala University, Disciplinary Domain of Humanities and Social Sciences, Faculty of Social Sciences, Department of Peace and Conflict Research, 2016

that the best thing would be to establish friendly relations with the coming stranger (referring to the British), because the spears and arrows would not be able to penetrate the iron snake (referring to the railway line), and therefore the warriors' attempt to fight the stranger and their snake would be futile"<sup>49</sup>. The warning my Mugo Kibiro presuppose the spirit of dialogue and negotiation. While this strategy as prophesied helped the British settle easily in Central Kenya, resistance then would have been lethal to the community because the British had superior weapons to those of the traditional Kikuyus.

As Lumumba, Mbondenji Odero opines, the underlying theme in the country's constitution history has the question of how to establish a constitutional regime that can guarantee everyone participation in the nation's economic, social and political activities<sup>50</sup>. We see in ADR a room and an opening where every part can express their views.

The Subsidiary 31 of Kenya Constitution 2010 provides for use of ADR i.e., the court may refer a matter for hearing and determination by alternative dispute resolution mechanism<sup>51</sup>. The reality on the ground is that many poor people especially the Kenya rural folks, cannot afford bureaucracy associated with the court litigation process. In this case justice is increasingly becoming a tool of the rich against the poor since the later cannot afford the cost involved in the court process. Thus, as in the spirit of The Evolution of Land Law in Kenya<sup>52</sup>, there is need to rethink ADR as being critical a tool for resolving conflicts and dispute as provided for in Article 159 of Kenya Constitution 2010 but more ideally have our judicial system make it a tenable reality.

From the literature reviewed we have seen an appreciation of alternative dispute resolution as a mechanism for resolving conflicts of various types. We have also seen how effective the legal system was in our traditional society especially before colonialism. We have also seen the dilution of customary legal system with the introduction of other legal systems. Notably, the customary legal system relied heavily

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<sup>49</sup> Jomo Kenyatta, *Facing Mt. Kenya by with an Introduction by B. Malinowski*, Published in United State by Random House, Inc Newyork. October 1965, p43

<sup>50</sup> PLO Lumumba, M.K Mbondenji and SO Odero in their book *The Constitution of Kenya Contemporary reading*, p1

<sup>51</sup> Kenya Constitution Where Legal Information is Public Knowledge *The Constitution of Kenya, 2010*, www.kenyalaw.org Published by the National Council for Law Reporting with the Authority of Attorney-General.

<sup>52</sup> Valentine D.B, Wakoko, in her article, *The Evolution of Land Law in Kenya*,

on ADR in dispute resolution. What we haven't seen is how effective ADR mechanism has been in solving land dispute.

Hence the conclusion, land dispute and conflict has lots of historical bearing in Kenya and that before colonialism ADR was a good instrument of resolving conflict. We have also come to the realisation that the introduction of foreign constitution didn't re-emphasize the traditional legal system that had ADR at the core. The re-emphasis of ADR in the current Constitution has not been used effectively in land dispute and therefore there is need to promote ADR and in particular re-introduce traditional dispute resolution mechanism in handling land disputes.

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## Challenges of Enforcement of Arbitral Awards

By: *Hon Justice (Rtd) Muga Apondi\**

According to the Black's Law Dictionary, 7<sup>th</sup> Ed. (West 1999), an arbitral award is a final judgment or decision by an arbitrator.<sup>1</sup> Normally, the said arbitral award is granted after the arbitrator has conducted a full hearing where all the parties and their witnesses have been heard and examined. According to Dr. Kariuki Muigua<sup>2</sup> the purpose of the arbitral award is to inform the parties of the arbitrator's decision, enable the party to enforce it and if the other party is aggrieved, to challenge it in Court as provided for in Sec. 35 of the Arbitration Act. The said leading arbitrator submits that the substantive requirements are that the award shall be cogent, complete, certain, final, enforceable and consistent\*. In the case of *Anne MumbiHinga Vs Victoria NjokiGathara*<sup>3</sup> the court of Appeal stated, inter alia,

*“One of the grounds relied on to invite the superior courts intervention in not enforcing the award was that of alleged violation of the public policy. Again no intervention should have been tolerated firstly because one of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly, although public policy can never be defined exhaustively and should be approached with extreme caution, failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised...”*

*In Kenya, the formal requirements of the Award are laid down under Sec. 32 of the Arbitration Act*<sup>4</sup> The said section sets out the formal requirements as follows:

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**\*LLB. (Hon), LLM (Nrb) International Trade & Investment Laws, DIP.LAW(KSL), ACI Arb, Former Puisne Judge, High Court of Kenya, Advocate of the High Court of Kenya, Commissioner of Oaths, Certified Professional Mediator, Freelance Lecturer**

<sup>1</sup> Antonio J. Rodriguez, Alonso T Chenault, Mary Campell Broughton and Michael A Haroski, Fowler Rodriguez

<sup>2</sup> “Selling Disputes Through Arbitration in Kenya” – 3<sup>rd</sup> Ed. (2017)

<sup>3</sup> Anne Mumbi Hinga Vs Victoria Njoki Gathara, (2009) eKLR

<sup>4</sup> Arbitration Act, 1995

- ✚ That the arbitral awards shall be made in writing and signed by the arbitrator(s).
- ✚ Where there are more than one arbitrator, the signatures of the majority of the arbitrators shall be sufficient, on condition that the reasons for any of the omitted signature can be stated
- ✚ Where the arbitrators do not sign the award, - at least all the arbitrators supporting the award ought to sign the same
- ✚ The arbitral award shall state the date and juridical seat of the arbitration
- ✚ A signed copy of the arbitral award shall be delivered to each party, subject to section 32B
- ✚ An arbitral tribunal may at any stage make a partial award in relation to specific issues before it.

Needless to state, there are five different awards that can be made by arbitral tribunals. These are:

- 1) Interim Award
- 2) Provisional Award
- 3) Consent Award
- 4) Additional Award<sup>5</sup>

### **Effects of A Valid Award on the Arbitrator**

It is generally accepted that when an arbitrator makes a valid award his authority as an arbitrator comes to an end and with it his powers and duties in the reference: he is then said to be *functus officio*. The general rule needs qualifications in two respects.<sup>6</sup>

- ✚ Where there is an interim award, the arbitrator still has authority to deal with the matters left over, although he is *functus officio* as regards matters dealt with in the award.<sup>7</sup>
- ✚ Secondly, where the award is remitted to the arbitrator by the Court for reconsideration he has authority deal with the matters on which the award has been remitted and to make a fresh award.

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<sup>5</sup>Dr. Kariuki Muigua – “Settling Disputes Through Arbitration in Kenya” 3<sup>rd</sup> Ed – 2017 – pg 152

<sup>6</sup>The law and Practice of Commercial Arbitration in England – 2<sup>nd</sup> Ed – by Sir Michael Mustill and Stewart Boyd.

<sup>7</sup>Fidelitas Shipping Co. Ltd vs v/o Exportchleb [1965]1 Lloyd’s Rep. 223 at 231

Significantly, where the arbitrator becomes *functus officio*, he has no power to alter the award without the consent of the parties.

### **Effect of Valid Awards on the Parties:**

A valid award confers on the successful claimant a new right of action, in substitution for the right on which his claim was founded\*. Where parties have voluntarily submitted themselves to arbitration, that contains an implied promise by each party to abide by the award of the arbitrator, and to perform his award. It is on this promise that the claimant proceeds, when he takes action to enforce the award.<sup>8</sup> Apparently, the other side of the coin is that the successful claimant is precluded by the award from bringing the same claim again in a fresh arbitration or action. That brings in the principle of *res judicata*. Besides the above, both parties are precluded by the award from contradicting the decision of the arbitrator on a question of law or fact decided by his award.

### **Recognition and Enforcement of Awards**

The recognition of an arbitral award entails the official acknowledgement of the award as valid and capable of enforcement. Therefore, a party seeking the recognition of an award has to apply to the relevant court to recognize the award as final and binding on the parties between whom it was made. Recognition is a defensive process. It can be used to shield against an attempt to raise in a fresh proceeding, issues that have already been decided in an earlier arbitration resulting in the award sought to be recognized.<sup>9</sup>

In the case of *Brace Transport Corporation of Monrovia, Bermuda v/s Orient Middle East Lines Ltd*<sup>10</sup>, the Supreme Court of India said:

*“An award may be recognized, without being enforced; but if it is enforced, then it is necessarily recognized. Recognition alone may be asked for as a shield against re – agitation of issues with which the award deals. Where a court is asked to enforce an award, it must recognize not only the legal effect of the award but must use legal sanctions to ensure that it is carried out.”*

Parties that have succeeded in presentation and determination of their cases in arbitral tribunals, invariably seek recognition of the awards to safeguard their interests. Naturally, recognition of a particular arbitral award relating to the same issues cannot

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<sup>8</sup> *Bremer OeltransportGimb v. Drewry* (1933) 1 KB 753

<sup>9</sup> Dr.KariukiMuigua, PhD, FCIArb, Charered Arbitrator – in “Settling Disputes Through Arbitration in Kenya.”

<sup>10</sup> AIR 1994 – SC 1715

be presented for enforcement. In the long run, the issues decided by that arbitral tribunal cannot be litigated again. That can effectively be done through the rule of *res judicata*. Where an award of an arbitral tribunal has been recognized by a court – local or foreign, then what follows is the implementation of the same.

Section 36 of the Arbitration Act states as follows:

1. A domestic arbitral award, shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this section 37.
2. An international arbitration award shall be recognized as binding and enforced in accordance as binding and enforced to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards.

Significantly, the law requires that where the party relying on an arbitral award or apply for its enforcement must furnish the High Court with the original award or a duly certified copy, the original arbitration agreement or a duly certified copy, a duly certified translation of the arbitral award or arbitration agreement where the same is not made in English.

### **Grounds for Refusal of Recognition or Enforcement.**

The Arbitration Act<sup>11</sup> has a wide range and comprehensive list of reasons that can be used against the party that was awarded a favourable arbitral award. The grounds for refusal are\*:

That a party to the arbitration agreement was under incapacity the arbitration agreement is not valid under the law to which the parties have subjected to it, the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings, the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the State or under the law that the arbitral award was made, the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence.

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<sup>11</sup> Cap 49 – Revised Edition 2012 [2010]

In addition, the above section grants the High Court wide powers to use as additional grounds for refusal of recognition or enforcement of arbitral awards. These are a finding that – the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya and the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.

### **Case Law Reflecting Enforcements of Awards:**

Research in different jurisdictions succinctly shows the different types of challenges where a successful litigant wishes to implement an arbitral award.

In a Canadian case in Ontario Court – General Division: - *Konto Yakin Kogyo Kabushiki – Kaisha vs Can – EngManufacturing Ltd.* (January 30, 1992)<sup>12</sup>. The respondent in this case submitted that the plaintiff had failed to comply with the provisions of art. 35(2) of The Model Law by not putting before the Court certified copies of the award and of the translation of the award when applying for its enforcement. The Court reviewed the meaning of “duly certified” used in art. 35(2) and concluded that while the initial documents submitted by the applicant did not meet that standard, subsequently filed documents did comply with the requirements of the provision and enforced the award.

In the case of *Conforce (Pvt) Ltd vs The City of Harare – Zimbabwe/Harare High Court*, Judgment No. HH 71 – 2000 (March 1, and April, 5 2000)<sup>13</sup> the successful party in this case applied to the High Court under art. 35 of the Model Law for the recognition and enforcement of the award. The application was opposed pursuant to art. 36 of the Model Law on the basis that the award was contrary to public policy, since it contravened the in duplum (the double) rule, which applies in terms of the Common Law of Zimbabwe and under which interest ceases to run when it equals the capital sum owing.

In the case of *Sam Ming City. Forestry Economic Co. vs Lam Pun Hung Trading as Henry Co* (June, 27, 2001)<sup>14</sup>. The defendants in this case claimed that the award dealt with a difference not contemplated by or falling within the terms of the submission to arbitration (arts 34(2)(a)(iii) and 36(1)(a)(iii) of the Model Law). The court found that the dispute as to whether monies had been wrongfully taken was plainly within the

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<sup>12</sup> 7 Ontario Reports (3d)

<sup>13</sup> A/CN. 9/SER.C/ABSTRACTS/ 31

<sup>14</sup> A/CN.9/SER.C/ABSTRACTS/39



scope of the arbitration agreement (art. 7(1) of the Model Law) and also that by arguing matter before the tribunal the parties submitted to the jurisdiction of the tribunal and were stopped from raising the jurisdictional point subsequently (art. 16(1) and (3) of the Model Law.

In the case of Hanseatisches Oberlandesgericht (Hamburg): 11 Sch 6/01 (January 24, 2003) A German Court declared an award<sup>15</sup> enforceable as the place of arbitration was in Germany. The refusal by the Polish Courts to enforce the award had no effect on the proceedings for the declaration of enforceability in Germany as invoked by respondent. It was held that the Polish decision did not bind the German courts in any way.

In Kenya, the court of Appeal, while handling the case of *Anne Mumbi vs Victoria Njoki Gathara*<sup>16</sup> discussed that she had not been served with a notification informing her when the award would be delivered or the notice of filing the award nor had she been served with a copy of the application seeking to enforce the award. The High Court dismissed the application to set aside.

On appeal to the Court of Appeal, the Court dismissed the appeal and held inter alia that the Appellant was deemed to have been properly notified of the award and service of necessary documents upon her was sufficient and satisfied the requirements of Sec 32 of the Act. Secondly, the application seeking to set aside the award had relied upon provisions of the Civil Procedure Act and Rules which was improper as the Arbitration Act is a complete code. It was stated that Rule 11 of the Arbitration Rules does not override the provisions of Section 10 of the Act and that the High Court did not have jurisdiction to intervene in any matter not specifically provided for in the Act. Thirdly, a party cannot seek to set aside an award outside the grounds specified in section 35 of the Act, therefore non – service of any process after an award had been made was not a ground for setting aside.

The application was also stated to have failed to meet the grounds for challenge to recognition and enforcement of an award under section 37 of the Act. The Court went further and stated that section 35(3) of the Act bars any challenge, even for valid reason, which is made three months after the award is delivered, and as such, the application for setting aside was made long after this period had lapsed and the court could not entertain it.

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<sup>15</sup> A/CN.9/SER.C/ABSTRACTS/50 – Schiedsvz 2003, 284.

<sup>16</sup> [2009] eKLR

## **Conclusion**

From the above analysis it is apparent that the Kenyan law clearly supports and encourages arbitration given the obvious benefits. The Kenyan law on arbitration succinctly meets the basic requirements at a global level and enhances international trade. In addition, international arbitration awards are recognized as binding and enforced in accordance with the provisions of the New York Convention or any other convention to which Kenya is a signatory. Where an international award needs to be enforced, then it must also meet the basic requirements laid down for domestic awards. The comprehensive legislation on arbitration is not only commendable but also makes Kenya an attractive and stable destination for international trade and investments. Shrewd and diligent investors always ensure that the legal regime of their investment destinations exude confidence and favourable business environment. The main objective of this paper was to demonstrate the basic challenges that litigants face in enforcement of arbitral awards in Kenya and some selected jurisdictions as demonstrated through case law.

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## Greening Alternative Dispute Resolution in Kenya

By: *Jacqueline Waihenya\**

*This paper takes on the question of whether Kenya's legal framework considers climate change in relation to the resolution of international disputes as well as within arbitration and mediation practice which are the predominant alternative dispute resolution mechanisms in the country.*

### 1. Introduction

In 2019 Lucy Greenwood an International Arbitrator made a promise to manage her arbitrations in an environmentally friendly manner\*. She launched what she called the Green Pledge to minimize the impact of her arbitration practice on the environment\*. This inspired many arbitration practitioners and stakeholders such as law firms, hearing venues, third party funders, conference organisers, legal journalists, legal technology providers as well as corporate clients who soon signed the Green Pledge as well.<sup>1</sup> Inspired by Lucy Greenwood the World Mediator's Alliance on Climate Change was established and a Mediator's Green Pledge was introduced.<sup>2</sup> Also inspired by Lucy Greenwood, the Greener Litigation Project also set out to become a catalyst for change to policy and procedure to embed meaningful and permanent change into the rules of litigation practice to reduce climate and other environmental impacts by court users and other stakeholders in and around the courts in the United Kingdom.<sup>3</sup>

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<sup>1</sup> Campaign for Greener Arbitrations, *The Campaign* (2021) Available at <https://www.greenerarbitrations.com/about> [Last accessed on 5 February 2022]

<sup>2</sup> World Mediators Alliance on Climate Change, *Mediator's Green Pledge: An Introduction* (2020-2021) Available at [Last accessed on 5 February 2022]

<sup>3</sup> Greener Litigation, *About Greener Litigation* (2022) Available at

In 2020 following the onset of the Covid Pandemic the *Civil Justice Council's Rapid Consultation*<sup>4</sup> considered the impact of Covid 19 on court processes and procedures prompting Mishcon de Reya LLP to propose a *Climate Change Strategy*<sup>5</sup> consisting of 3-step approach to reduce, capture and catalyse with the ultimate reduction targets to energy and office space, leveraging information communication technology (ICT), air travel and commuting.<sup>6</sup> This further inspired the establishment of the Greener Litigation Project.<sup>7</sup>

The Greening Pledges tend to cover workspace, to ensure a reduced environmental footprint through the use of reduced energy consumption and waste; Electronic Correspondence, strongly advocating for use of email and other electronic means unless hard copy correspondence is expressly needed even whilst noting that email does have a carbon footprint; Videoconferencing, encouraging the use of videoconferencing facilities as an alternative to travel; Use of electronic over printed hard copies of bundles of documents at hearings; Suppliers, requiring use of suppliers and service providers who are committed to reducing their environmental footprint including for the purposes of arranging for hearings; Expert witnesses & witnesses, suggesting the use of videoconferencing as opposed to hearings in person; Travel, avoiding unnecessary travel and using video conferencing facilities as an alternative; Air Travel, considering and questioning the need to fly at all times and offsetting carbon emissions for any arbitration-related travel.

Greening Investor State Dispute Settlement, Greening Litigation, Greening International Arbitration, Greening Mediation have been gaining currency around the globe. The question that therefore arises is whether greening dispute resolution in Kenya has any presence within our policy and legal framework and if in the affirmative, how to enhance the same.

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<https://greenerlitigation.org/about-us/#objectives> [Last accessed on 5 February 2022]

<sup>44</sup> Update: Rapid Consultation – The impact of COVID-19 measures on the civil justice system (1 May 2020) Available at <https://www.judiciary.uk/announcements/rapid-consultation-the-impact-of-covid-19-measures-on-the-civil-justice-system/> [Last accessed on 5 February 2022]

<sup>5</sup> Ibid

<sup>6</sup> Ibid Greener Litigation

<sup>7</sup> Mishon de Reya LLP, *Climate Change Strategy*, (2020) Available at [https://www.mishcon.com/assets/managed/docs/downloads/doc\\_3232/Climate%20Change%20Strategy.pdf](https://www.mishcon.com/assets/managed/docs/downloads/doc_3232/Climate%20Change%20Strategy.pdf) [Last accessed 5 February 2022]

## 2. Kenya's Approach to Climate Change:

Kenya was one of the first countries to accede to the *UN Framework Convention on Climate Change (UNFCCC)*<sup>8</sup> popularly known as the Paris Agreement and the Country submitted its first Climate Action Plan entitled the Nationally Determined Contribution (NDC) ahead of the 2015 Paris Agreement.<sup>9</sup> Ratified by almost all the countries of the world the Paris Agreement was to have come into effect in 2020 and all countries were empowered to take all necessary action to prevent global temperatures from rising above 2°C (Two degrees Centigrade) and to take any opportunities emerging from this new global paradigm towards clean and sustainable development.<sup>10</sup>

In line with the reporting requirements post 2020, Kenya submitted an *Updated Nationally Determined Contribution*<sup>11</sup> (Updated NDC) for the next 5 years in December 2021 ahead of the 26<sup>th</sup> Conference of Parties<sup>12</sup> (COP26). In a nutshell this is to the effect that the country can meet and exceed the initial NDC targets of reducing emissions by 30% relative to the business-as-usual scenario by 2030 based upon the Kenya National Vision 2030 and climate related policies.<sup>13</sup>

Materially, two key objectives of the Updated NDC that are relevant to greening dispute resolution include enhancement of energy and resource efficiency across the different sectors; and clean, efficient and sustainable energy technologies to reduce over-reliance on fossil and non-sustainable biomass-fuels.

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<sup>8</sup> Available at

[https://unfccc.int/files/essential\\_background/background\\_publications\\_htmlpdf/application/pdf/conveng.pdf](https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf) [Last accessed 5 February 2022]

<sup>9</sup> United Nations Climate Change, *Kenya Submits its Climate Action Plan Ahead of 2015 Paris Agreement*, 23<sup>rd</sup> July 2015 Available at <https://unfccc.int/news/kenya-submits-its-climate-action-plan-ahead-of-2015-paris-agreement> [Last accessed on 4 February 2022]

<sup>10</sup> Ibid

<sup>11</sup> Office of the Cabinet Secretary, Environment and Forestry, *Kenya Updated Nationally Determined Contribution* (December 2021) Available at <https://www.greengrowthknowledge.org/sites/default/files/downloads/policy-database/Kenya%20First%20%20NDC%20%28updated%20version%29.pdf> [Last accessed on 5 February 2020]

<sup>12</sup> The parties in COP are the governments that have signed the Paris Agreement and they meet once a year to discuss how to jointly address climate change. They are joined by world leaders, ministers, negotiators, representatives from civil society, business, international organizations, and the media. The most recent COP26 was held in Glasgow, Scotland.

<sup>13</sup> Ibid

### 3. Greening Investor State Dispute Settlement:

It is argued that an important way to combat and mitigate climate change is to implement climate friendly investment laws and policies to incentivize both domestic and foreign green investments.<sup>14</sup> Since 1970 the world has seen an uptake of environmental laws at city, state, national and international levels and thus the current and key challenge that now remains is enforcement and compliance through environmental governance and access to justice.<sup>15</sup>

The Stockholm Treaty Lab, a constitutive group of experts, designed a model treaty for Investor State Dispute Settlement (ISDS) entitled the Green Investment Treaty Model with the purpose of engaging investment law scholars who may not be aware of the relevant intersection between foreign direct investment (FDI) and climate change\*. The Model proposes a text embodying innovations at several levels to support the Paris Agreement and sustainable development and changes to the International Investment Agreements (IIAs) that (1) require arbitrators to be familiar with climate change and sustainable development laws and policies; (2) establishing a mandatory code of conduct; (3) a departure from transparency towards public participation.<sup>16</sup>

Though Kenya has entered into at least twenty bilateral treaties<sup>17</sup> as well as treaties with investment provisions (TIPs) including the African Union Treaty (1991), COMESA Treaty (1993), EAC Treaty (1999), Cotonou Agreement (2000), COMESA US-TIFA (2001), EAC-TIFA (2008) which are in force and other TIPs which have been signed but are not in force including the COMESA Investment Agreement (2007) and the UK-Kenya Economic Partnership Agreement (EPA)(2020)(UK-Kenya EPA)<sup>18</sup>

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<sup>14</sup> Daniel B. Magraw & Sergio Puig, *Greening Investor-State Dispute Settlement* (2018) 59 BC L Rev 2717 Available on Heinonline [Last accessed on 6 February 2022]

<sup>15</sup> George (Rock) Pring & Catherine (Kitty) Pring, *The Future of Environmental Dispute Resolution* (2011) 40 Denv J Int'l L & Pol'y 482 Available at Heinonline [Last accessed on 6 February 2022]

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<sup>18</sup> UNCTAD, *Investment Policy Hub* (2021) Available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/108/kenya> [Last accessed on 7 April 2021]

and more recently the African Continental Free Trade Agreement (AfCTA)<sup>19</sup> to woo FDI to the country she does not per se have a formal ISDS policy. Further even after being on the receiving end of 3 ISDS claims the country does it have in place a model BIT.<sup>20</sup> A cursory perusal of the country's executed IIAs both in force and those yet to come in force indicate that they contain a preamble, scope, admission, treatment, expropriation, transfer of funds, civils strife and dispute resolution. This points to the traditional investment treaty approach.

It is the recommendation of this author that Kenya considers overhauling its current approach to ISDS by establishing a Kenyan BIT Model and putting in place a formal ISDS Model that incorporates the provisions of the Model Green Investment Treaty requiring (1) Arbitrators to be familiar with climate change and sustainable development laws and policies; (2) Arbitrators who are subject to an established mandatory code of conduct and (3) Arbitrators, who embrace the departure from transparency towards public participation. Such arbitrators should further demonstrably espouse the general principles of the Greening Pledges.

#### **4. Greening Alternative Dispute Resolution in Kenya:**

There is a growing realization that no single institution serves only one function and no one important function in a society is performed by a single institution.<sup>21</sup> Consequently in Kenya the practice of Alternative Dispute Resolution (ADR) tends to revolve around the Courts. Courts are a significant stakeholder in the practice of ADR underpinned by the constitutional fiat at Article 169(2)(c)<sup>22</sup> such that in exercising judicial authority, the courts and tribunals are required to be guided by the principles of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

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<sup>19</sup>Agreement establishing the African Continental Free Trade Area (2019) Available at [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) [Last accessed on 6 April 2021]

<sup>20</sup> Lise Bosman and Susan Kimani, *Approaches to Investor State Dispute Resolution in Eastern Africa: Rwanda, Kenya and Mauritiu'* (2018) 2018 Acta Juridica 113 pg.115 Available at [Heinonline](#). [Last accessed on 7 February 2022]

<sup>21</sup> Eric D. Green Source, *A Comprehensive Approach to the Theory and Practice of Dispute Resolution* Journal of Legal Education , June 1984, Vol. 34, No. 2 (June 1984), pp. 245-258 Published by: Association of American Law Schools Stable Available at <https://www.jstor.org/stable/42892683> [Last accessed on 7 February 2022]

<sup>22</sup> Constitution of Kenya



Arbitration practitioners further engage in their references with one eye open to the Courts as their Awards are enforced through the High Court,<sup>23</sup> interim measures may be sought from the court,<sup>24</sup> even whilst court intervention is limited.<sup>25</sup> Likewise, the practice of mediation has gained currency through the Court Annexed Mediation Programme with a significant portion being undertaken through its aegis. Private mediation is also on the rise with the knowledge and comfort that mediation settlement agreements are enforceable through the courts per section 59B of the *Civil Procedure Act*.<sup>26</sup>

The Kenyan Court System is set out at Article 162 of the Constitution outlining the Superior Courts to be the Supreme Court, the Court of Appeal and the High Court<sup>27</sup> with two courts of equal status to the High Court being the employment and labour relations courts<sup>28</sup> and Environment and Land Court.<sup>29</sup> Subordinate courts being Magistrate's Courts,<sup>30</sup> Kadhis Courts,<sup>31</sup> Courts Martial<sup>32</sup> and specialized Tribunals<sup>33</sup> are further established at Article 169. The Mediation Accreditation Committee is further established pursuant to Section 59A of the Civil Procedure Act and it is empowered with accrediting Mediators in Kenya who are appointed to handle matters within the Court Annexed program. Arbitrations are generally undertaken pursuant to the Arbitration Act, 1995.

At first glance it would appear that no policy or legal provision governs the manner in which the Courts and alternative dispute practitioners manage the question of climate change and sustainable development. However, in 2020 responding to Covid Pandemic induced disruptive lock downs requiring staying at home protocols a plethora of practice directions in all our Courts have emerged outlining in detail how pleadings and documents in court ought to be set out including the spacing, font and font size and margins. The Courts have all initiated electronic filing though almost all of them require hardcopies to be presented as well.

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<sup>23</sup> Arbitration Act, Section 36

<sup>24</sup> Arbitration Act, Section 7

<sup>25</sup> Arbitration Act, Section 10

<sup>26</sup> Cap 21

<sup>27</sup> Constitution of Kenya Article 162(1)

<sup>28</sup> Constitution of Kenya Article 162(2)(a)

<sup>29</sup> Constitution of Kenya Article 162(2)(b)

<sup>30</sup> Constitution of Kenya Article 169(1)(a)

<sup>31</sup> Constitution of Kenya Article 162(1)(b)

<sup>32</sup> Constitution of Kenya Article 162(1)(c)

<sup>33</sup> Constitution of Kenya Article 162(1)(d)

The Supreme Court has gone one step further and limited the number of pages submissions can contain to a maximum of 30 pages.<sup>34</sup> The Courts of Appeal and High Courts and Subordinate Courts as a matter of general practice caution on the number of pages or otherwise prescribe the same on a case-by-case basis. The Court Annexed Mediation Program has further successfully introduced E-Mediation aptly named Virtual Dispute Resolution<sup>35</sup> which contemplates online mediation from inception upto to conclusion of the mediation process.

*The Practice Directions on Electronic Case Management, 2020* were the pioneering legal provision for the use of technology in Kenyan judicial proceedings,<sup>36</sup> as well as the integrating ICT into judicial processes in Kenya. These created electronic filing and electronic service of court documents; electronic case search; electronic diary; electronic case tracking system; electronic payment and receipting; electronic signature and electronic stamping; exchange of electronic documents, including pleadings and statements; and use of technology in case registration and digital recording of proceedings for expeditious resolution of cases.<sup>37</sup>

However, though the foregoing raft of changes demonstrate a drift towards the adoption of ICT into our Judicial processes including in Mediation these were more a reaction to the Covid Pandemic and their positive impact on greening litigation was more of a byproduct than any conscious policy and legal provisions directed towards ameliorating climate change.

## 5. Conclusion:

On the heels of COP26 let this be a clarion call to all dispute resolvers in Kenya to consider a more directed and deliberate approach towards greening the ADR mechanisms and litigation as our personal contribution in our firms and practices aimed at reducing emissions from our workplaces, processes and travel.

On the policy and statutory levels, the time is nigh to petition for inclusion of greening ADR into our framework.

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<sup>34</sup> The Supreme Court (General) Practice Directions, 2020 paragraph 17(a)

<sup>35</sup> Kenya Judiciary, Virtual Dispute Resolution (2020) Available at <file:///C:/Users/Jacqueline/Downloads/4.%20COURT%20ANNEXED%20MEDIATION%20VIRTUAL%20DISPUTE%20RESOLUTION%20VIRTUAL%20COURT.pdf> [Last accessed on 7 February 2022]

<sup>36</sup> Available at <http://kenyalaw.org/kl/index.php?id=10211> [Last accessed on 7 February 2022]

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## Understanding an arbitrator as a private Judge

By: Lady Justice Jemimah Keli \*

The Cambridge English dictionary defines an arbitrator as someone who has been officially chosen to make a decision that ends a legal disagreement without it having to be solved in court<sup>1</sup>. Thus an arbitrator is a private judge but with limited powers as to sanctions outside what is provided for under the Act<sup>2</sup>. The Arbitration Act recognizes the role of the Court in arbitration proceedings to issue interim reliefs as arbitrator powers are limited.<sup>3</sup>

An author has aptly explained my point of arbitrators being private judges as follows:- ‘As the decision maker of the dispute, the arbitrator is deemed to perform a judicial role. Arbitrators therefore need to exercise judicial or quasi-judicial prerogatives, an aspect of their function which makes them comparable to judges.’<sup>4</sup>

It is the opinion of the author that arbitrators are all powerful as their decisions are not subject of appeal on merit. The Black Law Dictionary defines an arbitrator as a neutral decision maker who is appointed directly or indirectly by the parties to an arbitration agreement to make a *final and binding decision* resolving the parties’ dispute<sup>5</sup>(emphasis given) That means the fate of the parties is sealed unless the arbitral tribunal is in breach of section 35 of the Act<sup>6</sup> or the parties agree that there can be appeal on points of law against the decision of the arbitrator under section 39 of the Arbitration Act. If the Arbitrator is wrong on the application of the law on facts the parties are still bound by the decision unless the agreement allowed appeal on points of law or the decision offends the provisions of section 35 of the Act. The Supreme

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<sup>1</sup> Accessed at <https://dictionary.cambridge.org>

<sup>2</sup>The main sanction an arbitrator can use is costs. For example, impose costs on offending party or deny them costs.

<sup>3</sup> Section 7 of the Arbitration Act provides for issuance of interim measure of protection by court

<sup>4</sup> Natalia Giraldo-Carrillo, the ‘Repeat Arbitrators’ Issue: A Subjective Concept, 19 International Law, Revista Colombiana de Derecho Interna- cional, 75-106 (2011). Accessed at <http://www.scielo.org.co>

<sup>5</sup>10<sup>th</sup> Edition Byran Garner, ED.Thomson Reuters

<sup>6</sup> Section 35 Provides for grounds of setting aside of arbitral award by the High Court like on prove of bribery or other influence of the Arbitrator among others

Court emphasized this issue in a decided case where it is stated, ‘Generally therefore, once parties agree to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute. Once an award is issued, an aggrieved party can only approach the High Court for setting aside the award, only on the specified grounds. 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 lead to a miscarriage of justice’.<sup>7</sup>

That makes arbitrators all powerful private judges. Judges in the common wealth jurisdictions have judicial code of conduct which guides their conduct as judges. Majority of these codes are inspired by the Bangalore principles of judicial conduct of 2002.<sup>8</sup> Part of the preamble reads:-

*‘The following principles are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge’*

The Kenya Judiciary Judicial service code of conduct<sup>9</sup> is highly inspired by the said Bangalore principles.

The arbitrators do not have a similar code of conduct and when they sit as private judges they are guided by individual conscience and personal integrity. Is it time to call for a similar code of conduct for arbitrators? I leave it to the various arbitration institutions. The author is quick to point out that the International Bar Association Guidelines on Conflict Interest in International Arbitration<sup>10</sup> which have been applied with approval in domestic arbitrations and peer review in the profession provide some

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<sup>7</sup> Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR at Paragraph 84

<sup>8</sup> (The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002) <https://www.unodc.org>

<sup>9</sup>The Judicial Service (Code of Conduct And Ethics) Regulations, 2020, Legal Notice No. 102

<sup>10</sup> Adopted by resolution of IBA council in 2014 available at <https://www.ibanet.org>

checks on the conduct of the arbitrators. However, in domestic arbitrations it is doubtful that the IBA code is enforceable and that all the arbitrators and parties are aware of the code. The institutions may consider adopting the code to apply to domestic arbitrations and sensitize the parties on the same. In the alternative the institutions can have a code of conduct for arbitrators to tame any rogue arbitrator as like in any society there can never lack rotten apple and the innocent parties are exposed.

### **Relevance of the article**

Several times while in practice counsel approached me on how to choose a good arbitrator. I was an arbitrator and also party advocate representing parties before the arbitral tribunal. The question of integrity kept on coming up. Integrity here referring question of the independence and impartiality of the arbitrator. Some of the integrity issues included failure to proceed timely on receipt of deposit of fees, failure to award costs to successful parties, some parties felt the awards were not supported by facts and the law yet they could not appeal on merit in majority of the cases, and in some cases the parties believed that the arbitrator was not independent or was biased. Indeed, some of the parties told me they had made complains to the appointing authority but received no relief.

The concern of threat of finality principle of arbitration following Supreme Court decision allowing appeal from High Court to Court of Appeal is an issue which should disturb the arbitration professionals and the author opines the arbitrators themselves can tame the threat by their conduct. These issues have been on my mind and with tremendous respect to the profession which I hold in high regard and belong to, this is my peer contribution in the spirit of making private judges, the arbitrators, thrive in Kenya and beyond our borders. It should be noted that in Kenya we have several appointing authorities being the Chartered Institute of Arbitrators (Kenya branch), Law Society of Kenya, the Nairobi Centre for International Arbitration and other professional societies.

### **Why is arbitration important and yet we have highly functional courts in Kenya and globally?**

Arbitration is a choice of the parties, the courts being the default forum for adjudication of all disputes. That means the parties choose an alternative to court. The courts also play a role in enforcing the awards and issuing interim measures of protection and



taking of evidence.<sup>11</sup> There are many reasons why parties make the choice to appear before the arbitral tribunal instead of court. The reason being that arbitration is said to have advantages especially in relation to commercial transactions over court. An article by the American Bar Association cites some of the benefits of arbitration as follows: -

*‘It has many advantages over litigation in court, such as party control of the process; typically lower costs and shorter time to resolution; flexibility; privacy; awards which are final and enforceable; decision makers who are selected by the parties on the basis of desired characteristics and experience; and broad user satisfaction.’<sup>12</sup>*

The advantages are many but considering the issues I mentioned earlier as having been brought to my attention by Counsel seeking to appoint arbitrators, the key feature of a good arbitrator is independence and impartiality. The act of participation in appointment of arbitrators in domestic arbitrations helps parties achieve their target of an ideal arbitrator. In the event the arbitrator is appointed by the institution, these two features of impartiality and independence still remain the salient features to look out for. The author proceeds on the assumption that the arbitrator is skilled and trained by a recognized institution. The leading training institution for arbitrators in Kenya is the Chartered Institution of Arbitrators- London and KIAC-Kigali. Locally, the Chartered Institution of Arbitrators- Kenya Branch also does training, but exams are administered by the Chartered Institution of Arbitrators- London, just like KIAC Kigali. The Nairobi Center for International Arbitration has also embarked on training of arbitrators. Indeed, now persons interested in the profession have more opportunities available for training.

### **The Terms Independence and Impartiality Defined**

In common usage, the word independence for an arbitrator means the absence of improper connections to the dispute, the parties, or the outcome of the dispute. Impartiality, on the other hand, addresses matters of prejudice.

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<sup>11</sup> Section 7 of the Arbitration Act allows a party to apply for interim measures of protection to the High Court, and under section 28 of the Act, the Court can be approached for assistance in taking evidence in the arbitration.

<sup>12</sup> American Bar Association, section of dispute resolution, ‘Benefits of Arbitration for commercial disputes’ Available at <https://www.americanbar.org>

The Black Law Dictionary<sup>13</sup> defines the two terms as follows:- The term ‘independence’ to mean, the quality, state or condition of being independent- not subject to control or influence of another, not associated with another entity or not dependent or contingent on something else while it defines the term ‘impartial’ is defined as not favouring one side more than another, unbiased and disinterested, unswayed by personal interest.

According to William Park lack of independence derives from what might be called problematic relationships between the arbitrator and one party or its lawyer. He opines that these problematic relationships result from financial dealings (such as business transactions and investments), ties of a sentimental quality (including friendships and family), or links of group identification (for example, shared nationality and professional or social affiliations). Individuals should decline appointment if they have doubts about their ability to be impartial or independent, or if facts exist such as to raise reasonable concerns on either score.<sup>14</sup>

The principle of law that justice must be seen to be done applies to arbitrators. Such that one may not suffer the problematic connections yet is what William Park calls bigot for suffering racial, tribal or nationalities bias. Park cites the English case arising from a maritime accident off the coast of France, between a Portuguese and a Norwegian vessel, submitted to arbitration in London by the two respective ship-owners *In Re the Owners Of the Steamship “Catalina” and the Owners of the Motor Vessel “Norma”* [1938] 61 *Lloyd's Law Report* 360 where during hearings, counsel for one side mentioned a case involving Italians. To which, the arbitrator responded as follows: -

*‘Italians are all liars in these cases and will say anything to suit their book. The same thing applies to the Portuguese. But the other side here are Norwegians and in my experience the Norwegians generally are a truthful people. In this case I entirely accept the evidence of the master of the [the Norwegian vessel].’*

‘In connection with the application to remove the offending arbitrator in the above ships case, it was argued that a formal award not having yet been rendered, there was no evidence that an ultimate decision against the Portuguese would in fact rest on the biased perspective. Rejecting what might be called an argument too clever by half, the

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<sup>13</sup> Black Law Dictionary 10<sup>th</sup> edition Byran Garner(ed), Thomson Reuters

<sup>14</sup> William P., 2015, ‘Arbitrator Bias’, No. 15-39 Boston University School of Law, Public Law Research Paper Available at [https://scholarship.law.bu.edu/faculty\\_scholarship](https://scholarship.law.bu.edu/faculty_scholarship)

court confirmed that justice must not only be done, but must be seen to be done. The arbitrator was removed.’<sup>15</sup>

This was a case of impartial arbitrator. He had prejudged one of the parties.

### **Can the issue of independence and impartiality be waived by the parties?**

To answer this question I would refer the reader to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines)<sup>16</sup> which contain a ‘Red List’ of prohibited relationships that bifurcates into waivable and non-waivable relationships. General principle 2 of the guidelines is relevant to this article. In the Explanation to General Standard 2 it is stated ‘(a) If the arbitrator has doubts as to his or her ability to be impartial and independent, the arbitrator must decline the appointment. This standard should apply regardless of the stage of the proceedings. This is a basic principle that is spelled out in these Guidelines in order to avoid confusion and to foster confidence in the arbitral process.’

General principle no. 4 provides waiver by parties but excludes any waiver by parties under non-waivable red list. Any waiver agreement by parties under the non-waivable red list is invalid. The red list derives from the principle that no person shall be judge in own cause. The non-waivable red list under part 2 of the IBA guidelines provides as follows: -

‘1.1 There is an identity between a party and the arbitrator, or the arbitrator is a legal representative or employee of an entity that is a party in the arbitration.

1.2 The arbitrator is a manager, director or member of the supervisory board, or has a controlling influence on one of the parties or an entity that has a direct economic interest in the award to be rendered in the arbitration.

1.3 The arbitrator has a significant financial or personal interest in one of the parties, or the outcome of the case.

1.4 The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.’

Then there is waivable red list that can be waived by agreement of parties and the appointing institution being aware of the conflict of interest. For example, the arbitrator has given legal advice, or provided an expert opinion, on the dispute to a party or an

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<sup>15</sup> Ibid page 7

<sup>16</sup> Adopted by resolution of IBA council in 2014

affiliate of one of the parties.<sup>17</sup> The author encourages all the appointing authorities to share the code with their arbitrators towards uniform standards among all the arbitrators.

### **So why the emphasis on independence and impartiality in appointment of arbitrator or arbitral tribunal?**

In our adversarial system which also applies to arbitration proceedings advocates tend to focus on victory for the clients and not necessary fairness. But the two are not incompatible. It is reported that there exists empirical data to indicate that parties to arbitration place ‘fair and just results’ high in their pantheon of virtues, regardless of whether, in the heat of battle, they focus more on victory. ‘A study by the Global Center for Dispute Resolution (an affiliate of the American Arbitration Association) found that attorneys and parties to arbitrations rated a ‘fair and just result’ as the most important element in arbitration, above all other considerations including cost, finality, speed and privacy. Both prior to the first hearing and after the award, parties to international commercial arbitrations were asked to rank the importance of eight variables: (i) speed; (ii) privacy; (iii) receipt of monetary award; (iv) fair and just result; (v) cost-efficiency; (vi) finality of decision; (vii) arbitrator expertise; and (viii) continuing relationship with opposing party. Claimants and respondents alike ranked ‘fair and just result’ higher (90 per cent for respondents and 75 per cent for claimants) than any other variable.’<sup>18</sup>

Fair and just result in arbitration process can only be achieved with an independent and impartial arbitrator. Fairmindedness and intelligence will always be the leading guide in choosing an arbitrator. It is not common sense for a party to choose a dull and corrupt person as arbitrator because their case is so weak they can only get victory through bribes and trickery.

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<sup>17</sup> IBA Guidelines on Conflict of Interest in International Arbitration, 2014. part 2 (2.1.1.)

<sup>18</sup> Ibid 8 page 5 author cites Richard W. Naimark and Stephanie E. Keer, ‘International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Business People’ in (2002) 30 Int’l Bus. L. 203; see also Richard W. Naimark and Stephanie E. Keer, ‘What Do Parties Really Want from International Commercial Arbitration?’ in (2002–2003) 57 Disp. Res. J 78 (publishing same results)

### **Some challenges in appointment of the private judge ‘the arbitrator’ and application of the IBA guidelines on conflict of arbitrators in international arbitration**

Party participation in the process of appointment of the arbitrator will mean each party is looking out for an arbitrator without any doctrinal predispositions or known personal beliefs<sup>19</sup>. The author opines that an arbitrator who has written an article on fraud in medical claims or negligence of doctors may have impartiality issues on such claims as an arbitrator. This also applies to professors who during academic journey have taken strong positions on certain issues. These issues the author opines cannot be overlooked in appointment process.

Another challenge is the common dual role of counsel and arbitrator where an arbitrator may be influenced by a similar case he handled as an advocate. Or advocates appearing before arbitrator have been arbitrators in cases where the arbitrator was the advocate. This on face of it, the author opines, creates a club and members of a club tend to be loyal.

Another challenge is repeat appointment of arbitrator by a party. Few Arbitrators may have expertise and command respect and the parties may be comfortable appointing them to exclusion of the others in the pool. A party who has appointed an arbitrator habitually may have expectations of being favoured and this can also be a perception as many arbitrators hold their reputations among peers in higher regard than how parties perceive them. The IBA guidelines on conflict interest (Supra) have foreseen these situations as potential conflicts and addressed what needs to be disclosed by the arbitrator categorizing the issues under red list( which must be disclosed) and farther the red list as either waivable by the parties or not ( discussed earlier), the orange list which is doubtful conflict issues which the arbitrator should disclose depending on the circumstances of the case and the green list which are issues which the arbitrator need not disclose.

General principle no. 6 of the IBA guidelines on conflict<sup>20</sup> in the case of repeat past appointments by same party or same counsel before the lapse of three year period provided for in the orange list, or when an arbitrator concurrently acts as counsel in an unrelated case with similar issues of law are raised, these need to be disclosed as they give rise to justifiable doubts to the arbitrator’s impartiality or independence. Likewise, an appointment made by the same party or same counsel appearing before the

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<sup>19</sup> Ibid 15

<sup>20</sup> Ibid 11

arbitrator, while the case is ongoing, may also have to be disclosed. The arbitrator in these related issues not directly listed under the orange list should consider disclosure. The arbitrator could as well be a close personal friend or sworn enemy of one of the parties or counsel in the arbitration. In even though the arbitrator ‘private judge’ feels such issues do not affect their independence the IBA Guidelines(supra) require disclosure under the Orange list.<sup>21</sup> I have limited the challenges addressed in this article to the issues of independence and impartiality.

### **Current checks in place for the private Judge’ the arbitrator’ in Kenya**

The Arbitration Act section 35 provides for challenge of the award on the following grounds:- ‘(2) An arbitral award may be set aside by the High Court only if— (a) the party making the application furnishes proof— (i) that a party to the arbitration agreement was under some incapacity; or (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or No. 4 of 1995 Arbitration [Rev. 2019] 20 (vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption; (b) the High Court finds that— (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or (ii) the award is in conflict with the public policy of Kenya.’

The Supreme Court has upheld the principle of finality of the arbitral awards subject to intervention of the court under section 35 while at same time stating the Court of Appeal has jurisdiction to entertain appeal from the High Court in the interest of justice<sup>22</sup>.

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<sup>21</sup> See Guidelines 3.4.3 and 3.4.4 under the Orange list

<sup>22</sup> In reported case of *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR.

The court can also intervene to uphold rejection of challenge of arbitrator or uphold the challenge and remove an arbitrator.<sup>23</sup>

Peer deterrence- majority of arbitrators hold their reputation among peers in high regard and this itself is a deterrence from misconduct. Again arbitrators rely on referrals based on past work.

There is also in place active mentorship programs for associate arbitrators, conferences of which arbitrators discuss experience and challenges as well as the members' forums.

### **Way forward**

It is not clear how many trained and certified arbitrators operate in Kenya. The Chartered institute of arbitrators- Kenya Branch indicates the institute has over 14000 arbitrators spread out in 1333 countries including Kenya. It is stated that the arbitrators are drawn from various professions in including law, engineering, architecture , property valuers, quantity surveyors among others.<sup>24</sup> The author calls for official listing of persons certified as arbitrators in Kenya. CI Arb London and Kenya branch are the oldest and leading trainer of arbitrators in Kenya. Indeed, the author believes that the arbitrators appointed by the Law Society of Kenya are more likely to be members of the Chartered Institute of Arbitrators and this also applies to other professional bodies. The author invites Chartered Institute of Arbitrators -Kenya Branch to consider adopting the IBA Guidelines on conflict of interest in international arbitration to apply to domestic arbitrators and to be applied in making appointments as well as handling complaints against arbitrators notwithstanding the jurisdiction of the court under section 35 of the Arbitration Act. The author notes that this will lead to less court intervention considering the Supreme Court decision in *Synergy Case*<sup>25</sup> where appeals were allowed or are permissible to Court of Appeal from High Court meaning the finality principle of arbitration is now elusive.

### **Conclusion**

The rules of natural justice apply to arbitrations, no person shall be a judge in own cause meaning the arbitrator must not have problematic connections to the case as explained in the article, and further justice must be seen to be done. Further in every case the arbitrator must listen and understand the case of each party and give an award which is fair and just. Independence and impartially are the two key qualities which

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<sup>23</sup> Section 14 (5) of the Arbitration Act, 1995

<sup>24</sup> Accessed at <https://ciarbkenya.org>

<sup>25</sup> Ibid 23

any arbitrator sitting as a private judge must possess. The author has made a case for local adoption of the IBA guidelines on conflict interest in international arbitration to apply in domestic arbitrations and be used as standard in appointments by all appointing institutions or equivalent standards. The author believes in upholding these ideals for less court intervention and enhanced confidence in arbitration as a mode of dispute resolution so that the society can enjoy the benefits of arbitration<sup>26</sup>.

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<sup>26</sup> The arbitration benefits were highlighted, see note 7



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## **Court Decisions**

Supreme Court of Kenya, Synergy Industrial Credit Limited v Cape Holdings Limited [2019] Eklr.

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## **Laws and Codes**

Arbitration Act, No. 4 of 1995(laws of Kenya)

The Judicial Service (Code of Conduct and Ethics) Regulations, 2020, Legal Notice No. 102

International Bar Association Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines)

**The Basis for Composite Multi-Contract Arbitration Proceedings  
Tamilnadu Road Sector Project II, Highways Department vs M/s.  
IRCON International Ltd and M/s. Sheladia Associates Inc.**

*By: Wilfred Mutubwa\**

Court: **High Court of Judicature at Madras**  
Case Number: **O.P. NO. 34 of 2020**  
Parties: **Tamilnadu Road Sector Project II, Highways Department  
(Petitioner) vs M/s. IRCON International Ltd and M/s.  
Sheladia Associates Inc (Respondents)**  
Judge: **Ms. Justice P.T. Asha**  
Date of Delivery: **19.01.2021**

The Petitioner filed a petition invoking the provisions of Section 11 (6) of the Arbitration and Conciliation Act, 1996, to appoint a suitable person as nominee Arbitrator of the Respondent as per the Arbitration clauses in the Agreements between it and the Respondents.

**Facts**

The Government of India had received financial assistance from the International Bank for Reconstruction and Development for the upgradation of roads. The assistance was for the Road Sector Project, a part of this assistance was made available to the State of Tamil Nadu. The Government of Tamil Nadu had set up the Petitioner as the implementing agency for the said project. The project involved three packages.

The 1<sup>st</sup> Respondent was entrusted with the civil construction work relating to upgradation of the roads for one of the three packages. The project was awarded in 2004 and an agreement to this effect was entered into on 04/02/2005. Prior to the aforementioned agreement, the Petitioner had engaged the services of the 2<sup>nd</sup> Respondent as the Supervision Consultant, to supervise the above project (all the three

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packages) and administer the contract for which an agreement was entered into on 10.09.2004 between the Petitioner and the 2<sup>nd</sup> Respondent. The project was completed on 30/08/2011 and the defects liability period which was 12 months from the date of completion as per the contract had also expired in the year 2012.

Much after the completion of the project, defects were noticed on the construction and the Project Director had thereafter addressed the Respondents asking them to submit a report regarding the remedial measures that could be carried out and the cost involved. In addition, the 1<sup>st</sup> Respondent was directed to rectify the defects because the defects had occurred only due to construction flaws which is directly attributable to the contractor.

The Petitioner soon thereafter issued two separate notices both dated 29.08.2019 to the Respondents, informing them about the invocation of the arbitral clause in the two contracts, while naming its arbitrator and calling upon the Respondents to nominate their arbitrator.

The 1<sup>st</sup> Respondent sent a reply dated 01.10.2019 denying their liability to rectify the defect at their cost arguing that the claim was highly time barred as the project had been completed way back in the year 2011 and the defect liability certificate had also been issued on 28.11.2012. The 2<sup>nd</sup> Respondent sent a response vide their lawyer's letter dated 07.10.2019 contending that no dispute existed in respect of the contract at the relevant point of time and therefore no liability whatsoever arises against them. Though the invocation of the Arbitral Clause was by way of two separate notices by the Petitioner filed a single petition under Section 11 (6) of the Act, seeking appointment of an arbitrator in respect of the dispute.

The Petitioner submitted that a single petition under Section 11 (6) was very much maintainable as the work of the 2<sup>nd</sup> Respondent was intertwined with the work executed by the 1<sup>st</sup> Respondent. The Petitioner, through their advocate, drew the attention of the Court to the clauses stipulating the procedure relating to dispute settlement and reference to Arbitration in both agreements with the Respondents. The Petitioner further contended that the language of the arbitral clauses of both agreements was similar. Lastly, the Petitioner submitted that the dispute review board contemplated in the agreement with the 1<sup>st</sup> Respondent is no longer available as it has been dismantled. Thus, they submitted the arbitral clause was flawed considering also that the arbitral clause did not differentiate between a technical or a non-technical dispute.

The Respondents questioned the petition on the ground that the contract entered into by the Petitioner with each of the Respondent was a separate and independent contract and that both Respondents are not parties to the contract entered into by the other with the Petitioner. They further contended that the procedure for appointing an arbitrator as contemplated in both the agreements were totally different/divergent and therefore a single petition is not maintainable. They also put forward a defense, that having issued the defect liability certificate as early as in the year 2012 the Petitioner cannot make a claim 7 years thereafter.

The 1<sup>st</sup> Respondent further stated that the contract had been discharged by performance in all respects and therefore they would contend that the demand for payment of the costs was illegal. The 2<sup>nd</sup> Respondents contended that there was no dispute in existence between the parties and therefore there was no liability on the side of the 2<sup>nd</sup> Respondent. Therefore, the Respondents sought for the dismissal of the petition.

### **Issues for Determination**

The issues the court considered for determination were, whether a composite arbitration proceeding can be initiated considering that though the Petitioner had entered into two separate agreements with the Respondents, the work to be performed by the two was intertwined? The court then considered if the answer to issue (a) is in the affirmative, then, in the light of the procedure for arbitration being different in the two agreements whether the Court can appoint a common Arbitral Tribunal to adjudicate the disputes between the Petitioner and Respondents? Lastly, the court considered the question whether the claim of the Petitioner is barred by limitation?

With regards to the first issue, the court found that a reading of the agreement with the 2<sup>nd</sup> Respondent demonstrated that right from the pre-construction stage, through the construction till the site is handed over, the contractor, namely, the 1<sup>st</sup> Respondent was to work in tandem and on the instructions of the 2<sup>nd</sup> Respondent. Thus, it was clear for the court that scope of work of both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was intrinsically intertwined.

Further, the court, set out to examine Judgments that set out the circumstances in which a composite arbitration can be ordered. Firstly, it considered the judgement in the case of *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and others (1999) 5 SCC 651*, where one of the issues that arose for consideration, was whether the arbitrator could deal with the dispute relating to the interior design agreement when

arbitration clause contained therein was different from the clause contained in the main agreement. The court therein held that the said clause encompasses the interior design agreements as well.

Moreover, the court considered the judgement in the case of *Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and others (2013) 1 SCC 641*, where it was held that the principal of composite performance has to be gathered from a reading of the main agreement as well as the principal and supplementary agreements and also the explicit intention of the parties, together with attendant circumstances. The Bench ultimately held that disputes referred to and arising from the multi-party agreements are capable of being referred to an arbitral tribunal in accordance with the agreement between the parties.

In *Duro Felguera, S.A Vs. Gangavaram Port Limited (2017) 9 SCC 729*, the Bench held that there has to be separate arbitral proceedings however it was open to the parties to agree to have the same arbitrator. Further, in *Ameet Lalchand Shah and others Vs. Rishabh Enterprises and another (2018) 15 SCC 678* the Bench, relying on the *Chloro case (supra)* referred the parties to the four agreements to arbitration even though there were different agreements involving several parties however all of them were only in respect of one commercial contract.

Lastly, the court considered the judgement in the case of *Cheran Properties Limited Vs. Kasturi and Sons Limited and others (2018) 16 SCC 413* where the Supreme Court stated that an effort should be made to find out the true essence of the business arrangement and ultimately to come to the conclusion as if there was an intent to bind someone who is not formally signatory but has assumed the obligations to be bound by the action of signatory.

The court after analyzing the aforementioned Judgements found that in order to bind parties who are signatories to different agreements to a single arbitral proceeding one has to first examine whether the scope of work of one is dependent on the other, without one the other cannot execute his work and whether parties were working towards common end. The Court observed that as seen in the abovementioned cases, the decisions would state that the Court should lean towards arbitration. Further, the court concluded that none of the judgements analyzed had divergent procedures for appointing the Arbitral Tribunal as in the matter before the court.

The Court examined the two agreements and found that the procedure of Arbitration between the two was totally different. Further, the court considered the judgement in *Walter Bau A G Vs. Municipal Corporation of Greater Mumbai and another (2015) 3 SCC 800*, where the Honourable Supreme Court held that the appointment of the arbitral tribunal should clearly be as per the agreed procedure and if there is a deviation then such an appointment was clearly invalid in law.

Ultimately, the court held that the procedure for appointing the arbitrator under the two agreements was totally in variance and cannot be reconciled. Further, the Petitioner had also not followed the procedure contemplated prior to the invocation of the arbitration clause under the respective agreements. The court noted that though two separate notices invoking the arbitration clause had been issued a single petition was filed and the remedy against each of the Respondents would be different. Therefore, the Court dismissed the petition on the ground of maintainability. However, it refrained from discussing the issue of limitation.

## **Case laws**

### **a) Indian**

Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and others (1999) 5 SCC 651.

Chloro Controls India Private Limited Vs. Severn Trent Water Purification Inc. and others (2013) 1 SCC 641.

Duro Felguera, S.A Vs. Gangavaram Port Limited (2017) 9 SCC 729.

Cheran Properties Limited Vs. Kasturi and Sons Limited and others (2018) 16 SCC 413.

Walter Bau A G Vs. Municipal Corporation of Greater Mumbai and another (2015) 3 SCC 800.

## **Statute**

### **b) Statutory Provisions**

Section 11(6) of the Arbitration and Conciliation Act, 1996

## **Champerty and Maintenance: The Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions**

*By: Peter Mwangi Muriithi\**

### **Abstract**

*The arbitration process invariably involves costs and expenses usually broadly classified into; cost of the award and cost of reference e.g. arbitrator's fees, costs of hiring the venue of arbitration, costs of stenography (where a stenographer has been contracted), legal fees of advocates employed e.t.c. These costs are borne by the parties to the arbitration process.*

*In a bid to meet these onerous costs parties to the arbitration process seek alternative ways. This sometimes involves third-party funding. This discourse seeks to critique: the legality of third-party funding in arbitration, the necessity to legislate on third-party funding in arbitration, and the pros and cons of third-party funding in arbitration, especially in common law jurisdictions.*

*Third-party funding is more often than not considered and/or juxtaposed with the common law doctrines of champerty and maintenance existing in litigation. These two doctrines are considered to define illegal agreements in litigation involving third-party funding in common law jurisdictions. Lord Justice Steyn in **Giles v Thompson**<sup>1</sup> defining the doctrines of champerty and maintenance existing in litigation opined as follows verbatim: "...in modern idiom **maintenance** is the support of litigation by a stranger without just cause. **Champerty** is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds."*

*Premised on the foregoing, inquisitively, this discourse questions whether third-party funding in arbitration in common law jurisdictions amounts to champerty and maintenance.*

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<sup>1</sup> *Giles v Thompson* [1993] UKHL 2, [1993] 3 All ER 321 (26 May 1993)



## **1.0 Introduction**

Arbitration is a private system of adjudication of disputes.<sup>2</sup> As such, parties who arbitrate are the ones who have made a deliberate choice to resolve their disputes outside of any judicial system.<sup>3</sup> The parties in an arbitration process as such seek to have the arbitrator render a final and binding decision, which is enforceable in a court.<sup>4</sup>

The arbitration process, however, invariably involves costs and expenses usually broadly classified into; cost of the award and cost of reference e.g arbitrator's fees, costs of hiring the venue of arbitration, costs of stenography (where a stenographer has been contracted), legal fees of advocates employed e.t.c.<sup>5</sup> These costs are borne by the parties to the arbitration process.

*Kariuki Muigua*, in his wisdom *verbatim*, opined as follows in regards to costs and expenses involved in arbitration:

*“...the arbitration process invariably involves costs and expenses and the questions of who bears the costs, how much is payable and when costs are to be awarded are very delicate questions. The costs of arbitration, also called costs of the award include the arbitrator's fees, costs of hiring the venue of arbitration, costs of providing transcripts of the proceedings (where these have been contracted), legal fees of advocates employed to advise on legal issues and experts' fees, disbursements and other allowances.”*<sup>6</sup>

The issue of third-party funding in arbitration especially in common law jurisdictions arises where parties to the arbitration process seek to meet these onerous costs and expenses invariably associated with the arbitration process.

Third-party funding in arbitration occurs where someone who is not involved in an arbitration process provides funds to a party to that arbitration in exchange for an

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<sup>2</sup>Khan F, *Alternative Dispute Resolution*, A paper presented to the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9<sup>th</sup> March 2007, at Nairobi.

<sup>3</sup>Margaret L. Moses, *The principles and practice of International Commercial Arbitration*, page 1 (Cambridge University Press)

<sup>4</sup>Ibid No.3

<sup>5</sup>Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya*, 3<sup>rd</sup> Edition (*Glenwood Publishers Ltd*) page 154

<sup>6</sup>Ibid No. 5

agreed return.<sup>7</sup> Typically, the funding will cover the funded party's legal fees and expenses incurred in the arbitration. Indeed, the funder may also agree to pay the other side's costs and provide security for the opponent's costs if the funded party is so ordered by the arbitral tribunal.<sup>8</sup>

## **2.0 A Critique of the Legality of Third-Party Funding in Arbitration in Common Law Jurisdictions.**

It is critical from the onset to state that this discourse focuses on third-party funding in arbitration in common law jurisdictions. However, specific references will be made to other legal systems for comparative reasons.

Arbitration has continued to grow in leaps and bounds becoming the preferred dispute resolution mechanism for many investors and entrepreneurs.<sup>9</sup> With such growth of arbitration, so have the number and range of institutions that are prepared to finance arbitration. In addition to specialized third-party funders, insurance companies, investment banks, hedge funds and law firms have entered the market.<sup>10</sup>

This raises the critical question to this discourse of whether third-party funding in arbitration is legal in common law jurisdictions. Answering this question in the negative (*i.e. third-party funding in arbitration is not legal*) will be equating third-party funding in arbitration to the common law *doctrines of champerty and maintenance that exists in litigation*.

This similarity is drawn from the definition of the doctrines of champerty and maintenance. Third-party funding is more often than not considered and/or juxtaposed with the common law doctrines of champerty and maintenance existing in litigation. *Champerty* can be referred to as the maintenance/funding of a person in a lawsuit on the foremost condition that the subject matter of the action is to be shared with the funder/maintainer, i.e., buying into someone's lawsuit as can be defined by a layman.

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<sup>7</sup><<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>> accessed on 3/2/22

<sup>8</sup><<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>> accessed on 3/2/22

<sup>9</sup>McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 211 <*JSTOR*, [www.jstor.org/stable/40705956](http://www.jstor.org/stable/40705956)> lastly accessed on 3/2/22

<sup>10</sup><<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>> accessed on 3/2/22

<sup>11</sup> In the present time, *Maintenance* is when a stranger supports the litigation without a legally sufficient reason. *Champerty* is referred to as an aggravated form of maintenance.<sup>12</sup> This definition of champerty and maintenance was re-affirmed by Lord Justice Steyn in the case of *Giles v Thompson*.<sup>13</sup>

*Doctrines of champerty and maintenance in litigation* are considered to define illegal agreements in litigation involving third-party funding in common law jurisdictions.<sup>14</sup> To establish the legal position of third-party funding in common law jurisdictions there is need to examine the procedural law (Arbitration Acts) and arbitration rules in Kenya and United Kingdom as sample representation of common law jurisdictions.

A brief analysis of; the Arbitration Act No. 4 of 1995(Kenya), UK Arbitration Act 1996 Cap 23, Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules October 2020<sup>15</sup>, the Nairobi Centre for International Arbitration (Arbitration) Rules, December 2015<sup>16</sup>, Chartered Institute of Arbitrators Arbitration Rules 1 December 2015(UK)<sup>17</sup>, and the London Court of International Arbitration, Arbitration Rules October 2020<sup>18</sup> demonstrates that all these statutes and rules all give a *wide berth* to

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<sup>11</sup> <<https://www.law.cornell.edu/wex/champerty>> accessed on 3/2/22

<sup>12</sup> <<https://blog.ipleaders.in/maintenance-champerty-torts/>>accessed on 3/2/22

<sup>13</sup> *Giles v Thompson* [1993] UKHL 2, [1993] 3 All ER 321 (26 May 1993) [Lord Justice Steyn opined "...in modern idiom **maintenance** is the support of litigation by a stranger without just cause. **Champerty** is an aggravated form of maintenance. The distinguishing feature of champerty is the support of litigation by a stranger in return for a share of the proceeds."

<sup>14</sup> <<https://legal-dictionary.thefreedictionary.com/Champerty+and+Maintenance>> accessed on 3/2/22

[Both champerty and maintenance have been illegal for two basic public policy reasons since early common law:

(1)It is considered desirable to curb excess litigation for the operation of an efficient judicial system. The reasons for this are numerous and include problems of overcrowding on court calendars, economic considerations, and the desirability of promoting a society that is not excessively litigious. Champerty and maintenance work contrary to this societal goal by stirring up litigation. (2) Champerty and maintenance bring money to an individual who was not personally harmed by the defendant. An attorney found guilty of either champerty or maintenance will be subject to the payment of any damages that may have been incurred by the parties to the law suit and to disciplinary proceedings, which can result in his or her disbarment.

<sup>15</sup><<https://ciarbkenya.org/wp-content/uploads/2021/03/chartered-institute-of-arbitrators-kenya-branch-arbitration-rules-2020.pdf> >accessed on 3/2/22

<sup>16</sup><<https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf>> accessed on 3/2/22

<sup>17</sup><<https://www.ciarb.org/media/1552/ciarb-arbitration-rules.pdf>> accessed on 3/2/22

<sup>18</sup><[https://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2020.aspx](https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx)> accessed on 3/2/22

the issue of third-party funding in Arbitration. These aforementioned arbitration statutes and arbitration rules of reputable arbitration centres in Kenya and the United Kingdom as examples of common law jurisdictions have not in any way addressed the issue of third-party funding in arbitration. Consequently, the certain implication is that third-party funding in arbitration is not outlawed and/or illegal in common law jurisdictions.

However, to assert this unequivocally one is persuaded to analyze whether third-party funding in arbitration is addressed by some of the international arbitration conventions, model law, and international arbitration rules that most common law jurisdictions subscribe to. A brief analysis of the UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, UNCITRAL Arbitration Rules 2013, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,<sup>19</sup> and ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules)<sup>20</sup> similarly demonstrates that they all give a *wide berth* to the issue of third-party funding in Arbitration. They have not in any way addressed the issue of third-party funding in arbitration.

The aforementioned analysis clearly manifests that third-party funding in arbitration is not outlawed and/or illegal in common law jurisdictions. It is however, peculiarly notable that some civil law jurisdictions have addressed the issue of third-party funding. In this discourse for comparative analysis on third-party funding in arbitration this paper shall focus on France and China as examples of civil law jurisdictions.

In this regard, France as a civil law jurisdiction adopts *France Arbitration Law as codified in the Code Civil (Code de Procédure Civile)* as the procedural law.<sup>21</sup> A brief analysis of *France Arbitration Law as codified under articles 2059, 2060, and 2061 of the Code Civil (Code de Procédure Civile)* shows that it does not address the issue of third-party funding.

However, the International Chamber of Commerce (ICC) a renowned commerce institute, that offers arbitration services and is located in Paris, France has rules that

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<sup>19</sup> ICSID website < <https://icsid.worldbank.org/en/pages/icsiddocs/overview.aspx> > lastly accessed on 3/2/22

<sup>20</sup> Ibid No. 19 page 99

<sup>21</sup> <<https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/france>> accessed on 3/2/22

briefly address the issue of third-party funding.<sup>22</sup> The ICC Rules of Arbitration came into force on 1<sup>st</sup> January 2021, under Article 11(7) provides the following verbatim in so far as third-party funding is concerned<sup>23</sup>:

*“In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.”*

Article 11(7) of the ICC Rules of Arbitration (2021) creates an onerous duty of disclosure for any party involved in an arbitration process before ICC to disclose any third-party funding agreement and/or arrangement. China as a civil law jurisdiction has enacted the *Arbitration Law of the People's Republic of China* as the procedural law. A brief analysis of the *Arbitration Law of the People's Republic of China* shows that it does not address the issue of third-party funding.<sup>24</sup> Indeed, similar to France it is the Arbitration rules of an institution in China that address third-party funding.

Beijing Arbitration Commission / Beijing International Arbitration Center a renowned arbitration institute in Beijing China, that offers arbitration services has rules that address the issue of third-party funding.<sup>25</sup> The Beijing Arbitration Commission/ Beijing International Arbitration Center Rules for International Investment Arbitration which became effective on October 1, 2019, under Article 39 provides for third-party funding. *Article 39* of the Beijing Arbitration Commission/ Beijing International Arbitration Center Rules for International Investment Arbitration provides the following verbatim in so far as third-party funding is concerned<sup>26</sup>:

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<sup>22</sup><<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>> accessed on 3/2/22

<sup>23</sup><<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/>> accessed on 3/2/22

<sup>24</sup><<https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn138en.pdf?crazycache=1>> accessed on 3/2/22

<sup>25</sup><<https://www.acerislaw.com/beijing-arbitration-commission-beijing-international-arbitration-center/#:~:text=The%20Beijing%20Arbitration%20Commission%2C%20also,and%20other%20dispute%20resolution%20mechanisms.>> accessed on 3/2/22

<sup>26</sup><<https://iaa-network.com/wp-content/uploads/2021/07/Beijing-Arbitration-Commission-Arbitration-Rules.pdf>> accessed on 3/2/22

“... (1) “Third-party funding” is the provision of funds or other equivalent support for the conduct of proceedings by a person or entity that is not a Party to the Dispute (the “third-party funder”) to a Party to the proceedings, an affiliate of that Party or a representative of that Party.

(2) Where a Party has a third-party funding arrangement, the Party shall file a written notice to the other Party, the Arbitral Tribunal and the BAC, disclosing in sufficient detail: (a) the existence of the third-party funding; (b) the identity of the third-party funder and its actual controller (if applicable); (c) where an arbitrator has been nominated or appointed, the relationship, if any, between the third-party funder and its actual controller (if applicable) and the arbitrator; and (d) whether or not the third-party funder has committed to cover adverse costs liability.

(3) The notice referred to in paragraph 2 shall be filed by the Claimant or the Respondent at the same time as, or within 7 days of, the submission of the Notice of Arbitration or the Response to the Notice of Arbitration respectively, or within 7 days of the conclusion of a third-party funding arrangement if the arrangement is concluded after the submission.

(4.) Each Party shall disclose to the other Party, the Arbitral Tribunal and the BAC any change to the information referred to in paragraph 2 occurring after the initial disclosure, including termination of the funding arrangement, within 7 days of the change.

(5.) When making a decision on the costs of the arbitration and other costs, the Arbitral Tribunal may take into account the existence of any third-party funding arrangement, and whether the requirements set forth in the preceding paragraphs 2, 3 and 4 have been complied with by the Party accepting the funding. Where a third-party funder has not committed to undertake adverse costs liability, the Arbitral Tribunal may order the Party accepting the funding by such funder to provide appropriate security for costs where necessary”

Article 39, of the Beijing Arbitration Commission/ Beijing International Arbitration Center Rules for International Investment Arbitration, creates an *onerous continuous duty of disclosure* for any party involved in an arbitration process before the institute

to disclose any third-party funding agreement and/or arrangement both to the institute and the parties involved in the arbitration process.<sup>27</sup>

In the end, it is clear that under various rules in institutes in civil law jurisdictions like France and China third-party funding is addressed, unlike common law jurisdictions where the issue of third-party funding is not addressed in 'toto' and is given a wide berth.

Further, it is also apparent that third-party funding unlike champerty and maintenance is not illegal. The only common requirement accompanying third-party funding is disclosure as clearly manifested by *Article 39* of the Beijing Arbitration Commission/Beijing International Arbitration Center Rules for International Investment Arbitration.<sup>28</sup>

The allure of third-party funding in arbitration can be traced from the following reasons:<sup>29</sup>

- a) Necessity: Arbitration can be expensive. If a claimant does not have the means to pursue a meritorious claim, funding may well be its only option. This is closely connected to access to justice. The proponents of third-party funding in arbitration opine that; third-party funding a party enhances access to justice.<sup>30</sup> This is because a party who would normally be inhibited from

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<sup>27</sup><<https://iaa-network.com/wp-content/uploads/2021/07/Beijing-Arbitration-Commission-Arbitration-Rules.pdf>> accessed on 3/2/22

<sup>28</sup><<https://iaa-network.com/wp-content/uploads/2021/07/Beijing-Arbitration-Commission-Arbitration-Rules.pdf>> accessed on 3/2/22

<sup>29</sup><<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>> accessed on 3/2/22

<sup>30</sup>M.T. Ladan, Access to justice as a human right under the ECOWAS community law 'A paper presented at: The Commonwealth Regional Conference on the theme: - The 21<sup>st</sup> Century Lawyer: Present Challenges and Future Skills, Abuja, Nigeria, 8 to 11 April, 2010.

[*Access to justice* as a concept refers to a situation where people in need of help, find effective solutions available from justice systems that are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.]

Available at;

<[http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAF\\_OAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAF_OAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-)>lastly accessed on 3/02/22



accessing justice through arbitration due to costs and expenses involved in the arbitration process, third-party funding ensures access to justice.

b) Risk management: Claimants with the funds to arbitrate may want to lay off some of the risk associated with costly arbitration, and the inherent unpredictability of costs, and be prepared to give up a proportion of any recoveries to do so.<sup>31</sup> It also enables a company to invest that money elsewhere. In addition, the funded party is relieved of costs pressures and cash-flow issues associated with the legal costs of the arbitration.

c) Validation: Funders are only interested in good claims. They will therefore conduct extensive due diligence and carry out their own analysis of the merits before agreeing to provide funding.<sup>32</sup> This objective analysis may assist the claimant to shape its case strategy, and may also encourage early settlement once the other party is made aware that the claim has the backing of a funder.

However, there is criticism that is levelled towards third-party funding in arbitration. This includes:

a) Third-Party Funding is considered to be expensive: A successful claimant will generally have to pay a significant proportion of damages recovered to the funder.<sup>33</sup> While there is the potential for successful claimants to recover these funding costs from the respondent, the decision on recoverability will always be fact-dependent. Expense, therefore, remains a factor to be considered.

b) Negating Party Autonomy: Although funders are generally prohibited from taking undue control or influence in an arbitration, there may be some loss of autonomy on the part of the funded party (in particular when considering settlement) as funders may reserve the right of approval of the settlement.<sup>34</sup>

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<sup>31</sup><https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/> accessed on 3/2/22

<sup>32</sup>Ibid No. 31

<sup>33</sup><https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/> accessed on 3/2/22

<sup>34</sup>Ibid No.33



c) Requirement for Disclosure: Increasingly, funded parties are being required (whether by order of the tribunal or the applicable institutional rules) to disclose the fact of funding and the identity of the funder (but not necessarily the funding terms). This in turn may prompt the respondent to make an application for security for costs.<sup>35</sup>

d) Costs: Substantial costs can be incurred when packaging the case for presentation to a funder. These will have been wasted if the application for funding is unsuccessful. Even if successful, funders are not usually liable for any costs incurred before the funding arrangement is put into place, including the costs of packaging and the negotiation of the funding arrangements.<sup>36</sup>

It is clear that with these pros and cons of third-party funding in arbitration, parties in an arbitration process are consistently in a delicate balancing act, in deciding whether or not to enter into a third-party funding agreement. Indeed, at this decision-making juncture for parties in arbitration process, the seminal feature of arbitration namely party autonomy is manifested.<sup>37</sup>

### **3.0 Way Forward for Common Law Jurisdictions on Third-Party Funding in Arbitration**

Third-party funding has not been legislated in common law jurisdictions. This by implication makes third-party funding legal in common law jurisdictions. However, to promote effective arbitration in common law jurisdictions time is ripe to enact rules and/or amend statutes to provide for third-party funding.

Common law jurisdictions can borrow heavily from civil law jurisdictions. It is also clear that “disclosure” is the most apparent and obvious ingredient in constituting the rules and/or legislation on third-party funding in common law jurisdictions.

### **4.0 Conclusion**

Unlike in litigation where the *doctrines of champerty and maintenance* exist in common law jurisdictions to prevent funding by a party who is not a party in the dispute

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<sup>35</sup><<https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/>> accessed on 3/2/22

<sup>36</sup>Ibid No.35

<sup>37</sup>Kariuki Muigua, *Settling Disputes through Arbitration in Kenya*, 3<sup>rd</sup> Edition (Glenwood Publishers Ltd), page 3

before the court, in arbitration third-party funding is legal. However, to avoid abuse and misuse of third-party funding in arbitration time is ripe to enact rules and/or amend statutes to provide for third-party funding common law jurisdictions.

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## **Review of the Sinohydro Corporation Limited Case: Clarifying the Principles on the Encashment of Performance Guarantees**

By: **Ibrahim Kitoo\***

### **Abstract**

*This paper seeks to in detail define a performance guarantee and explains how it differs from other forms of financing support mechanisms like the Letter of Credit, Indemnity and others. It examines the role of performance guarantees in commerce. The paper also revisits the doctrine of privity of contract in the context of performance guarantees. The paper seeks to establish that a guarantor is not privy to the underlying contract and as such cannot rely on the underlying contract against which a performance guarantee is issued when a call for payment is made under a guarantee as this will be in violation of the principle of autonomy in contracting and an affront on the principle of privity of contracts. The paper concludes that the only exception is when there is clear fraud and for which the bank has notice of. The paper also seeks to examine the International Chamber of Commerce (ICC) Uniform Rules for Demand Guarantees 2010<sup>1</sup> and how they provide for the requirements of making a demand under the performance guarantee and how they are generally applicable to performance guarantees that expressly submit to the Rules. The paper will further examine how the court gave clarity on the law, principles and practice on encashment of performance guarantees in the Sinohydro Corporation case and reiterated the position that a bank must always honour a call for payment under the guarantee unless there is a clear case of fraud.*

### **1.0 Introduction – Defining Performance Guarantee/Bond**

Performance bond is defined as a bond given by a surety to ensure the timely performance of a contract.<sup>2</sup> The term ‘performance guarantee’ is always used

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<sup>1</sup> ICC Publication No. 758.

<sup>2</sup> Brian Garner, *Black’s Law Dictionary*, (8<sup>th</sup> edn)

invariably with the words ‘performance bond’ and ‘performance security.’<sup>3</sup> ‘Demand guarantee’ is also used in some instances. A Performance Guarantee is a tripartite arrangement between the bank (issuer), developer (employer) and the contractor if it is a construction project. In an international sale it will be between the seller, buyer and the bank. A performance guarantee can as well be issued by an authorised financial institution apart from a bank.<sup>4</sup> Performance guarantees are used as instruments of financing in international trade, the construction industry and public procurement.

The Public Procurement and Asset Disposal Act, 2015 read with the Public Procurement and Asset Disposal Regulations, 2020 make reference to ‘performance security.’ The Kenya Public Procurement and Asset Disposal Regulations, 2020 gives a definition of the performance security as any security provided by a contractor/supplier solely for the protection of the procuring entity, against non-performance for the supply of goods, works or services.<sup>5</sup>

## **1.1 Distinguishing Performance Guarantee/Bond from other forms of financing legal instruments**

### **1.1.1 Performance Guarantee/Bond – Versus - Letter of Credit**

**Black’s Law Dictionary** defines a performance bond as *a bond given by a surety to ensure a timely performance of a contract* while a Letter of Credit is defined as *‘an instrument under which the issuer (bank), at a customer’s request, agrees to honour a draft or other demand for payment made by a third party (beneficiary), as long as the draft or demand complies with specified conditions, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied.’*<sup>6</sup>

The above definitions connote similarity of the two instruments to some extent. They are instruments of financing in international trade and both make assurance of

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<sup>3</sup> Hazron Maira, ‘Performance Bonds Disputes in Construction. Can all Disputes be Resolved using the Arbitration Clause in the Contract?’, (2019) 7 Alternative Dispute Resolution No. 1, 106

<sup>4</sup> Geraldine Andrews & Richmond Millet, *Law of Guarantees*, (6<sup>th</sup> edn, Sweet & Maxwell, South Asian Edition). Reference is also given to Section 143 of the Public Procurement & Asset Disposal Act, 2015

<sup>5</sup> Section 2 of the Public Procurement & Asset Disposal Act, 2015, *Ibid*.

<sup>6</sup> Bryan Garner, *Black’s Law Dictionary*, (8<sup>th</sup> edn)

payments of money to a named beneficiary.<sup>7</sup> They are both tripartite and three separate agreements are entered into to give effect to both agreements. Lord Denning in *Edward Owen Engineering Ltd – Versus - Barclays Bank International Ltd*<sup>8</sup> underscored the principle of the bank's independent obligations under the Letter of Credit because the instrument is autonomous to the primary contract. He went ahead to conclude that a performance guarantee stands on a similar footing to a Letter of Credit.<sup>9</sup>

For both instruments, the bank's obligation to pay is not predicated on the underlying contract. Payment must be honoured once it is called for. Fraud is the only exception. It was said of irrevocable letters of credit and performance bonds in *Bolivinter Oil SA – Versus - Chase Manhattan NA*<sup>10</sup> that; '*the unique value of such a letter, bond or guarantee is that the beneficiary can be completely satisfied that whatever disputes may thereafter arise between him and the bank's customer in relation to the performance or indeed existence of the underlying contract, the bank is personally undertaking to pay him provided that the specified conditions are met. In requesting his bank to issue such a letter, bond or guarantee, the customer is seeking to take advantage of this unique characteristic.*'

A notable difference is that performance guarantees are more common in the construction industry while Letters of Credit are commonly used in cross-border international trade. Furthermore, Performance guarantees are governed by the ICC Uniform Rules for Demand Guarantees (URDG) while the Letters of Credits are governed by the Uniform Customs and Practice for Documentary Credits (UCP 600). UCP 600 enjoys a much more widespread acceptance than the Rules for demand guarantees.<sup>11</sup>

### **1.1.2 Performance Guarantee – Versus - Surety**

A surety is defined in Black's Law Dictionary as a '*person who is primarily liable for the payment of another's debt or the performance of another's obligation\**.' The distinguishing factor from an insurance arrangement is that a surety is not compensated for assuming responsibility over the debt of another person. Suretyship may be conditional or unconditional. The only commonality between a surety and a guarantor

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<sup>7</sup> Bryan Garner, *Black's Law Dictionary*, (8<sup>th</sup> edn) Ibid

<sup>8</sup> (1978) *Q.B.* 159

<sup>9</sup> (1978) *Q.B.* 159 Ibid

<sup>10</sup> (1984) 1 *W.L.R.* 392

<sup>11</sup> Geraldine Andrews & Richard Millett, '*Law of Guarantees*' (6<sup>th</sup> edn, Sweet & Maxwell South China Edition)

is the assumption of responsibility over the obligations of another person. The major difference is that a surety is bound on the same instrument with its principal and is intimately involved from the start to the end of the principal's contractual obligations.<sup>12</sup> A guarantor on the other hand has to enter into a separate agreement (performance agreement) with the beneficiary which is analogous to the underlying contract. The guarantor will further enter into a separate agreement with the principal where the bank agrees to provide the bond and the principal undertakes to indemnify the guarantor once it has made payment called for under the bond.<sup>13</sup>

### **1.1.3 Performance Guarantee – Versus - Cash Deposit**

Black's Law Dictionary defines a cash deposit/security deposit as '*money placed with a person as earnest money or security for the performance of a contract and the money will be forfeited if the depositor fails to perform.*' A cash deposit gives assurance to a potential buyer of a good/service that the seller will honour his part of the contract. However, it must not be lost that a number of firms have to deal with cash flow problems and making cash deposits will further impose adverse financial implications on them. Hence an on-demand performance guarantee will come in handy for such firms.<sup>14</sup>

### **1.1.5 Performance Guarantee – Versus - Indemnity**

Indemnity is an obligation to remedy loss incurred by another. An indemnity bond is defined as a '*written promise to pay money or do some act if certain circumstances occur or a time lapse.*'<sup>15</sup> The indemnitor keeps the indemnitee harmless against damage from contracting with a third party. An indemnity contract will be signed by which the promissor agrees to reimburse a promisee for loss notwithstanding the liability of a third person. Whereas a guarantee is tripartite in nature i.e., made between the guarantor (issuer), principal and the beneficiary the indemnity is much simpler in that it only involves two parties in this case an indemnitee and an indemnitor.

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<sup>12</sup> Bryan Garner, *Black's Law Dictionary*, (8<sup>th</sup> edn)

<sup>13</sup> Hazron Maira, 'Performance Bonds Disputes in Construction. Can all Disputes be Resolved using the Arbitration Clause in the Contract?', (2019) 7 Alternative Dispute Resolution No. 1, 107 – 108

<sup>14</sup> Jason Chuah, '*Law of International Trade: Cross-Border Commercial Transactions*' (5<sup>th</sup> edn, Sweet & Maxwell)

<sup>15</sup> Bryan Garner, *Black's Law Dictionary*, (8<sup>th</sup> edn)



### **1.1.6 Performance Guarantee – Versus – Bid/Tender Security**

A bid security is an amount of money that may be calculated as a percentage of the budget estimate of a procurement requirement or a percentage of a bidder's bid price.<sup>16</sup> It is used by the client as protection against bidders withdrawing their bids prior to the end of their bid validity period, or for refusing to sign the contract. The bid security is intended to deter bidders from withdrawing their bids because they would otherwise forfeit the bid security amount to the client. It gives the client some assurance that the selected bidder will sign the contract or otherwise forfeit their bid security.<sup>17</sup>

The Public Procurement and Asset Disposal Act, 2015 defines “tender security” as a guarantee required from tenderers by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation in the tender process and includes such arrangements as bank or insurance guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange tender securing declaration, or other guarantees from institutions as may be prescribed.<sup>18</sup> The form of tender security is required to be stated as an absolute value and of an amount of not more than two percent of the tender as valued by the procuring entity.<sup>19</sup> Under the Act, a procuring entity may immediately release any tender security in the event that the procurement proceedings are terminated; the procuring entity determines that none of the submitted tenders is responsive; when a contract for the procurement is entered into; or when a bidder declines to extend the tender validity.<sup>20</sup>

A bid security may be required of firms that submit offers in response to an invitation for bids. It is commonly used when procuring goods, works, and non-consultant services. Tender securities are not required in procurements reserved for small and micro-enterprises owned by women, youth, people with disabilities and other disadvantaged groups but in this case they are required to fill and sign a prescribed Tender Securing Declaration Form.<sup>21</sup>

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<sup>16</sup> Bryan Garner, *Black's Law Dictionary*, (8<sup>th</sup> edn)

<sup>17</sup> Please also refer to Section 61(3) of the Public Procurement & Asset Disposal Act, 2015

<sup>18</sup> Section 2 of the Public Procurement & Asset Disposal Act, 2015, *Ibid.*

<sup>19</sup> Section 61(2) of the Public Procurement & Asset Disposal Act, 2015, *Ibid.*

<sup>20</sup> Reference is given to Section 61(4) of the Public Procurement & Asset Disposal Act, 2015.

<sup>21</sup> Reference is given to Section 61(5) of the Public Procurement & Asset Disposal Act, 2015.

### **1.1.7 Performance Guarantee – Versus – Payment Guarantee**

A payment guarantee provides the beneficiary with financial security should the applicant fail to make payment for the goods or services supplied.<sup>22</sup> Payment guarantees mitigate credit or country risk when selling on an open account basis. They're often used to cover the non-payment of debts arising under a transaction or over a period of time.

A payment guarantee sometimes offers a type of collateral in exchange for the promise of payment at a future time, effectively minimising the risk for the company conducting the sale. It usually takes the form of an agreement or contract, and there are a variety of different types. Such guarantees generally run up to the final scheduled date of payment.

Payment guarantees are financial commitments that require the debtor to make a repayment based on the terms outlined in the original debt agreement. Sometimes, the payment guarantee is backed with some form of collateral, such as property.

### **1.1.8 Performance Guarantee – Versus – Advance Payment Guarantee**

In construction and engineering projects an employer will often make advance payments to a contractor to enable it to meet significant start up or procurement costs. As a condition of advance payment, the employer will typically require a guarantee (also referred to as a bond), provided by a bank or other financial institution, to secure the payment against any default by the contractor. The value of the guarantee will usually be expressed to amortise as the contractor performs work and earns money under the contract, because the amount of the advance payment to be secured is reduced.

In the context of the Public Procurement and Asset Disposal Act, 2015, no works, goods or services contract should be paid for before they are executed or delivered and accepted by the accounting officer of a procuring entity or an officer authorised by the accounting officer of a public entity except where so specified in the tender documents and the contract agreement and the same should not be paid before the contract is signed.<sup>23</sup> The Act provides for advance payment under exceptional circumstances provided that the same shall not exceed twenty percent (20%) of the tender price and

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<sup>22</sup> Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions* (5<sup>th</sup> edn, Sweet & Maxwell)

<sup>23</sup> Reference is given to Section 146 of the Public Procurement & Asset Disposal Act, 2015.

that the same is paid only upon submission of an advance payment security from a reputable bank or any authorised financial institution issued by a corresponding bank in Kenya recognised by the Central Bank of Kenya, in case the successful tenderer is a foreigner.<sup>24</sup> The Act restricts the utilisation of the advance payment to only activities related to the tender and provides that if the successful tenderer uses the entire advance or part of it in other unrelated activities to the contract then the same shall be immediately considered as a debt which shall be paid by seizing the entire security or part of it.<sup>25</sup>

## **2.0 Role of Performance Guarantees in Commerce & Application under the Kenya Public Procurement & Asset Disposal Act, 2015 & Regulations, 2020**

### **2.1 The role of Performance Guarantees in Commerce**

The essence of performance guarantees/bonds in commerce cannot be gainsaid. They provide a safety mechanism against poor, inadequate or delayed performance or total non-performance. The court in the case of *Sinohydro Corporation Limited – Versus - GC Retail Limited & Another*<sup>26</sup> cited the *Harbottle case*<sup>27</sup> where the learned judge held that ‘*it is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce...*’ Performance bonds are widely considered as being a ‘*part of the essential machinery of international commerce and to delay payment under such documents strikes not only at the proper working of international commerce but also at the reputation and standing of the international banking community.*’<sup>28</sup>

It must be noted that performance guarantees serve to indemnify and not to enrich. Payment made under a guarantee should only cover the actual loss suffered. Any ‘unjust’ enrichment will be recovered. The use of performance bonds is on the rise in commerce predominantly where government departments and corporations are party to the transaction. The usage is more prevalent in the construction industry and international sales.<sup>29</sup> In the case of *Cargill International SA, Geneva Branch Cargill*

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<sup>24</sup> Reference is given to Section 147 of the Public Procurement & Asset Disposal Act, 2015.

<sup>25</sup> Reference is given to Section 148 of the Public Procurement & Asset Disposal Act, 2015.

<sup>26</sup> (2016) eKLR at paragraph 73

<sup>27</sup> (1978) 1 Q.B

<sup>28</sup> Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, (5<sup>th</sup> edn, Sweet & Maxwell)

<sup>29</sup> Geraldine Andrews & Richard Millet, *Law of Guarantees*, (6<sup>th</sup> edn Sweet & Maxwell South Asia Edition)

*(HK) Ltd – Versus - Bangladesh Sugar & Food Industries Corporation*<sup>30</sup> the court stated that the performance bond serves the following commercial purposes:-

- i. Assures the employer that the contractor will do his part of the contract;
- ii. There is ready money to compensate the employer when the contractor does not meet his obligations;
- iii. Employer has an ‘unquestionably solvent’ source to claim for compensation arising out of contractor’s breach.

The foregoing underscores the crucial role of performance bonds in the construction industry. Indeed, where a contractor defaults the employer simply operates the bond and need not go through a tedious arbitral or litigation process to get damages.

## **2.2 The Application of Performance Guarantees under the Kenya Public Procurement & Asset Disposal Act, 2015 & Regulations, 2020**

Section 142 (1) of the Act provides that ‘*subject to the regulations, a successful tenderer shall submit a performance security equivalent to not more than ten percent (10%) of the contract amount before signing the contract.*’ Where the contractual obligation is not discharged satisfactorily the security shall unconditionally and fully be seized by the procuring entity as compensation. This shall not extinguish other penalties under the Act.<sup>31</sup> The requirement to furnish performance security does not apply to tenders related to consultant services, works and supplies where the estimated value does not exceed a threshold established by the procurement regulations, or works and supplies reserved for women, youth, persons with disabilities and other disadvantaged groups, and for these categories, the performance securities that may be waived or fixed at not more than one percent (1%) of the contract price.<sup>32</sup> The performance security may not generate interest and it shall be determined in accordance with the form provided for in the tendering document and may be paid in form of a bank guarantee, issued by an authorised financial institution or an irrevocable letter of credit.<sup>33</sup>

Further, the Act in Section 144 provides that the successful bidder shall provide other forms of performance security in the tender forms if necessary. It further provides that

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<sup>30</sup> (1997) EWCA Civ 2757

<sup>31</sup> Section 142(2), Public Procurement and Asset Disposal Act No. 33 of 2015

<sup>32</sup> Section 142(3), Public Procurement and Asset Disposal Act No. 33 of 2015.

<sup>33</sup> Section 143, Public Procurement and Asset Disposal Act No. 33 of 2015.

where the procuring entity calls for payment, the issuer shall pay the whole of it the delay of which shall attract a penalty of one percent (1%) for every day of payment delay after ten (10) working days from the receipt of the claim provided that this requirement is disclosed in the performance security and if it is necessary to take the matter to courts, and the court rules in favour of the procuring entity, this interest shall continue to accrue up to the time the court's decision is executed. For a foreign contractor, Section 144 (4) provides that the '*guarantee shall be issued by a local bank or authorized financial institution issued by a corresponding bank in Kenya recognized by the Central Bank of Kenya.*'

When bids are invited for the supply of goods or services for a public entity, Regulation 106 (7) calls for the inclusivity of the security in the bid documents. The entity making the procurement is required to prescribe the value which should be in tandem with the order that has been made. Performance bonds are now required of potential bidders that seek to do business with the government. This must be cited as good practice as the procuring entity is assured of recourse in case of delays or second-rate performance under the contract. This ensures proper utilization and sound management of taxpayers' money as the risk of abandoned projects are done away with.

The foregoing is further buttressed by Regulation 133 (1) (b) which operationalizes Section 140 (d) of the Act. The performance security shall cover the procurer's damages occasioned by delay or unsatisfactory performance. The contract will be cancelled if the damages outweigh the security and liability will attach for the contractor. To give concrete expression to Section 142(3), Regulation 135 (1) sets that for contracts valued above Kenya shillings five million (Kshs. 5,000,000/-), performance security must be furnished. It must be obvious that contracts for the mentioned value carry with them bigger risks in the event of breach. The centrality of a performance guarantees in insulating such bigger magnitude risks cannot thus be downplayed.

Under Regulation 135 (2), a performance security is not required where the contracted consultant is covered by a professional indemnity cover. For instance, most parastatals or state corporations always invite tenders from prospective law firms for the provision of legal services for each financial year. Successful bidders are placed in the entity's panel of lawyers and will be assigned briefs from time to time. When placing bids, firms are required to provide their professional indemnity covers which will act in

place of the performance guarantees. Law firms that do not supply the professional indemnity cannot be selected to be part of the panel of lawyers.

The government is working hard to put in place affirmative action in all sectors to provide competitive advantage to the historically marginalized special interest groups. As such, Regulation 135 (2) states that where a bid targets special interest groups i.e., persons living with disability (PWDs) and the youth, the security to be furnished shall not exceed one percent (1%) of the contractual sum.

### **3.0 Revisiting the Doctrine of Privity of Contracts in the context of Performance Guarantees**

*Black's Law Dictionary* defines privity as ‘*the connection or relationship between two parties, each having a legally recognized interest in the same subject matter.*’ Privity of contract is recognized as the affiliation between contracting parties and which will allow them to sue each other to enforce their rights and a third party cannot come in to enforce the contract.<sup>34</sup>

The court in *Savings & Loan (K) Ltd – Versus - Kanyenje Karangaita Gakombe & Another*<sup>35</sup> addressed the issue of privity, whether a stranger could enforce the contract and whether a suit could be struck out for not disclosing a cause of action or being an abuse of the court process as the plaintiff was not privity to the contract. The court held as follows; ‘*in its classical rendering, the doctrine of the privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.*’

In *Agricultural Finance Corporation – Versus - Lengetia Limited*<sup>36</sup> the learned judge quoted Halsbury’s Laws of England, 3<sup>rd</sup> Edition, Volume 8, Paragraph 110 and stated that generally a contract only touches the contracting parties and a stranger cannot thus purport to enforce it. Likewise, a stranger cannot be sued under the contract even if it was made for his advantage. The court held that ‘*...the fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue under the contract.*’

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<sup>34</sup> Brian Garner, *Black's Law Dictionary*, (8<sup>th</sup> edn)

<sup>35</sup> (2015) eKLR

<sup>36</sup> (1985) KLR 765

In the context of a performance guarantee, a bank that issues the performance bond is not privy to the underlying contract. The guarantor (bank/financial institution) cannot therefore examine the underlying contract when a call for payment is made under the bond as this would be at cross-purpose with the principle of autonomy of contract. Though the performance guarantee will make reference to the underlying contract for it is the reason why it was furnished in the first place, they remain analogous for the payment under a performance bond is not predicated on the situations/disputes that may obtain under the underlying contract.<sup>37</sup>

A performance guarantee is made to offer the same level of protection in trade like cash deposit by making it payable on first demand without requiring proof or by making it unconditional. This in banking terms is referred to as ‘payable on demand without contestation.’<sup>38</sup>. The ‘pay first, argue later’ maxim applies for demand guarantees. It is contrary to the presumed intention of the parties if a bank is allowed to refuse to pay.<sup>39</sup>

The principle of autonomy is sacrosanct. The courts will not be used as conduits to derogate from the autonomy principle that is held in very high regard by the law on demand guarantees.<sup>40</sup> Indeed the URDG 758 in Article 5 emphasizes on the independence of the guarantee from the underlying relationship.

### **3.1 The International Chamber of Commerce (ICC) Uniform Rules for Demand Guarantees 2010 (ICC Publication No. 758)**

The ICC Publication No. 758 was published in 1<sup>st</sup> July 2010. The rules have been made by the International Chamber of Commerce (ICC) to achieve global commercial homogeneity in the practice and usage of demand guarantees. The harmonization will see to it that we have more clarity, precision and comprehensiveness though with some few drawbacks, the 2010 publication has almost achieved just that.

To begin with, the Rules **in Article 1** provide that that they shall only apply to instruments that have expressly stated that they are subject to them. Where a demand guarantee submits to the URDG, the counter-guarantee is automatically subject to the

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<sup>37</sup> Edward Owen Engineering Ltd vs Barclays Bank International Ltd (1978) 1 ALLER 976

<sup>38</sup> Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, (5<sup>th</sup> edn, Sweet & Maxwell)

<sup>39</sup> TTI Team Telecom International Ltd vs Hutchison 3G UK Ltd (Jan 23,2003)

<sup>40</sup> Jason Chuah, *Law of International Trade: Cross-Border Commercial Transactions*, (5<sup>th</sup> edn, Sweet & Maxwell)



rules unless it states otherwise. However, a guarantee is not subjected to the rules because a counter-guarantee is. For a guarantee made after 1<sup>st</sup> July 2010 that does not particularise the version of the rules that it is subjecting itself to, it shall be presumed that it is subject to the 2010 Publication.

On the effectiveness of the guarantee, it is deemed issued once it is no longer in the guarantor's control. The instrument is irrevocable on issue even if it is not expressly so stated.<sup>41</sup> The Rules articulately address the independence of the guarantee. Article 5 states that the guarantee by its characteristic is self-governing. The mere reference to the underlying relationship for identification purposes does not compromise the independence of the guarantee. Similarly, a counter-guarantee is not tied to the guarantee and the underlying relationship. The foregoing is buttressed by Article 6 which states that guarantors only deal with documents and not the goods and services referred to in those documents.

Clarity and precision are required of the guarantees but they must not be excessively detailed. A guarantee must pinpoint the guarantor, the applicant and the beneficiary. A guarantee reference number and identification of the underlying relationship are mandatory. The guarantee must also state its expiry date, the applicable language, the currency and the conditions for calling for payment.<sup>42</sup>

As for the governing law and jurisdiction, Articles 34 and 35 provide that it shall be that of the location of the guarantor's branch or the office that issued the guarantee unless otherwise stipulated in the guarantee. It has been argued that the potential drawback for this position is the possibility of conflicting judgments proclaimed by the various courts.<sup>43</sup> Most performance guarantees relate to underlying contracts between parties in different dominions. The multiplicity of adjudication in different jurisdictions spells inconsistency of precedent. This often than not is likely to undermine the uniformity that the UDRG seeks to achieve.

Under Article 15 a claim for payment is to be supported by the documents enumerated under the demand guarantee and a beneficiary's statement laying down how the account party has breached the main contract. Parties can opt to eliminate the need for

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<sup>41</sup> Article 4 of the URDG 758

<sup>42</sup> Article 8 of the URDG 758

<sup>43</sup> Geraldine Andrews & Richard Millet, *Law of Guarantees*, (6<sup>th</sup> edn Sweet & Maxwell South Asia Edition)



the accompanying statement under the guarantee/counter-guarantee. The statement highlighting the breach/breaches may be included in the demand or can be in separate accompanying document.

The URDG limits the liability of the guarantor under the guarantee to a great extent. Article 12 expressly states that the guarantor is only limited to the beneficiary in line with the terms and conditions of the guarantee as a matter of priority and secondly in accordance with the URDG in so far as they are not inconsistent with the terms and conditions in the guarantee. This cements the position that the applicability of the URDG is not mandatory. Parties to a guarantee can only submit to it at their own discretion.

### 3.1.1 Presentation of the guarantee

This is done at the place where the guarantee was issued or such other place as the document may specify and it must be done before the expiry date as stipulated under Article 14. Further, the presentation should indicate the guarantee under which it is made. This is done by stating the guarantor's reference number for the guarantee.

**Article 21** states that the currency of payment shall be the one specified in the guarantee. Where it is not able to pay under the particular currency due to circumstances beyond the guarantor's control or it is contrary to the law to pay using that specific currency the guarantor shall pay using the coinage of the place of making the payment in line with the prevailing exchange rate.

The URDG addresses *force majeure* in detail. These are aspects out of reach of the guarantor's/counter guarantor's control. They include wars, acts of terror, civil insurrection etc. when a guarantee expires at such time when its presentation for payment is impeded by a *force majeure* the guarantee shall be extended for thirty (30) days. This places an obligation on the guarantor to promptly notify the principal of this development.<sup>44</sup> Further, guarantors are not free of liability for not acting in good faith with respects to Articles 27 to 29 which deal with disclaimers on effectiveness of documents, transmission and translation and for the acts of another party.

In conclusion, the URDG are yet to achieve widespread acceptance and usage as the UCP 600 for the Letters of Credit. Nevertheless, After the URDG Publication 758 of

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<sup>44</sup> Article 26 of the URDG 758

2010, there appears to be an increased usage and acceptability. This may be attributed to the work of the ICC Task Force on Guarantees that was formed to oversee international guarantee practice and to promote wider usage of performance guarantees.<sup>45</sup>

#### **4.0 Revisiting the Sinohydro Corporation Limited -Versus - GC Retail Limited & Equity Bank Limited (2016) eKLR**

In this case, the High Court was seized of the opportunity to clarify and/or restate the law and principles on encashment of performance guarantees/bonds.

##### **4.1. Procedural History and Parties**

The Plaintiff in this case was Sinohydro Corporation Limited. It sued GC Retail Limited (1<sup>st</sup> Defendant) and Equity Bank Limited (2<sup>nd</sup> Defendant). The Plaintiff approached the court by a Notice of Motion dated 5<sup>th</sup> October 2015. It was brought under Section 7 (1) of the Arbitration Act of 1995, Rule 11 of the Arbitration Rules of 1997, Order 51 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 3B of the Civil Procedure Act. The Plaintiff sought a temporary injunction to stop the 1<sup>st</sup> Defendant from making a claim arising from the performance bond of USD 5,946,886.25 issued by the 2<sup>nd</sup> Defendant pending the hearing and determination of the case. The application also sought to restrain the 2<sup>nd</sup> Defendant from honouring the demand issued by the 1<sup>st</sup> Defendant for payment under the performance bond.

##### **4.2. The Plaintiff's Case**

The 1<sup>st</sup> Defendant engaged the Plaintiff to construct Garden City Mall Phase I. The contract value inclusive of Value Added Tax for the execution and completion of the works was USD 49,557,385.00. Clause 4.2 of the contract between the Plaintiff and the 1<sup>st</sup> Defendant required the Plaintiff to provide a performance bond as security for performance of the contract. The bond of USD 5,949,886.25 was issued by the 2<sup>nd</sup> Defendant in irrevocable terms on 29<sup>th</sup> July 2013. The 1<sup>st</sup> Defendant was named as the beneficiary, the Plaintiff as the principal and the 2<sup>nd</sup> Defendant named as the agent of the Plaintiff.

There was breach and the 1<sup>st</sup> Defendant issued a demand to the 2<sup>nd</sup> Defendant for payment of the bond. The Plaintiff contested that the call for payment by the 1<sup>st</sup>

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<sup>45</sup> Geraldine Andrews & Richard Millet, *Law of Guarantees*, (6<sup>th</sup> edn Sweet & Maxwell South Asia Edition)

Defendant was premature, fraudulent and alleged deliberate suppression of material facts.

In its case, the Plaintiff submitted that there was a dispute as to the real cause of the failure to complete works within the timelines of the contract. The Plaintiff blamed late approvals and delays by nominated subcontractors and that the parties were negotiating for a possible extension of the completion period before the 1<sup>st</sup> Defendant made the demand for payment. The Plaintiff terms the calling for payment as premature since clause 20 of the contract provided for Alternative Dispute Resolution (ADR) that could have been pursued by the parties as a matter of priority. This according to the plaintiff met the threshold for grant of an injunction under **Section 7** of the **Arbitration Act**.

Plaintiff further alleged conflict of interest occasioned by the common directorship of the project managers, Mentor Management Limited and the 1<sup>st</sup> Defendant. This according to the Plaintiff meant that Mentor Management could not objectively make a determination on the dispute of extension of time and that failure to disclose common directorship amounted to fraud against the Plaintiff.

The Plaintiff further contended that the 1<sup>st</sup> Defendant had a made a substantial contribution to the delay and was partly to blame and the 1<sup>st</sup> Defendant did not deny that the Plaintiff had a good claim for extension. Plaintiff argued that it was not a stranger to the performance bond as it was named as the Principal and the 2<sup>nd</sup> Defendant as its agent. The Plaintiff submitted that the performance bond cannot be used as a collateral contract to any contracts with third parties and naturally, the payment of the performance bond can only be done when the contractor fails to perform under the contract.

The Plaintiff took a position that ADR was inextricably linked with the performance bond and the payment thereof would occasion grave prejudice to the Plaintiff and would defeat the purpose of ADR. The Plaintiff in its further affidavit contended that its application for extension of time was not objectively considered by the project manager since that decision was made by the 1<sup>st</sup> Defendant. This according to the Plaintiff amounted to bad faith and the Plaintiff sought injunctive orders to preserve its rights under the contract.

### **4.3. The 1<sup>st</sup> Defendant's Case**

In opposing the application, the 1<sup>st</sup> Defendant's case was that the performance bond was between itself and the 2<sup>nd</sup> Defendant and that it was parallel to the main contract. 1<sup>st</sup> Defendant contended that in trying to connect the bond with the contract the Plaintiff was attempting to re-write it. That the bond was irrevocable, payable on demand and was not subject to arbitration.

1<sup>st</sup> Defendant argued that it suffered a loss of USD 1,500,000.00 as a result of the delay and that it needed payment under the performance bond to enable it meet obligations to third parties. 1<sup>st</sup> Defendant further denied that it acted in bad faith and that the issue of common directorship between itself and Mentor Management was a matter of public knowledge. The issue of common directorship was irrelevant to the determination of whether the performance bond should be paid or not. 1<sup>st</sup> Defendant argued that upon consulting an expert, the issue of extension of time was not merited hence the decision to deny it.

Further, it was the 1<sup>st</sup> Defendant's position that dispute resolution process under the main contract was a long process with no fixed timelines yet the performance bond had an expiry date. Lastly, 1<sup>st</sup> Defendant submitted that if it was the intention of the parties to have the payment of the performance bond pegged on the dispute resolution under the main contract, it would have been expressly so indicated in the main contract or in the performance bond agreement.

### **4.4. The 2<sup>nd</sup> Defendant's Case**

The 2<sup>nd</sup> Defendant's contention was that it was aware of the dispute and it was not involved in the contractual obligations and disputes between the 1<sup>st</sup> Defendant and the Plaintiff. The 2<sup>nd</sup> Defendant was willing to effect the bond and that the only reason it had not done so was because of restraining orders given by the court on 7<sup>th</sup> October 2015. The 2<sup>nd</sup> Defendant asserted that it was not averse to paying the performance bond and was willing to abide with court orders with respect to paying under the bond.

### **4.5. Analysis of Issues for Determination**

#### **i. Whether the Plaintiff was party to the performance bond**

The 1<sup>st</sup> Defendant said that the Plaintiff was not privy to the performance bond but the Plaintiff rebutted the argument stating that the bond was issued for its benefit. In considering the arguments, the court stated in paragraph 49 of its ruling that '*it must*

be noted that a performance security bond is a three-party agreement between the principal, the obligee, and the surety in which the surety agrees to uphold, for the benefit of the obligee, the contractual obligations of the principal if the principal fails to do so.’ The obligee can only make a claim when the principal defaults on the underlying contract.

The court stated that the performance bond between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was made to very specific terms hence it was an ‘*on-demand performance* hence the Plaintiff was not privy to the bond agreement and could only approach the court for an injunction where fraud was alleged. In applying the fraud rule, ‘*ex turpi non oritur causa actio*’ in other words, fraud unravels all, the court granted audience to the Plaintiff as it alleged that the 1<sup>st</sup> Defendant had acted fraudulently in calling for the bond.

## **ii. Whether the performance bond is part of the main contract**

The Plaintiff advanced the position that the performance bond was intricately intertwined to the main contract and inseparable hence the Plaintiff could not be a stranger to the performance bond contract. 1<sup>st</sup> Defendant argued that the performance bond was separate and distinct from the underlying contract between the principal and beneficiary.

The learned judge quoted Paget’s Law of Banking and stated that; “*the principal that underlies demand guarantee is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by the disputes under the underlying contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it matters not that between himself and the principal he is entitled to payment. The guarantor must honour the demand...*”

The court held that the guarantee is an independent document and can stand on its own.

## **iii. Whether the demand for payment of the bond was fraudulent**

The court was of the view that a dispute between the contractor and employer need not affect the issuer of the bond. In citing the *Edward Owen* case the court said that a ‘*bank which gives a performance guarantee must honour the guarantee according to its terms unless there is fraud of which the bank has notice of.*’ The court also cited *Transafrica Assurance Co. Ltd -Versus - Cimbria (EA) Ltd*<sup>46</sup> where it was held that ‘*a bank or institution giving a performance bond is therefore bound to honour it in*

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<sup>46</sup> (2002) 2 EA 627 (CAU)

*accordance with the terms of the bond if it appears the papers are in order regardless of any dispute between the buyer and the seller arising from the contract in respect of which the bond was given. It is only excused where there is fraud of which it has notice.'*

The learned judge reiterated that a dispute between the contracting parties should not concern the issuer of a performance bond unless there is fraud for which it has notice. It is only in very exceptional circumstances that the court will interfere with the payment of a performance bond. In essence fraud must not only be pleaded but must be clearly demonstrated.

The learned judge advanced the common law definition that fraud essentially means presenting a claim which the beneficiary or in this case the 1<sup>st</sup> Defendant, knows to be an invalid claim. The judge went ahead to cite *United Trading Corporation S.A – Versus - Allied Arab Bank Ltd (C.A. July 17, 1984)* in stating that '*the evidence of fraud must be clear, both as to the fact of fraud and as to the bank's knowledge.*' The court opined that since the case was at an interlocutory stage, affidavit evidence had to satisfy the court that there was fraud or likelihood of fraud.

Upon examining the affidavit evidence of parties, the court held that the mere existence of common directorship between the 1<sup>st</sup> respondent and the project manager did not amount to fraud. The court stated that the Plaintiff ought to have proved how the common directorship amounted to fraud in the 1<sup>st</sup> Defendant calling for the payment of the bond. The court further held that the refusal by the 1<sup>st</sup> Defendant to grant an extension of time could not amount to fraud as the plaintiff had been granted two extensions before. The court directed that the 2<sup>nd</sup> respondent must pay up on the performance bond. The court held that the Plaintiff had failed to establish fraud on the part of the 1<sup>st</sup> Defendant.

#### **iv. Whether the Plaintiff is entitled to interim injunction as prayed**

The court underpinned that '*it is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks*' with fraud being the only exemption. The court could not issue interim orders as the Plaintiff has failed to prove fraudulent conduct on the part of the 1<sup>st</sup> Defendant in calling for payment under the performance bond. The application was dismissed with costs to the Defendants.

## 5.0 Conclusion

That performance bonds are the lifeline of international commerce cannot be gainsaid. They also play a crucial role in construction contracts and government procurement. This means that the sacrosanct status of this instrument of financing must be respected and protected in equal measure. When a call for payment is made under the bond, the guarantor must pay. The only condition to be met by the beneficiary is the production of documents to accompany the call for payment as stipulated under the bond. This must also be accompanied by a supporting statement from the beneficiary under Article 15 of the URDG if the guarantee is subject to the ICC Uniform Rules for Demand Guarantees.

The cases cited in this paper have demonstrated that courts will not readily grant injunctions to stop payments to a beneficiary under the bond save for instances where there are very clear cases of fraud. Even then, an injunction will only be granted where the balance of convenience tilts towards its issuing. It has been argued that in the context of performance guarantees, the balance is ‘*almost always decisive against the grant of an injunction.*’<sup>47</sup> What must always obtain is that a bank/financial institution that issues the performance bond must always honour it according to its undertaking. The guarantor is not privy to the underlying contract. For avoidance of doubt, when a call for payment is made, the bank must pay and not examine the underlying contract to analyse the circumstances that may have led to the breach.

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<sup>47</sup> Jason Chuah, ‘*Law of International Trade: Cross-Border Commercial Transactions*’ (5<sup>th</sup> edn, Sweet & Maxwell)

## Second Bite of the Cherry: Appeals Against Arbitral Awards in Kenya

By: *Khaseke Makadia Georgiadis*\*

### 1.0 Introduction

The Kenyan arbitration law (the “Act”)<sup>1</sup>, like the Model Law<sup>2</sup>, advocates for finality of arbitral awards. As such, there are very limited instances under the law that an arbitral award could be challenged. Much of the literature and court decisions have dwelt on the setting aside procedure under section 35 of the Act<sup>3</sup> and the right of appeal against the decision of the High Court under section 35 of the Act<sup>4</sup> but there is less focus on challenging an arbitral award through an appeal to the court both in terms of court decisions<sup>5</sup> and literature. This is attributable to two factors: most arbitration agreements provide that an arbitral award ensuing from arbitration shall be final, and unlike the setting aside procedure, which is allowed as of right under the Act, the appeal process against an arbitral award is not automatic; it is consensual<sup>6</sup> meaning that unless parties have agreed to prefer an appeal, no appeal on merits lies against an arbitral award.

Unlike other jurisdictions which permit appeals against arbitral awards through leave of the court, no such procedure exists under the Act. Interventionists argue that the

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<sup>1</sup> Arbitration Act No. 4 of 1995 Laws of Kenya.

<sup>2</sup> United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (*the UNCITRAL Model Law*)

<sup>3</sup> *Supra*, note 1

<sup>4</sup> See for instance, Dr. Kariuki Muigua, Arbitration Law and the Right of Appeal in Kenya (January 16, 2021). (2021 9(2) *Alternative Dispute Resolution*, Available at SSRN: <https://ssrn.com/abstract=3953985>, accessed on 25<sup>th</sup> January 2022; Melisa Ngania, *Review of The Principle of Finality in Arbitral Proceedings Under Section 39 (3) (B) of The Arbitration Act, 1995*, (2018) *Journal of cmsd Vol 2(2)*

<sup>5</sup> This fact was acknowledged in *Albatross Aviation Limited & another v Phoenix of East Africa Assurance Company Limited* [2018] eKLR, where Court noted that there was a dearth on the cases in respect of the matters covered under section 39 of the Arbitration Act.

<sup>6</sup> See *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; *Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR, *Micro-House Technologies Limited versus Co-operative College of Kenya* [2017] eKLR, *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR



absence of an appellate mechanism, other than with the agreement of the parties, is undesirable due to various reasons including the fact that it stifles the growth of commercial law, and because arbitrators just like judges are not infallible and there should be an appellate mechanism to correct an obvious error of law apparent in an arbitral award<sup>7</sup>. On the other hand, non-interventionists have touted the principle of finality as the basis for such a restricted appellate mechanism as is the case under the Act.

This article seeks to render an exposition of the court's jurisdiction to hear an appeal against an arbitral award<sup>8</sup> under the Act. In so doing, it shall interrogate the requirements and the procedure that such an appeal must comply with especially in light of the recent decision in *Kenya Ports Authority vs Memphis Limited*.<sup>9</sup> It shall also delve into the substance of the nature of issues that the appeal may entail. Finally, the article will discuss the right of appeal to the Court of Appeal with a view to drawing the difference between the Court of Appeal's jurisdiction and that of the High Court.

## 2.0 The legal framework for appeals against arbitral awards

It is imperative to note that, in considering the legal framework governing appeals against arbitral awards in Kenya, one must bear in mind the fact that court's intervention in arbitral proceedings is highly restricted. This is seen through the provisions of section 32A of the Act which stipulate that "*except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse lies against it otherwise than in the manner provided by the Act*".<sup>10</sup> As such, it is in this context of the above provisions that the place of appeals against awards must be considered.

### 2.1 Jurisdiction of the court

The jurisdiction of the court<sup>11</sup> to entertain appeals against awards in Kenya is circumscribed under section 39 of the Act. However, for the court to exercise this jurisdiction, the law stipulates that certain requirements must be met. These are:

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<sup>7</sup> Melissa Ng'ania, 'Review of the Principle of Finality of Arbitral Proceedings under Section (3) (b) of the Arbitration Act, 1995' (2018) 22 Journal of CMCD 44.

<sup>8</sup> It shall not deal with an application arising during the course of arbitration proceedings as envisaged under section 39(1) (a) of the Act.

<sup>9</sup> Civil Appl. No 39 of 2021

<sup>10</sup> Arbitration Act, s. 32A

<sup>11</sup> The Act states that such an appeal may be instituted in the High Court. However, with the establishment of courts of same status as the High Court, appeals whose subject matter fall within the jurisdiction of these courts can be heard and determined by those courts.

- i) Parties must have agreed to appeal against an arbitral award.
- ii) The appeal must be on questions of law arising out of an arbitral award; and
- iii) The appeal must be filed in court within 30 days from the date of publication of the arbitral award.

### 2.1.1 Agreement to appeal against an arbitral award

It is a pre-requisite that for the court to exercise jurisdiction under section 39(1) of the Act, parties must have agreed that an appeal may be made by either party<sup>12</sup>. However, the nature of such agreement is not provided for. As such, questions linger whether such an agreement should be in the arbitration agreement or whether it can be in a separate document, or it could be by exchange of correspondence. And even so, must such an agreement be executed by parties?

Where there is an express agreement signed by the parties to appeal against an arbitral award, there appears to be no controversy even where such agreement is not in the arbitration agreement<sup>13</sup>. However, disputes arise where the agreement of the parties is recorded by an arbitrator in his directions or minutes of a meeting before him.

Unlike an arbitration agreement which must conform to certain formalities as stipulated under section 4 of the Act, section 39 only provides that such “parties have agreed” that an appeal may be made to the High Court on any question of law arising out of the award. It is therefore arguable that an agreement to appeal may even be informal such that it can be oral or inferred from the conduct of the parties.

Due to the imprecise language used under section 39 of the Act, there have been controversies around the nature of the agreement to appeal. The controversy has entailed whether the agreement to appeal must also conform to the attributes of an arbitration agreement or it could be informal as stated above. Further, what would be the status of such an agreement *Vis a Vis* an arbitration agreement which states that the arbitral award is final and binding upon the parties?<sup>14</sup> Courts have had occasion to deal with these controversies although there is still no clarity in law as to the nature of the

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<sup>12</sup> Section 39(1)(a) of the Act.

<sup>13</sup> For instance, in *Kenya Oil Company Limited vs Kenya Pipeline Company Limited* (2014) *eKLR*, paragraphs 24, 37, and 38.

<sup>14</sup> In the UK, the wording of the arbitration agreement cannot preclude a right to appeal against an award with the leave of court: *Essex County Council vs Premier Recycling Ltd* [2006] *EWHC* 3594

agreement. This is partly due to the fact that not much thought was given by the courts on the import and true construction of the provisions of section 39 of the Act in so far as the nature of the agreement to appeal is concerned.

Despite the recent decision of the Court of Appeal in *Memphis Limited vs KPA*<sup>15</sup>, there appears to be two schools of thought espoused by the superior courts as regards the nature of the agreement to appeal against an arbitral award. The first school of thought suggests that a right to appeal against an arbitral award must be entrenched in the arbitration clause/agreement or that such right must be agreed upon in writing as is the case with an arbitration agreement under section 4 of the Act. This school of thought is depicted in *Talewa Contractors Limited vs Kenya Highways Authority*.<sup>16</sup>

In that decision, the High Court seemed to propagate the view that the agreement to appeal against an arbitral award should be entrenched in the arbitration clause. It opined thus:

*“In the instant matter, I find that the Respondent has aptly demonstrated that there is no arbitration agreement where the parties had either [sic] entrenched an automatic right of appeal to this court in the arbitration clause, thus rendering the arbitral award herein not subject to appeal before this court. In absence of such an agreement in the arbitral clause between the parties deprives this court jurisdiction to entertain any application seeking its appellate intervention against the aforesaid arbitral award herein as the Appellant/Applicant came out seeking for.”<sup>17</sup>*

It is apparent from the decision, that the High Court appears to have placed reliance on the sentiments of the Court of Appeal<sup>18</sup> in *Kenyatta International Convention Centre vs Greenstar Systems Ltd*<sup>19</sup>, that the agreement to appeal against the decision of the High Court must be entrenched in the arbitration clause. However, the High Court seems to have taken the decision of the Court of Appeal out of context. In that case, the Court of Appeal was dealing with the right of appeal under section 35 of the Act to the Court of Appeal. Additionally, the Court of Appeal confirmed that there are two

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<sup>15</sup> Mombasa Court of Appeal Civil Application No. 39 of 2021 - *Memphis Limited vs Kenya Ports Authority* [2021] eKLR

<sup>16</sup> *High Court Civil Appeal No. E001 of 2018 – Talewa Contractors vs Kenya Highways Authority* [2019] eKLR

<sup>17</sup> *Ibid*, paragraph 34.

<sup>18</sup> See paragraph 20

<sup>19</sup> [2018] eKLR, paragraph

ways in which it can have jurisdiction to entertain an appeal from the High Court; either where there was an agreement between the parties or where it grants leave to appeal against the decision of the High Court. No firm legal position was outlined by the Court of Appeal in *KICC vs Greenstar* as to what form or nature that the agreement to appeal should take.

Even though the High Court arrived at the correct decision, on the facts; that there was no agreement<sup>20</sup> to appeal against the award, the reasoning that the agreement to appeal must be entrenched in an arbitration clause is problematic to reconcile with the decision it relied upon in arriving at that conclusion.

The second school of thought was advanced in *Kenya Ports Authority vs Memphis Limited* (“*KPA vs Memphis*”)<sup>21</sup>, where the superior court<sup>22</sup> held that there was no requirement under section 39 of the Act that an agreement to appeal against an arbitral award must be in the arbitration clause. That notwithstanding, the court further stated that even if such an agreement is required to conform to the provisions of section 4 of the Act, the agreement between the parties in that case conformed to those provisions as it had been reduced into writing by the arbitrator. It is perhaps important to highlight the brief facts of this case: parties had an arbitration agreement which provided that the arbitral award shall be final<sup>23</sup>. When the dispute arose and was referred to arbitration, the parties’ advocates at the preliminary meeting by consent agreed to reserve a right of appeal against the arbitral award on questions of law only as provided under section 39 of the Act. This consent was recorded by the arbitrator in the Order for Directions (OFD) No.1.<sup>24</sup>

After the tribunal published its award, the appellant was aggrieved by some of the findings and filed an appeal before the superior court. Before the appeal was heard, the respondent (claimant) filed an application to strike out the appeal on the ground that there was no agreement by the parties to appeal against the award. Majorly, the respondent contended that the superior court lacked the jurisdiction to hear and determine the appeal as parties had not agreed on the right to appeal against the award as contemplated under section 39 of the Act. According to the respondent, the OFD,

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<sup>20</sup> See the distinction drawn between the facts in that case and *Talewa* Case at paragraph 21 of the *KPA vs Memphis* case.

<sup>21</sup> ELC Civil Appeal No. 23 of 2020 *Kenya Ports Authority vs Memphis Limited* [2020] eKLR Environment and Land Court.

<sup>23</sup> *Ibid*, para 1.

<sup>24</sup> *Ibid*, para 4.

relied upon by the appellant as the basis of the agreement to appeal, could not be taken as an agreement between by the parties as it was neither signed by the parties nor their legal representatives. Further, the respondent argued that the OFD could not supersede the express provisions of the lease agreement which contained the arbitration agreement. According to the respondent, the lease agreement expressly provided that the terms of the agreement, including the arbitration agreement, could not be amended, varied, or changed unless with an agreement in writing and signed by the parties.

In dismissing the respondent's contentions, the superior court opined that the OFD was a record of the consent of the parties reserving the right of appeal and it mattered not whether it was not signed by the parties or their representatives. In so holding, the court was of the view that the arbitrator, in recording the consent and signing the OFD, acted as an agent of the parties and neither parties could now assail that consent. The superior court's decision appears to have been influenced by the fact that the appellant never denied that the parties agreed, during the preliminary meeting, to reserve the right of appeal<sup>25</sup>. What the appellant seemed to advance in its objection was that the agreement did not either conform to the terms of the lease agreement or the provisions of section 4 of the Act.

Whilst dismissing the appellant's application and recognizing that a right of appeal had been agreed upon by the parties as evidenced by the OFD, the superior court upheld the principle of party autonomy which espouses the liberty of the parties to agree on how their arbitration proceedings should be conducted. In essence, even if the arbitration agreement provided that the arbitral award shall be final, parties are free, when the dispute arises, either before or during the arbitration proceedings to agree to appeal against the arbitral award.

The superior court's position found favour with the Court of Appeal when the appellant sought leave to appeal from that decision. This was in *Memphis Limited vs Kenya Ports Authority*<sup>26</sup> ("*Memphis vs KPA*"). Although the Court of Appeal did not directly

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<sup>25</sup> See paragraph 17 the court opined thus:

*"Nobody has raised issue that what the arbitrator recorded as consent was not the agreement of the parties. The net result is that this must be construed as a further agreement of the parties on the nature of arbitration. For all intents and purposes, it was akin to a further arbitration agreement, and in this further or additional agreement, the right to appeal was reserved. A consent recorded in court or before the tribunal has the same import as if it was an agreement of the parties. To say otherwise would be to overturn the whole concept of consents recorded in court or before a tribunal."*

<sup>26</sup> *Supra*, note 8.

address the matter by concurring with the decision of the High Court, it affirms the second school of thought. It is therefore safe to surmise that on account of the Superior Court decision in *KPA vs Memphis*, the agreement to appeal under section 39(1) of the Act may either be express or informal such as through exchange of correspondence, or a consent recorded by an arbitral tribunal exhibited in an OFD or the minutes of arbitral tribunal's meetings. It may also be contained in the arbitration agreement/clause or after the arbitration proceedings commence.

### 2.1.2 Appeals on questions of law only

According to section 39 of the Act, the appeal must relate to “questions of law” arising out of an arbitral award. It is therefore apparent that questions of fact are not and cannot be the subject of an appeal against an arbitral award. Such appeals are confined to only questions of law. This restriction means that appeals on questions of facts “dressed-up” as questions of law would not be entertained by the court under section 39 of the Act. In *The Chrysallis*, the question arose as to the proper scope of an appeal on a question of law. It was stated that “the court has no jurisdiction to review the arbitrator's decision otherwise than by an 'appeal' on a 'question of law'”.<sup>27</sup>

However, what constitutes “**questions of law**” may be notoriously difficult to identify.<sup>28</sup> As stated in *Fence Gate Ltd. v. NEL Construction Ltd*<sup>29</sup>; “It is never easy to define what is meant by a question of law in the context of an arbitration appeal.”

#### 2.1.2.1 Question of law

Unlike the United Kingdom's (“UK”) Arbitration Act<sup>30</sup>, the Act does not afford a definition of what constitutes a “question of law” under section 39. Both the High Court<sup>31</sup> and the Court of Appeal<sup>32</sup> have had opportunity to shed some light on this and clarify what a “question of law” is but other than mentioning the UK cases in passing, they merely stated that they found the UK cases persuasive<sup>33</sup>.

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<sup>27</sup> *Vinava Shipping Co. Ltd v Finelvet A.G* (“*The Chrysalis*”) [1983] 1 Lloyd's Rep. 503

<sup>28</sup> *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR

<sup>29</sup> (2001) All ER (D) 214

<sup>30</sup> Arbitration Act, s. 82(1), defines a ‘question of law’ as ‘a question of the law of England and Wales for a court in England and Wales and a question of the law of Northern Ireland for a court in Northern Ireland.’

<sup>31</sup> In *High Court Civil Appeal No. 23 of 2010-Kenya Oil Limited vs Kenya Pipeline Company* (2012) eKLR (, at paragraphs 53 and 54.

<sup>32</sup> In *Court of Appeal Civil Appeal No. 102 of 2012- Kenya Oil Limited & Another vs Kenya Pipeline Company* [2014] eKLR, see paragraphs 39-45.

<sup>33</sup> *supra*, note 24, paragraph 54; *Ibid*, paragraph 46.

An attempt to define what a “question of law” is, must bear in mind that what constitutes a question of law in judicial review may not necessarily be the same as what is envisaged under section 39 of Act<sup>34</sup>. It is with this in mind that the UK courts have attempted to illuminate some light on what is “a question of law” under the UK Arbitration Act and which by extension the Kenyan courts found to be persuasive.

However, it is worthwhile noting that UK courts as well have not found it easy to state what really a question of law is. Instead, they have proffered a criterion that assists the court to determine what is a question of law in any particular matter. This is seen in *The Chrysalis*, where Mustill J opined that:

“...whether the award can be shown to be wrong in law, the answer is to be found by dividing the arbitrator’s process of reasoning into three stages:’

- (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.
- (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.
- (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.”

The courts have relied upon this test in arriving at their decisions for instance where the appeal was dismissed for being based on facts<sup>35</sup>. According to Lord Mustill, an appeal against an award (in our case envisaged under section 39) can only be properly addressed at the second stage. He surmised that, “The second stage of the process is the proper subject matter of an appeal under the 1979 Act”. As such, it has been clarified that while considering what constitutes a question of law in the second stage, the court must accept, without any qualifications, the arbitrator’s findings of facts. This was stated in *The Baleares*<sup>36</sup> by Lord Steyn:

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<sup>34</sup> Per Lord Steyn in *Geogas SA vs Trammo Gas Limited (“The Baleares”)* [1991] 3 ALL ER 554

<sup>35</sup> *Kershaw Mechanical Services v Kendrick Construction* [2006] EWHC 727, and *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826 (Comm)

<sup>36</sup> *Supra*, note 27



“On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of the fact might be...”

That proposition is in consonance with the Kenyan legal position in *M’Riungu vs Republic*<sup>37</sup> where the Court of Appeal opined that;

*“Where a right of appeal is confined to questions of law only, an appellate court should accept the findings of fact of the lower court or courts and not treat them as holdings of law or mixed fact and law. It should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law.”*

From the foregoing, it seems that determining what is a question of law is a delicate balancing act which the court must make in light of the specific circumstances of each case. This difficulty was noted in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others*<sup>38</sup>, when the Court of Appeal opined that:

“There is no denying from the cases we have referred to, that in not a few cases the determination of whether a particular complaint on appeal is a question of law or of fact is not always a very straight-forward one, not least because the determination of whether a lower court drew the correct legal conclusions inevitably entails an examination of the factual basis of the decision.”

In view of the foregoing, the position appears to be that in considering what a question of law is in a particular appeal against an arbitral award, courts must take a restrictive approach to prevent parties from seeking to dress up questions of fact as questions of law<sup>39</sup>. This is illustrated in the case of *Demco Investments & Commercial SA vs SE Banken Forsakring*<sup>40</sup>, where it was held that the adequacy of evidence is not challengeable in appeal on a question of law. The court emphasized that for purposes

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<sup>37</sup> (1982-1988) 1 KAR,

<sup>38</sup> *Supra*, note 28.

<sup>39</sup> David S.J.S. *et al* (eds.), 2007, *Russell on Arbitration*, Sweet and Maxwell.

<sup>40</sup> [2005] 2 Llyod’s Rep 650



of an appeal under section 69 of the UK Act, the facts had to be accepted as determined by the arbitrator. Further, the restrictive approach is seen in cases where courts have refused to entertain an appeal which seeks to review an arbitrator's finding on what documents constitute the agreement between the parties, as that is not a question of law<sup>41</sup>.

However, there is an increasing willingness by the courts in UK to entertain appeals on a wide range of matters such as proper construction of an instrument on the basis that construction of a written instrument is a question of law<sup>42</sup>, omission by the arbitral tribunal to address an important issue which required to be determined in order to substantiate the tribunal's decision<sup>43</sup>, misconstruing an exclusion clause in a contract<sup>44</sup>, where the tribunal wrongly determined that the applicant was obliged to make payments to the buyer under a sale contract<sup>45</sup>, or where the tribunal erred on the classification of an obligation in a shipping contract.<sup>46</sup>

Perhaps the clearest exposition on what constitutes a question of law is to be found in the Singaporean case of *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd*<sup>47</sup>, where it was stated that a question of law arises where the arbitrator fails to identify the correct legal principle to be applied to the facts, but a question of law does not exist where the arbitrator identifies the correct legal principle and applies it in a wrongful manner.<sup>48</sup> Additionally, the court stated that there is need to delineate between a "question of law" and an "error of law", since questions of law confer jurisdiction on the court to hear appeals against arbitral awards unlike errors of law.<sup>49</sup> In this regard, questions of law are findings of law that parties dispute and which need the court's guidance to be solved whereas errors of law arise where an arbitrator fails to apply a legal principle correctly and, in this instance, leave to appeal would not be granted.<sup>50</sup>

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<sup>41</sup> *Plymouth City Council vs DR Jones (Yeovil) Ltd* [2015] EWHC 2356

<sup>42</sup> *Trustees of Edmond Stern Settlement vs Levy* [2007] W.L. 1623226 at page 10.

<sup>43</sup> *Pentoville Shipping Ltd vs Transfield Shipping Inc (The Jonny K)* [2006] 1 Lloyd's Rep 166.

<sup>44</sup> *Tricon Energy Limited vs MTM Trading LLC* [2020] EWHC 700 (Comm)

<sup>45</sup> *Nobiskrug GmbH v Valla Yachts Limited* [2019] EWHC 1219 (Comm)

<sup>46</sup> *Silverburn Shipping (IoM) Ltd v Ark Shipping Company LLC* [2019] EWHC 376 (Comm)

<sup>47</sup> *Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

The New Zealand Arbitration Act, which confers a similar right of appeal to parties against arbitral awards, describes questions of law to entail incorrect interpretation of the applicable law, regardless of whether the error appears on the record of the decision.<sup>51</sup> However, this does not include the question of whether the award was supported by evidence or whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts.<sup>52</sup> Questions of law are affirmed to be those about what the correct legal test is, questions of fact being questions about what took place between the parties and questions of mixed fact and law are whether the facts do satisfy the legal tests.<sup>53</sup>

As to whether mixed questions of fact and law are appealable under section 39, the Kenyan position is unclear. In the commonwealth, a restrictive approach seems to be the most prevalent position when it comes to appeals on mixed questions.<sup>54</sup> However, there are instances where mixed questions of fact and law can be considered together<sup>55</sup> although in most cases the imperative view is that the arbitrator's findings of fact need to be taken as final so that the issue remains whether the law was rightly applied to those facts rather than whether the facts do support the findings of law.<sup>56</sup>

Thus, the courts have adopted a high threshold under which courts will interfere only if “on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion”.<sup>57</sup> This means that it is in quite limited circumstances that courts will consider admitting appeals based on mixed law and fact.

The Canadian Court in *Sattva* held that matters such as contractual interpretation have the key objective of determining the intention of parties which is a fact specific goal and since doing this requires the basic principles of contractual interpretation, then though it may be a mixed question, it still qualifies to be entertained as a matter of

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<sup>51</sup> Arbitration Act 1996, Clause 5(10)

<sup>52</sup> *Ibid*

<sup>53</sup> Jack Alexander & Jack Davies, ‘Appeals on Mixed Questions and Facts under the Arbitration Act 1996’ (2018) *New Zealand Law Journal* 27.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> John G Walton, ‘Appeals on Questions of Law- A New Zealand Perspective’ (Bankside Chambers, 20 April 2018) <<https://johnwalton.co.nz/musings/appeals-on-questions-of-law---a-new-zealand-perspective>> accessed 16/1/2022

<sup>57</sup> See Teresa Cheng, *The Search for Order Within Chaos in the Evolution of ISDS*, CIArb’s 45th annual Alexander Lecture on 16 January 2020, available at <[https://www.doj.gov.hk/en/community\\_engagement/speeches/20200116\\_sj1.html#\\_ftn72](https://www.doj.gov.hk/en/community_engagement/speeches/20200116_sj1.html#_ftn72)> accessed 18/1/2022

law.<sup>58</sup> However, in *Rua v Mamaku Highlands Ltd*<sup>59</sup>, the New Zealand court dismissed an application for grant of leave to appeal on mixed questions. The court stated that “...to the extent that a question of fact is bound up inextricably with a question of law, the Court’s discretion to refuse leave might be exercised more readily.”

From the foregoing, the position in Kenya as regards the appeals on mixed questions is unclear, but should they arise then the thresholds to be met are quite high, with very limited chances of success.

### 2.1.3 Appeal must be filed within 30 days

The final restriction is that the appeal must be filed within the time limit and the manner prescribed by the Rules of the High Court<sup>60</sup>. Although the specific timeline is not mentioned under that section, the procedure governing the filing of appeals in the High Court is stipulated in the Civil Procedure Act<sup>61</sup> and the Civil Procedure Rules 2010. Section 79G of the Civil Procedure Act provides that appeals to the High Court must be filed within 30 days from the date of the judgment or ruling being appealed. It is noteworthy that section 79G envisages appeals from decrees and orders of the subordinate court and hence there are in built flexibilities in that section for reckoning the 30 days. According to that section, the 30 days period does not include the period of time that may have been requisite for the preparation and delivery of the certified copy of the decree or order to the appellant. Certainly, this flexibility would not be applicable in appeals against arbitral awards as the appellant does not require a certified copy of the decree or order; all that is required is the arbitral award.

The second flexibility under section 75G is that the High Court can extend the time for filing an appeal “if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”<sup>62</sup> It is therefore arguable that unlike the period for setting aside application under section 35 of the Act which is cast in stone<sup>63</sup>, the

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<sup>58</sup> *Sattva Capital Corp v. Creston Moly Corp* [2014] 2 SCR 633

<sup>59</sup> *Rua v Mamaku Highlands Ltd* [2012] NZHC 1848

<sup>60</sup> Section 39(4) of the Act

<sup>61</sup> Cap. 21, Laws of Kenya.

<sup>62</sup> Proviso to section 75G of the Civil Procedure Act, Cap. 21 Laws of Kenya

<sup>63</sup> Section 35(3) of the Arbitration Act No. 4 of 1995, see also *Ann Mumbi Hinga v Victoria Njoki Gathara NRB CA Civil Appeal No. 8 of 2009 [2009] eKLR* where the court was categorical that, “Section 35 of the Arbitration Act bars any challenge even for a valid reason after 3 months from the date of delivery of the award.”; see also *Heva Fund LLP v Katchy Collections Limited* [2018] eKLR, where the court refused to extend time file an application to set aside an arbitral award under section 35.

period for filing appeals against arbitral awards is flexible and can be extended by the High Court if plausible reasons are given for the delay. In *Albatross Aviation Limited & another v Phoenix of East Africa Assurance Company Limited*<sup>64</sup>, the High Court allowed the appellant to file an appeal against an arbitral award out of time because delay had been occasioned because the appellant was pursuing an additional award.

### 3.0 Appeals to the Court of Appeal

Decisions of the superior courts under section 39(1) (b) are appealable to the Court of Appeal either where parties have so agreed prior to the delivery of an award<sup>65</sup>, or by leave of the Court of Appeal where 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.<sup>66</sup>

Although the Act does not provide for guidance on what are “points of law of general importance”, the Court of Appeal in *Memphis vs KPA*<sup>67</sup> adopted the criteria enunciated by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi-Ruscione*<sup>68</sup> in determining points of law of general importance. Taking a cue from that decision, it is, therefore, safe to say that a point of law of general importance is one whose “impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest”.

As stated by the Supreme Court, “a point of law of general importance may arise where it is demonstrated that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified to enable the courts to administer the law, not only in the case at hand but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law”.<sup>69</sup>

### Conclusion

This article has given an account of the jurisdiction of the court to hear appeals against arbitral awards in Kenya. It has been noted that although there exists an appellate mechanism against arbitral awards, the same is restricted. First, parties must have agreed that such an appeal can be made, the appeal is only limited to questions of law arising from the arbitral award, and the appeal must be filed within 30 days from the

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<sup>64</sup> [2018]eKLR

<sup>65</sup> Section 39(3)(a)

<sup>66</sup> Section 39(3)(b)

<sup>67</sup> *Supra*, Note 9

<sup>68</sup> [2013] eKLR. This was a decision in the context of certification under Article 163(4) (b) of the Constitution.

<sup>69</sup> *Memphis vs KPA*, paragraph 20.

date of publication of an award, although, as argued, this period is not cast in stone and may be extended by the court on plausible grounds.

Due to the inexact language used in the Act under section 39, there has been uncertainty and disputes regarding some of the identified restrictions. For example, disputes have arisen as to the nature of the agreement to appeal. Further, there has been uncertainty as to what questions of law entail. Therefore, the article has attempted to give guidance on the resolution of these uncertainties based on case law from Kenya and other jurisdictions.

Finally, the article discussed, albeit in brief, the jurisdiction of the Court of Appeal to entertain appeals from decisions of the superior courts under section 39. It was seen that unlike appeals to the superior courts which can only be made by agreement of parties, appeals to the Court of Appeal can be made either through agreement of parties or through leave of the Court of Appeal. However, the appellant must surmount the hurdle of demonstrating that the intended appeal raises a point of law of public importance.

## Arbitration Act 1995: Is A Reform Overdue?

By: *Austin Ouko\**

### Abstract

*The Arbitration Act 1995 has been in operation for the last 26 years. Many key changes have taken place in the arbitral arena including technological changes and globalisation of the arbitral practice. It is probably the right time to systemically review and/or overhaul some aspects of the Act based on these changes to ensure that it remains effective, agile and responsive to the ever-changing landscape. Rather than present an exhaustive list of proposed areas of review, this article focuses on three potential areas for review where recent case law has highlighted gaps in the Act and areas where clarification and reform would be welcome.*

### 1.0 Introduction

Several countries have moved to revise or overhaul their arbitration legislation owing to the development of trade, commercial transactions and the increased use of arbitration.<sup>1</sup> However, Kenya is yet to modernise its Arbitration Act 1995 save for the amendments that were done in 2009.<sup>2</sup> After being in force for more than two decades, it is probably the right time now to systematically revisit some aspects of the Act to ensure that it remains fit for purpose in the years to come.<sup>3</sup> There is debate around whether the scope of the Act's provisions meets the increasing complex needs of arbitration today. It is possible that some would assume the Act is behind the times.<sup>4</sup>

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<sup>1</sup> Countries such as Netherlands in 2014, India in 2015 and 2021, Russia in 2016, Sweden 2018 and Tanzania in 2020.

<sup>2</sup> Arbitration Act, Chapter 49 of the Laws of Kenya. The Act was assented to 10 August 1995 and commenced operation on 2 January 1996.

<sup>3</sup> Victoria Clark, 'The English Arbitration Act turns 25: Is it time for an update?' <<https://www.bclplaw.com/en-US/insights/the-english-arbitration-act-turns-25-is-it-time-for-an-update.html>> accessed 15 January 2022.

<sup>4</sup> Naomi Jeffreys, 'UK Arbitration Act: Time for a revamp?', 9 November 2018, <https://www.4newsquare.com/uk-arbitration-act-time-for-a-revamp/> accessed 18 January 2022.

To bring to the fore some of the many changes that have taken place in the arbitration arena. First, technological change is taking place at an ever-increasing pace and transforming the way in which business and arbitrations are being done.<sup>5</sup> In order to navigate Covid-19 pandemic difficulties, arbitral parties and tribunals were forced to rapidly adopt electronic service of documents, electronic arbitration awards, and a “change of hearing venues” from a physical room to a virtual room which stood to be most disruptive.<sup>6</sup> Second, globalisation is a reality – the change in the legal profession is an excellent example of this. Digital technology has facilitated the growth of off-shoring and near-shoring work.<sup>7</sup> It has facilitated the growth of law firms and arbitral tribunals across many different jurisdictions across the world. Where once a law firm may have an office in one or two significant commercial centres outside their home jurisdiction and called themselves a global law firm, we now have truly global law firms with offices in cities throughout the world.<sup>8</sup> Underpinning this is the obvious: as business, commerce, financial and other markets have become increasingly global, lawyers, dispute resolvers – and the law – must follow suit.<sup>9</sup>

On 30 November 2021, the UK Law Commission announced that it would review the UK Arbitration Act 1996 with a view to ensuring it is as clear, modern and efficient as possible and, if necessary, suggest possible amendments. The aim is to maintain the attractiveness of England and Wales as a “destination” for dispute resolution and the pre-eminence of English Law as a choice of law.<sup>10</sup> The proposed specific matters to be addressed would be determined in the coming months, through consultation with stakeholders. However, as part of its consultations it received a number of submissions on areas of the Act that could be included.<sup>11</sup> These possible areas include issues relating to; the power to summarily dismiss unmeritorious claims or defences in arbitral proceedings; the courts’ powers exercisable in support of arbitration proceedings; the procedure for challenging a jurisdiction award; the availability of appeals on points of

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<sup>5</sup> Lord Thomas of Cwmgiedd, Speech on Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration, The Bailii Lecture 2016, 9 March 2016 available <https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-baillii-lecture-20160309.pdf>

<sup>6</sup>Austin Ouko, ‘The Disruptive Impact of Covid-19 on Arbitration Practice in the East African Region’ (March 2021) Vol. 9 (2) *Alternative Dispute Resolution Journal* 219-238.

<sup>7</sup>*Ibid.*

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

<sup>9</sup>*Ibid.*

<sup>10</sup>UK Law Commission, *Reforming the Law*, (Review of the Arbitration Act 1996), <https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/>

<sup>11</sup>*Ibid.*

law; the law concerning confidentiality and privacy in arbitration proceedings; Electronic service of documents, electronic arbitration awards and virtual hearings.<sup>12</sup>

Although it may prove to be that case that not all of the identified issues are ultimately considered by the Law Commission, or that the Law Commission determines that no amendments to the Act's existing provisions are required in relation to certain of these issues.<sup>13</sup> However, the Law Commission's decision to revisit the Act confirms that the United Kingdom wishes to remain a pro-arbitration jurisdiction at the forefront of international dispute resolution for the near future.<sup>14</sup>

It is against this backdrop that this article will attempt to review the Kenyan Arbitration Act 1995, with a view of proposing certain areas in which reform of the Act could be looked into to ensure that it remains effective, agile and responsive to the changing landscape of arbitration practice worldwide. Rather than present an exhaustive list, this article will focus on three potential areas for review where recent case law has highlighted gaps in the Act and areas where clarification and reform would be welcome.<sup>15</sup> These include; first, express provisions on the use and role of technology in arbitrations. Second, reviewing whether a reversal of the presumption of confidentiality in arbitral proceedings would be a good idea. Third, a look into the right of appeal under Section 35 of the Act in light of the recent Supreme Court decisions.

The paper is divided into four parts. Part II will give background of the Arbitration Act 1995. Part III will explore the use of technology in arbitrations and propose possible amendments to the Act. It will discuss the issue of transparency and confidentiality in arbitrations and why there is need for a rethink of the presumption of confidentiality. It will also delve into the recent Supreme Court decisions as regards the right to appeal under Section 35 and why there is need to amend the section. Part IV concludes by stating that after 26 years of the Act being in operation it is time to overhaul it through a wide stakeholder consultation and public participation process.

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<sup>12</sup>*Ibid.*

<sup>13</sup>Morgan Lewis, 'UK Law Commission to Review Arbitration Act 1996', 8 December 2021, <<https://www.jdsupra.com/legalnews/uk-law-commission-to-review-arbitration-3584793/>> accessed 20 January 2022.

<sup>14</sup>*Ibid*

<sup>15</sup>Clark, *Supra* note 3.



## 2.0 Background of The Arbitration Act 1995

Article 159 of the Constitution of Kenya 2010 recognises Alternative Dispute Resolution (ADR) as an avenue to access justice. It provides that in the exercise of judicial authority, courts and tribunals should be guided by alternative forms of dispute resolution including reconciliation, mediation arbitration and traditional dispute resolution mechanisms.<sup>16</sup> It bestows responsibility on the state to ensure access to justice for all persons at a reasonable fee that shall not impede them.<sup>17</sup> It is clear from the above stated provisions that the Constitution promotes access to justice through ADR.

The earliest arbitration law in Kenya was the Arbitration Ordinance 1914, which was a reproduction of the English Arbitration Act of 1889. The Ordinance provided for resolution of commercial disputes as an alternative to litigation. Although, it was criticised because it did not effectively promote arbitration as it gave the national courts wide powers to interfere and control the arbitration procedures.<sup>18</sup>

With the development of trade and the increased use of arbitration in dispute settlement, there was a need reform. The first legislation that regulated arbitration in Kenya after independence in 1963 was the Arbitration Act of 1968. The Act was modelled around the English Arbitration Act of 1950. The intention was to ensure that arbitration proceedings were more insulated from courts interventions as was the case under the 1914 Ordinance.<sup>19</sup>

However, one of the main criticisms of the 1968 Act, was that it did not limit the extent to which courts could interfere with the arbitral processes. This affected the efficiency and effectiveness of arbitrations because of delays, and additional procedures and costs

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<sup>16</sup>Constitution of Kenya (2010). Art. 159.

<sup>17</sup>Constitution of Kenya (2010), Art. 48.

<sup>18</sup>David Ndolo, 'Arbitration law and practice in Kenya as compared to the UK and US with specific focus on anti-suit injunctions and arbitrability of disputes', (A thesis submitted in partial fulfilment of the University's requirements for the Degree of Doctor of Philosophy, Coventry University, 2020).

<sup>19</sup>Karega M and Abdallah, *Kenya The International Arbitration Review* (9th ed. Law Business Research 2018) at page 283 as cited in Ndolo, *Supra* note 18.

in arbitrations as references to courts were frequent and often defeated the purpose of arbitration as an ADR mechanism.<sup>20</sup> As Justice Karanja observed:<sup>21</sup>

*The Act (Arbitration Act 1968) provided too much intrusive powers to the courts to interfere with arbitral proceedings and the awards. This was contrary to the intention of the traders who intended that arbitration should be unfettered from the courts' intricate legal procedures which hampered efficiency in dispute resolution and resultantly slowed down growth in trade.'*

Therefore, there was another to reform the law to keep up with international standards with the intention of reducing the court's influence in arbitration. To achieve this in February 1989, Kenya ratified the 1958 New York Convention and adopted the UNICITRAL Model Law on arbitration.<sup>22</sup> This led to the repealing of the Arbitration Act 1968 replacing it with the current legislation governing arbitration in Kenya, the Arbitration Act 1995 which is based on the is based on the UNICITRAL Model Law.<sup>23</sup> The Act was assented to on 10<sup>th</sup> August 1995 and commenced operation on 2<sup>nd</sup> January 1996. The Arbitration Act 1995 was amended via the Arbitration (Amendment) Act 2009, which was assented to on 1<sup>st</sup> January 2010 (hereinafter referred to as the Amending Act).<sup>24</sup> The 1995 Act is made of 42 sections and is divided into 8 parts.

The essence of the Act is to govern all international or domestic arbitration in Kenya.<sup>25</sup> It provides the default position in very many respects of the arbitral processes. For instance, if parties in an arbitration agreement have not provided the number of arbitrators, the Act provides that the presumption is that the parties intended for one arbitrator.<sup>26</sup> In doing so the Act gives liberty to the parties to decide for themselves in

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<sup>20</sup> Githu Muigai & Jacqueline Kamau 'The Legal Framework of Arbitration in Kenya' at page 1 (Chapter 1 of Muigai G Arbitration Law and Practice in Kenya (Law Africa, 2013).

<sup>21</sup> Nyutu Agrovet Limited v Airtel Networks Ltd, Civil Appeal (Application) No. 61 of 2012: [2015] eKLR.

<sup>22</sup>The Model Law was developed with the aim of harmonizing national arbitration laws and to assist states in reforming and modernizing their arbitration laws and procedure to ensure they apply the fundamental features and the requirements of international commercial arbitration.

<sup>23</sup>Ndolo, *Supra* note 18.

<sup>24</sup>See Kariuki Muigua, 'The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya Visa-Viz Arbitration Act 1996 of United Kingdom', A lecture on Arbitration Act, 1995 and Arbitration Act 1996 of UK delivered at the Chartered Institute of Arbitrators Kenya Branch Entry Course held at College of Insurance on 25-26th August 2008 (Revised on 2nd March 2010).

<sup>25</sup>Section 2 of the Arbitration Act 1995.

<sup>26</sup>Section 11.

the arbitration agreement their desired arbitration process. In respect to the courts' intervention in arbitral proceedings, section 10 of the Act (modelled from Article 5 of the UNICITRAL Model law) limits courts' power to intervene in matters governed by the Act except as provided in the Act.<sup>27</sup>

It is against this background and the Act having been in operation for 26 years now, it is probably the right time to systematically relook at some aspects of the Act to ensure that it remains fit for purpose in the years to come. Premised on the many changes that have taken place in the arbitral field and the gaps in the Act that may have been identified through Court decisions.

The next part of the article will focus on the three highlighted potential areas for review or reform.

### **3.0 Potential Areas for Review/Reform**

The three potential areas are; use of technology in arbitrations, the transparency and confidentiality in arbitrations and the right of Appeal under Section 35 of the Arbitration Act.

#### **A. The Use of Technology in Arbitration**

Already years ago, the arbitration community globally was on a quest to make fuller use of available technologies in proceedings.<sup>28</sup> The motivation for technological innovation in arbitration was largely for economy in time and cost. In other words, greater and better use of technology was already identified as distinctly in arbitration's best interest and, according to some, inevitable. Covid-19 pandemic hastened the use of technology in arbitral processes.<sup>29</sup> For example, initially the use of video conferencing technology had provoked an interesting split in 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

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<sup>27</sup>Ndolo, *Supra* note 18.

<sup>28</sup>Ouko, *Supra* note 6.

<sup>29</sup>George A. Bermann, "Dispute Resolution in Pandemic Circumstances' in Katharina Pistor, 'Law in the Time of COVID-19', (2020) <<https://scholarship.law.columbia.edu/books/240>> accessed on 19 January 2021.

the time and expense that bedevils arbitration hearings and of course, several practitioners stood somewhere in between those two poles.<sup>30</sup>

However, adaptation to Governments public health directives as a result of the Covid-19 pandemic situation forced the traditionalists to rapidly adopt electronic service of documents, electronic arbitration awards, and a “change of hearing venues” from a physical room to a virtual room.<sup>31</sup> 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.<sup>32</sup>

Looking beyond the Covid-19 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.<sup>33</sup>

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.<sup>34</sup> Thereby drastically decreasing the cost of doing an arbitration. Further, 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

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<sup>30</sup>Sophie 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](https://www.researchgate.net/publication/303749723_The_Impact_of_Technology_on_Arbitral_Decision_Making_-_The_Practitioner's_Perspective)> accessed on 26 June 2020.

<sup>31</sup>Ouko, *Supra* note 6.

<sup>32</sup>Chitranjali Negi, ‘Concept of Video Conferencing in ADR: An Overview-Access to Justice’, (2015) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2662344](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662344)> accessed on 28<sup>th</sup> June 2020.

<sup>33</sup>Maxi Scherer, ‘Remote Hearings in International Arbitration: An Analytical Framework’ (2020) *Journal of International Arbitration* 37(4).

<sup>34</sup>Professor 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](https://www.ucl.ac.uk/laws/sites/laws/files/birkenhead_lecture_2017_professor_dame_hazel_genn_final_version.pdf)> accessed on 19 April 2020.

interaction.<sup>35</sup> 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.<sup>36</sup>

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 the parties, witnesses and arbitrator.<sup>37</sup> 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.<sup>38</sup>

The Arbitration Act 1995 requires the parties to an arbitration to do all things necessary for the proper and expeditious conduct of the arbitral proceedings.<sup>39</sup> The parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings.<sup>40</sup> 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.<sup>41</sup> From the foregoing, the Act tries to distinguish between oral hearings and written proceedings.<sup>42</sup> 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

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<sup>35</sup>Shekhar Kumar, ‘Virtual Venues: Improving Online Dispute Resolution as an Alternative to Cost Intensive Litigation’, (2019) 27 J. Marshall J. Computer & Info. L. 81.

<sup>36</sup> JTC 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](https://www.ncsc.org/__data/assets/pdf_file/0031/18499/2017-12-18-odr-for-courts-v2-final.pdf)> accessed on 30 March 2020.

<sup>37</sup>Solomon 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.

<sup>38</sup>Negi, *Supra* note 32

<sup>39</sup>The Kenyan Arbitration Act, Section 19A.

<sup>40</sup>See Section 20.

<sup>41</sup>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](https://profiles.uonbi.ac.ke/kariuki_muigua/files/05_onyema_ttaa_ch.4_kariuki_muigua.pdf)> accessed on 5 July 2020.

<sup>42</sup>Section 20.

in-person hearing and virtually with the difference that the communication is transmitted either with or without technological tools.<sup>43</sup>

The Act does not expressly provide while at the same time does 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.<sup>44</sup> However, it is now clear that the potential requirement for statutory assistance on the use of technology in arbitration should be actively considered. 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.<sup>45</sup>

It is desirable that the Arbitration Act 1995 should emphasize on the use and role of technology like what the United Arab Emirates has done in its Arbitration Law, 2018.<sup>46</sup> The law has several references to the use of modern means of 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.<sup>47</sup> 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

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<sup>43</sup> David 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](http://ijal.in/sites/default/files/Vol9Issue1/Amnd/David_Bateson-Virtual_Arbitration_The_Impact_of_COVID-19.pdf)> (accessed on 3rd December 2020).

<sup>44</sup>Ouko, *Supra* note 6.

<sup>45</sup>Kariuki 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.

<sup>46</sup>Federal Law No. (6) of 2018 on Arbitration, United Arab Emirates.

<sup>47</sup>Arbitration Act, Art 24(1)(b).

communication without their physical presence at the hearing. The emphasis on the use of technology will undoubtedly modernise arbitral proceedings in the UAE.<sup>48</sup>

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.”<sup>49</sup>

Further, consideration should be made for a review of the Act to make an express provision as to the ability of an arbitral tribunal to order virtual hearings where one party objects bearing in mind the provisions of Section 20 of the Act.<sup>50</sup> There is a risk that this could potentially give rise to debates as to enforceability of an award where that party feels they have been denied a fair hearing as a result. The Austrian Supreme Court has already dealt with a case where the issue of whether conducting an arbitration hearing by videoconference over the objection of one party violated due process.<sup>51</sup>

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<sup>48</sup>Essam 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+UAAs+New+Arbitration+Law>> accessed on 29 June 2021.

<sup>49</sup>Dutch Civil Procedure Code, art. 1072b(4) as cited by Scherer, (n 66).

<sup>50</sup>Section 20 of the Act provides that parties are free to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings. Failing an agreement under subsection, the arbitral tribunal may conduct the arbitration in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases. Fenwick Elliott Solicitors, Time for a review? Review of the Arbitration Act 1996 launched by the Law Commission, <https://www.lexology.com/library/detail.aspx?g=f9475139-2b31-4bbf-9d0e-0cb95bffb9c6>

<sup>51</sup>See Case No 18 ONc 3/20s issued on 23 July 2020; The Respondents in an arbitration seated in Vienna and administered by the Vienna International Arbitral Centre (VIAC) had challenged the arbitral tribunal over its decision to conduct an evidentiary hearing remotely by videoconference. After the VIAC had rejected the challenge, the case went to the Austrian Supreme Court. The Court held that arbitrator challenges based on allegations of procedural irregularity can only succeed under Austrian law if the tribunal’s conduct of the proceedings were to result in serious procedural violations or in permanent and significant (dis)advantages to a party. The court found that holding a remote hearing against the objection of a party does not meet this high threshold. Specifically, the Court confirmed that remote hearings are generally permissible under Austrian arbitration law, that the arbitral tribunal enjoys broad discretion as to the organization and conduct of the proceedings, and that the alleged



Should an amended Act expressly lay down the rules in such cases to avoid such challenges in the years to come?<sup>52</sup>

## B. Transparency and Confidentiality in Arbitrations

The terms “privacy” and “confidentiality” are at times used interchangeably, they are in fact different. The former means that the hearings are held in camera, whilst confidentiality refers to the obligation of the participants involved in the proceedings not to reveal information regarding the arbitration to strangers.<sup>53</sup>

Confidentiality is one of the perceived advantages of arbitration over court litigation. The advantages of confidentiality in arbitration proceedings are well understood. The preservation of sensitive proprietary and commercial information, coupled with the ability to preserve an existing commercial relationship, are some of the two main factors favouring the maintenance of confidentiality in arbitration proceedings.<sup>54</sup> It is well established that unauthorised release of information or documents or publication of awards by one party, is prohibited and such a breach of confidentiality is subject to the same sanctions that apply to contractual breaches of confidence.<sup>55</sup> On the other hand, it is widely recognised that the publication of awards, when done in an anonymous manner, without revealing the names of the parties and sensitive information, does not breach the confidentiality principle.<sup>56</sup> This is notably the case with publications made by arbitral institutions. The arbitral community, however, is still very much divided on this and the debate over whether publication of awards is advantageous or detrimental to the system continues.

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inadequacies of remote hearings do not exist (or can be remedied). The Court therefore rejected the Respondents’ challenge.

<sup>52</sup>Fenwick Elliott Solicitors, ‘Time for a review? Review of the Arbitration Act 1996 launched by the Law Commission’, 15 December 2021 <<https://www.lexology.com/library/detail.aspx?g=f9475139-2b31-4bbf-9d0e-0cb95bffb9c6>> accessed on 1 February 2022.

<sup>53</sup>Elina Zlatanska, ‘To Publish, or Not to Publish Arbitral Awards: That is the Question...’, 2015(81)1 *The International Journal of Arbitration, Mediation and Dispute Management* 25-37.

<sup>54</sup>Allen & Overy, ‘Reform of the English Arbitration Act 1996: a nudge towards reversing the presumption of confidentiality’, 31 July 2017 <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/reform-of-the-english-arbitration-act-1996>> accessed on 22 January 2022.

<sup>55</sup>Adam Samuel, ‘The Unauthorized Publication of Arbitral Awards’ (1989) *Lloyd’s Maritime and Commercial Law Quarterly* 158 and Smit, ‘Breach of Confidentiality as a Ground for Avoidance of the Arbitration Agreement’ (2000) 11 *American Review of International Arbitration* 567, 582 as cited in Zlatanska, *Supra* note 52.

<sup>56</sup>Zlatanska, *Supra* note 52.



The principle of party autonomy as expressed in sections 20 and 25 of the Arbitration Act gives parties to an arbitration the right to agree on all procedural and evidential matters. Parties often choose to arbitrate in order to keep details of their dispute private. Under the Act, the parties have an implied duty to maintain the confidentiality of the proceedings. This extends to the hearing, the documents and submissions generated (and disclosed) in the dispute, and the award ultimately rendered by the arbitral tribunal. Although there are exceptions to this obligation for example, where disclosure is in the interest of justice. However, there is no statutory definition of confidentiality in the Act.

Similarly, the UK Arbitration Act of 1996 also does not define confidentiality. The 1989 Report by the UK Departmental Advisory Committee on Arbitration Law (the DAC Report) made it clear that this was a deliberate decision.<sup>57</sup> The drafters of the Act considered giving confidentiality a firm statutory basis in the Act, but the exercise proved too difficult and controversial. One issue was whether it was possible to give an accurate exposition of the principle of confidentiality in the abstract. Another concern was that the myriad of exceptions and qualifications to the principle of confidentiality made it difficult to formulate acceptable statutory guidelines.<sup>58</sup>

The DAC Report noted that the position is not wholly satisfactory, but concluded that, because the principles are unsettled, they were better left to the common law to evolve on a pragmatic case-by-case basis. However, that conclusion was subject to the following caveat:<sup>59</sup>

*“In due course, if the whole matter were ever to become judicially resolved, it would remain possible to add a statutory provision by way of amendment to the Bill.”*

Almost 25 years have passed since the UK Act was enacted and, in that time, the common law has evolved.<sup>60</sup> The UK Court of Appeal decisions in *Ali Shipping Corporation v Shipyard Trogir*<sup>61</sup> and *Emmott v Michael Wilson & Partners Ltd*<sup>62</sup> are now the leading cases on the nature of the obligation of confidentiality. A further raft

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<sup>57</sup>Clark *Supra* note 3.

<sup>58</sup>*Ibid.*

<sup>59</sup>*Ibid.*

<sup>60</sup>*Ibid.*

<sup>61</sup>[1997] EWCA Civ 3054.

<sup>62</sup>[2008] EWCA Civ 184.

of case law has formulated recognised exceptions to the duty of confidentiality. Gaps remain, but a reform of the Arbitration Act would allow the drafters to re-consider whether it is now possible to formulate some clear, statutory guidelines on confidentiality.<sup>63</sup>

Furthermore, the strength of this perceived benefit of confidentiality is not, however, as clear cut as it might seem. Arbitral confidentiality is, as the Lord Mayor observed is, “overrated”.<sup>64</sup> Why? Because the market tends to know which parties are involved in which arbitrations and what the arbitration is about.<sup>65</sup> He recalled in one of the market conferences on the UK Arbitration Bill in July 1995, a very well-known member of the insurance community pointed out how easy it was to acquire any award in the insurance market. This shocked the purists, but reflected reality. And then even when confidentiality and privacy are maintained during the arbitration, it does not stay so for long, as information leaks and private markets in the trade of arbitral decisions develop.<sup>66</sup> If the arbitral award requires recognition and enforcement, the inevitable entry into the public arena occurs.<sup>67</sup> Further, parties can bring arbitration proceedings into the public eye by challenging an award before the courts. There is no express rule applying confidentiality to arbitration proceedings before the courts (which includes documents on the court file). It is at the court’s discretion whether or not details of an underlying arbitration will be made publicly available.<sup>68</sup>

For many years, confidentiality in arbitrations in Kenya had been taken for granted and no one questioned its ambit and effectiveness. It was until recently that the extent of confidentiality in arbitral proceedings became a debated topic arising out of arbitrations involving public institutions and due to claims of bribery or corruption in the proceedings.<sup>69</sup> Disputes involving public bodies often involve matters of public

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<sup>63</sup>Clark *Supra* note 3.

<sup>64</sup> Lord Thomas, *Supra* note 5.

<sup>65</sup>*Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> Ben Hornan and Marie Davoise, ‘Reform of the Arbitration Act 1996 and confidentiality: it’s not all about an opt-in’, 19 April 2018 <<https://www.hlarbitrationlaw.com/2018/04/reform-of-the-arbitration-act-1996-and-confidentiality-its-not-all-about-an-opt-in/>> accessed on 10 January 2022.

<sup>69</sup>See *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, para. 188; *Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex*, High Court of Kenya, Nairobi, Misc. application no. 67 of 2013)).

interest. Taxpayers have a legitimate interest in knowing how their monies are being spent and disputes therein are being resolved.<sup>70</sup>

Arbitrations have been left to rely almost entirely on case law rendered by the courts. With the increase in arbitration, where decisions more often than not remain confidential, the development of that case law has, arguably, been constrained. This is particularly true of sectors where arbitration is the most popular, if not default, mechanism for dispute resolution, such as in construction.<sup>71</sup> On a practical level, the absence of publicly available arbitral decisions has also meant that the appointment of arbitrators rests heavily on the recommendations and advice of lawyers. The absence of transparency means that parties simply do not know how arbitrators perform the role of fact-finders, or the role of contract interpreters. Given that a key draw of arbitration is meant to be the ability to appoint one's own arbitrator, greater transparency in these areas would be welcome.<sup>72</sup> If arbitration practice is to continue to develop, it is important that it remains cognizant of public demand, as well as the legal and commercial environment in which it operates.

More recently, calls for increased transparency in the field have added a new dimension to the debate by arguing that the publication of awards is one of the most significant ways to achieve this. Even though some of the leading arbitrators have recognised the practical importance of publishing awards and have supported the idea that systematic publication can increase confidence and transparency in the system as a whole, arbitral awards are still unpublished.<sup>73</sup>

As a result, much of the information concerning arbitration and the arbitrators' decision-making approach is obtained through anecdotal sources<sup>74</sup> Globally there is no uniform practice of publishing awards and the existing compilations published by internationally renowned arbitral institutions have been criticised for being biased and not representative of the whole.<sup>75</sup> It has been argued that sometimes the redaction of the awards is so extensive that it is unclear how the arbitrators reached their decisions,

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<sup>70</sup> Hornan & Davoise, *Supra* note 66.

<sup>71</sup> Allen & Overy, *Supra* note 54.

<sup>72</sup> *Ibid.*

<sup>73</sup> Zlatanska, *Supra* note 52.

<sup>74</sup> *Ibid.*

<sup>75</sup> Christopher Drahozal, 'Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration' (2006) 22 *Arbitration International* 297; Drahozal, 'Of Rabbits and Rhinoceri' (2003) 20 *Journal of International Arbitration* 23, 25.

thus the publication becomes somewhat futile. Moreover, there is a danger of the development of a parallel market for the “unlawful” publication of awards, either through information leaks or the emergence of “private libraries” of arbitral awards in law firms benefitting members of an exclusive “club”.<sup>76</sup>

The debatable proposed solution would be to reform the Arbitration Act by introducing an “opt-in” system, so that arbitral proceedings are only treated as confidential where the parties expressly provide for confidentiality in their arbitration agreements, in the absence of which the proceedings are not be treated as confidential.<sup>77</sup> It has also been argued that reversing the presumption of confidentiality would help make the arbitral process and its outcomes more predictable. It has been said that one way of achieving this is to encourage a richer body of precedent, helping the development of the law in fields that traditionally rely heavily on arbitration, such as construction.<sup>78</sup> Other jurisdictions such as, Norway’s Arbitration Act has adopted the “opt-in” system.<sup>79</sup> Australia’s Arbitration Act and Hong Kong Arbitration have adopted an “opt-out” system in which there is an automatic presumption of confidentiality over arbitral proceedings, unless the parties “opt out” of this framework.<sup>80</sup> Similarly, the obligation to treat all matters relating to an arbitration as confidential is enshrined in the Arbitration (Scotland) 2010 Act. Singapore and New Zealand also have codified provisions.<sup>81</sup>

Given the apparent importance of confidentiality to users of arbitration, it is necessary to test carefully the underlying rationale for the proposed reforms; namely, to provide greater transparency and predictability to the arbitral process. It is also necessary to assess whether an “opt-in” system would have the desired effect.<sup>82</sup>

In those circumstances, there is a risk that depriving awards of confidentiality could have the paradoxical effect of developing two parallel sources of decisions: awards given by arbitrators (without precedential value) and court judgments (that do have

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<sup>76</sup>Zlatanska, *Supra* note 52

<sup>77</sup>Hornan & Davoise, *Supra* note 67.

<sup>78</sup>*Ibid.*

<sup>79</sup>Clark, *Supra* note 3; *See* Norway Arbitration Act, Lov om voldgift (2004/05/14 nr. 25), Section 5, available at <<https://lovdata.no/dokument/NLE/lov/2004-05-14-25>> accessed on 10 Februray 2022.

<sup>80</sup>*Ibid.*

<sup>81</sup>*Ibid.*

<sup>82</sup>Hornan & Davoise, *Supra* note 67.

precedential value), potentially leading to uncertainty as to which will be preferred by arbitrators in cases before them. There is no doubt parties and their counsel would feel the need to rely on both in their submissions, which would inevitably increase the time and costs proceedings.<sup>83</sup>

Therefore, scope of the duty of confidentiality and legal basis are important issues of policy. A balance needs to be struck between the increasing trend towards transparency in arbitration and the fact that confidentiality is regularly cited by parties as one of the key advantages of arbitration as compared with litigation. Jurisdictions like New Zealand, Scotland and Singapore have sought that balance through legislation, perhaps now is the time for Kenya to follow suit.<sup>84</sup>

### **C. Right of Appeal under Section 35 of the 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.<sup>85</sup> The section provides for recourse to the High Court against an arbitral award through an application for setting aside an award.<sup>86</sup> The High Court upon such an application may set aside the award if the party making the application proves that: a party to the arbitration agreement was under some incapacity;<sup>87</sup> the arbitration agreement is not valid under the law to which the parties have subjected it or the laws of Kenya;<sup>88</sup> the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings;<sup>89</sup> the arbitral award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration;<sup>90</sup> the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;<sup>91</sup> or the making of the award was induced or affected by fraud, bribery, undue influence or corruption.<sup>92</sup> The High Court may also set aside the award if it finds that the subject matter of the dispute is not capable of

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<sup>83</sup> Ibid.

<sup>84</sup> Clark, *Supra* note 3.

<sup>85</sup> Kariuki Muigua, 'Arbitration Law and the Right of Appeal' (2021)9(2) Alternative Dispute Resolution Kenya.

<sup>86</sup> Section 35(1).

<sup>87</sup> Section 35 (2)(a)(i).

<sup>88</sup> Section 35 (2)(a)(ii).

<sup>89</sup> Section 35 (2)(a)(iii).

<sup>90</sup> Section 35 (2)(a)(iv).

<sup>91</sup> Section 35 (2)(a)(v)

<sup>92</sup> Section 35 (2)(a)(vi)

settlement by arbitration under the law of Kenya or the award is in conflict with the public policy of Kenya.<sup>93</sup>

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*.<sup>94</sup> 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.<sup>95</sup> Specifically, the majority of the Supreme Court judges held that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal.<sup>96</sup> From their 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. Therefore, their position was that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under section 35 for Orders to set aside of the award. 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 they acknowledged the need to shield arbitral proceedings from unnecessary Court intervention, they also acknowledged the fact that there may be legitimate reasons seeking to appeal High Court decisions.<sup>97</sup>

Moreover, considering that there is no express bar to appeals under section 35, they were of the opinion that an unfair determination by the High Court should not be immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, this jurisdiction should be exercised carefully so as not to open a floodgate of appeals thus undermining the very essence of arbitration.<sup>98</sup>

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<sup>93</sup> Section 35 (2)(b)(i) & (ii)

<sup>94</sup> *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.

<sup>95</sup> Muigua, *Supra* note 83.

<sup>96</sup> *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

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

In concluding this issue, they agreed with the Interested Party, the Chartered Institute of Arbitrators, 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, steps outside the grounds set out in the said section. Thereby making a decision so grave, so manifestly wrong and which completely closes the door of justice to either of the parties. This circumscribed and narrow jurisdiction should be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.<sup>99</sup>

The Supreme Court went on to restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows that an intended appeal, which is not anchored upon the four corners of section 35 of the Arbitration Act, should not be admitted. In that 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.<sup>100</sup>

Prior to the Supreme Court decisions in Nyutu Agrovets Limited -vs- Airtel Networks Kenya Limited and Synergy Industrial Credit Limited v Cape Holdings Limited,<sup>101</sup> the question of whether the right of appeal accrues under section 35 of the Arbitration Act had 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. 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.<sup>102</sup> In other instances, the Court of Appeal had decided that it had jurisdiction to entertain appeals under section 35 of the Act, it took 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.<sup>103</sup> 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.<sup>104</sup>

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<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> [2019] eKLR

<sup>102</sup> Muigua, *Supra* note 83.

<sup>103</sup> See Kenya Shell Limited -vs- Kobil Petroleum Limited, Civil Application No. 57 of 2006 as cited in Muigua, *Supra* note 82.

<sup>104</sup> Muigua, *Supra* note 83.

On a comparative basis, section 67(4) of the English Arbitration Act provides clarity on the issue of appeals, unlike section 35 of the Kenyan Arbitration Act which does not expressly bar or allow an appeal from a High Court decision made pursuant to the section. The English 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.<sup>105</sup> 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.<sup>106</sup>

The Supreme Court has rendered some certainty on the issue of the right of appeal under section 35 of the Arbitration Act. However, the issue of grant of leave under section 35 of the Arbitration Act and the grounds that will warrant the same have been fully settle yet going by the above discussion. This calls a 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. Further, section 35 of the Act ought to be interpreted in a way that promotes the purpose and objectives of arbitration and limit court intervention while at the same time ensuring expeditious yet just resolution of disputes. 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. 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.<sup>107</sup>

## Conclusion

As this article has highlighted, 26 years have passed since the Arbitration Act came into operation. A lot has changed since then including changes in technology and globalisation of the arbitral practice. Additionally, some gaps in the Act have been identified through court processes challenging arbitrations and awards which require legislative intervention. It would be appropriate to review and/or reform some aspects of the Act to ensure that it remains fit for purpose in the years to come. A focused

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<sup>105</sup>See Arbitration Act, 1996 (Chapter 23), United Kingdom, S 67 (4) as cited in Kariuki Muigua, Arbitration Law and the Right of Appeal in (2021)9(2) Alternative Dispute Resolution Kenya.

<sup>106</sup>See Synergy Industrial Credit Limited -vs- Cape Holdings Limited Supreme Court, Petition No. 2 of 2017; Muigua, *Supra* note 82.

<sup>107</sup> *Ibid.*



thought to the issue and a participatory and all inclusive process would be necessary in the review/reform process.

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## The New Tanzania Arbitration Act: A challenge to Party Autonomy?

By: **Juvenalis J. Ngowi\***

### 1. Introduction

On 18<sup>th</sup> January, 2021, the Tanzania Arbitration Act<sup>1</sup> (the “Act”) came into operation<sup>2</sup>. The Act repealed and replaced the outdated Arbitration Act, CAP 15 R.E. 2019. This old piece of legislation was enacted in 1931 with very few amendments made over the years. The Rules made under the old legislation which were enacted in 1954 and hardly provided for favourable environment within which to conduct Alternative Dispute Resolution (ADR) in general and arbitration proceedings in particular in Tanzania. It should also be noted that political and economic ideologies in Tanzania have been changing from time to time and it was obvious that the repealed Arbitration Act was outdated and the enactment of the new Act was inevitable. Given the current political, social and economic situation of Tanzania, it is expected that new Act will strike a balance protecting public policies in matters of investment and other commercial transactions between private sector, public sector and private public partnerships (PPP) without compromising general principles of arbitration particularly parties’ autonomy. The question is how far has the Act succeeded in this balance?

It is important to note that there are other pieces of legislation that affect arbitration proceedings in one way or another.<sup>3</sup> The general principle of law is that when there is a specific legislation which provides for a particular aspect, such law should prevail over the general law unless provided otherwise. As such, the new Act cannot override specific provisions related to arbitration proceedings as provided in other specific legislation including the Natural Wealth and Resources (Permanent Sovereignty) Act<sup>4</sup> and the Civil Procedure Code of Tanzania<sup>5</sup>.

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<sup>1</sup> Act No. 2 of 2020

<sup>2</sup> Vide Government Notice No. 101 of 2021 titled, the Arbitration (Date of Commencement) Notice, 2021

<sup>3</sup> Notably, the Civil Procedure Code, Chapter 33 R.E 2019, the Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 and the Tanzania Investment Act, Cap 38 RE 2002

<sup>4</sup> Act No. 5 of 2017

<sup>5</sup> Chapter 33 of Revised Edition 2019

The new Act has heightened regulation of the arbitration process in Tanzania. The regulation start from the process of appointing arbitrator to the time of executing an award\*. Court powers within the current legislation are more elaborate and factors which can be used to set aside arbitral awards are more clearer compared to what was provided under the repealed Act which had a blanket provision providing that courts may set aside an arbitral award where the arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured<sup>6</sup>. There are regulations made under the Act and under the Civil Procedure Code which regulate and control the ADR process.<sup>7</sup>

This paper offers an analysis of the new Act with specific overview of areas that appear to interfere with parties' autonomy either by authorities established by the Act or other statutes and will also looks at the provisions which give courts powers to intervene with the process particularly at the time of enforcement of an award. The paper looks at the process of appointment of an arbitrator and courts' intervention during enforcement of arbitral awards.

## **2. Appointment of Arbitrators**

One of the advantages of the arbitration process is the autonomy of the parties to appoint the “judge” of their own case.<sup>8</sup> However, this autonomy is not absolute under the Act,. Where arbitration is conducted in Tanzania, the parties' choice of arbitrators, is limited to a pool of accredited arbitrators. Under the new Act, a person who intends to practice as an arbitrator in mainland Tanzania must obtain accreditation from the Accreditation Panel<sup>9</sup>. Thus, parties cannot appoint any person to act as an arbitrator despite of his or her experience and expertise either as an arbitrator or an expert in a certain area unless such person has complied with the accreditation process. Thus if a person intends to act as an arbitrator in Tanzania Mainland s/he must first apply and qualify for accreditation, and only after one is accredited and gazetted, can such a person qualify to be appointed as an arbitrator by parties. This would mean that, parties may agree to be arbitrated by a certain person due to some qualifications which such person possesses, but before the appointment is confirmed, parties must ensure that the person or persons so selected is accredited as an arbitrator.

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<sup>6</sup> Section 16 of The Arbitration Act, Cap. 15 R.E. 2019

<sup>7</sup> The Arbitration (Rules of Procedure) Regulations, 2021, Reconciliation, Negotiation, Mediation and Arbitration (Practitioners Accreditation) Regulations, 2021, Code of Conduct and Practice for Reconciliators, Negotiators, Mediators and Arbitrators Regulations, 2021

<sup>8</sup> Dr. Clement J. Mashamba, *Arbitration Law and Practice in Tanzania*, Dar es Salaam, Theophilus Enterprises, 2015

<sup>9</sup> Section 6 of the Arbitration Act, Cap. 15 R.E. 2020

Before the enactment of the new Act, parties were free to choose any person of their choice to arbitrate their disputes regardless of the qualifications of such persons and without any requirement of such person to be accredited by any accreditation body or authority. It is important to note that not every person can qualify for accreditation as an arbitrator. The law provides for the minimum qualifications for a person to qualify for accreditation as an arbitrator. The qualifications enumerated under the Rules<sup>10</sup> are to the effect that a person may be eligible to be registered as an arbitrator if such person has either qualifications to be appointed as a judge of the High Court of Tanzania or has experience of at least five years in panels and tribunals that settle disputes at national or international level or has dispute resolution qualification from a recognised institution or is an advocate of the High Court of Tanzania with at least five years of practice as an advocate and is a holder of bachelor degree or its equivalent from a recognised institution. The Act makes it an offence for a person to act as an arbitrator without complying with the requirements of the law and upon conviction, such person may be liable to penal or monetary sanctions. It is important also to note that a person practicing as an arbitrator in another jurisdiction is also required to apply for accreditation to practice as an arbitrator in Tanzania. This in a way limit parties to enjoy services of foreign arbitrators in the proceedings to be conducted in Tanzania.

Probably of interest here is also the fact that the accreditation panel is chaired by the Attorney General. For purposes of maintaining independence of the accreditation panel, it can be argued that the chairperson should be appointed by members of the panel and not a senior government official.

As mentioned earlier, there are other legislations which restrict parties' autonomy to appoint arbitrators, and the place of arbitration. Until recently, section 11 of the Natural Wealth and Resources (Permanent Sovereignty) Act No. 5 of 2017 ("Permanent Sovereignty Act") prohibited disputes related to natural wealth and resources to be subjected to proceedings in any foreign country. Under this specific legislation, disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources were to be adjudicated by judicial bodies or other organs established in the United Republic of Tanzania and in accordance with laws of Tanzania. The effect of this provision was that parties could not appoint foreign arbitral institutions to arbitrate disputes related to natural wealth and resources in Tanzania unless such institution is established in Tanzania. Notably, Tanzania is rich in natural resources

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<sup>10</sup> Rule 6 of Government Notice No. 147 of 2001



and there are significant projects involving exploration and exploitation of gas, oil and minerals involving the government and private investors.

In what has seen to be a positive move by international investors, the new Arbitration Act has stepped in to amend section 11 of Permanent Sovereignty Act such that disputes related to natural wealth and resources can now be arbitrated by foreign arbitral institutions but the arbitration must be conducted in Tanzania. Since the law requires any arbitrator who intends to act as an arbitrator in Tanzania to be accredited, the choice of parties as to who should arbitrate their disputes involving wealth and natural resources remains limited to only those accredited as arbitrators in Tanzania.

Section 22 of the Public Private Partnership Act (PPPA) was amended in 2018 to the effect that all disputes arising under a PPP agreement would be resolved through negotiation and in case the matter is not settled at negotiations stage, it would be referred to mediation, arbitration or adjudication, after which proceedings would be subjected to judicial bodies or other organs established in Tanzania. This provision has now been amended by section 102 of the Arbitration Act which has done away with the requirement to have the matter adjudicated by judicial bodies or other organs body established in Tanzania. This would mean that international arbitration centres can be engaged in arbitrating disputes which arise out of PPP agreements with a condition that the arbitrators so appointed must be accredited and registered in Tanzania.

From the above analysis, it may be debatable whether parties' autonomy in appointing arbitrators of their choice is limited by provisions related to accreditation of the arbitrators and other provisions of the law which governs place of arbitration. Much as international arbitration institutions are allowed to arbitrate disputes in Tanzania, the requirement for accreditation of arbitrators who want to practice in Tanzania can be seen as narrowing down the choice of parties to use international arbitration institutes in arbitration proceedings conducted in Tanzania.

### **3. Court's power to set aside Arbitral Awards.**

An award made by an arbitral tribunal may by leave of the Court be enforced as judgement or order of the Court.<sup>11</sup> The new Act, provides more clarity on grounds under which one can challenge the enforcement of an arbitral award when compared to the repealed Act. Generally there are two main grounds for a party to challenge arbitral award<sup>12</sup>. The first ground is on jurisdiction and the second is on serious

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<sup>11</sup> Section 73(1) of the Arbitration Act, 2020

<sup>12</sup> Sections 74 and 75 of the Arbitration Act

irregularity. The new Act provides for particulars of what may amount to serious irregularity and as we shall see later, the provision provides a list of matters which the court should consider when determining whether there are irregularities which can cause or likely cause substantial injustice.

If the award is challenged on grounds of either substantive jurisdiction or allegations of serious irregularity and the Court agrees with those grounds or any of them, the Court can vary the arbitral award and if that happens, the variation made by Court shall have effect as part of the arbitral award. In this situation the final award is composed of the decision of the arbitral tribunal and that of the court to the extent of the variation made. Looking at this critically it is clear that the final award to be executed is not only arbitrator's decision but also the court's decision. The court may also remit the award to the arbitral body in whole or in part, for reconsideration and if this happens, the arbitral body shall make a fresh award in respect of the matter remitted. The court may also declare the award to be of no effect either wholly or partially.

The provisions of the new Act relating to when and how the court can use its power when an award is submitted for enforcement by the court have been tested by the High Court of Tanzania (Commercial Division).<sup>13</sup> In its decision in the cited matter, the High Court insisted that courts should be very cautious when deciding whether the arbitral award should be enforced or not. The court should not be trapped into the temptation of re-appreciating the evidence. The High Court quoted with approval the decision of the same Court<sup>14</sup> in which it was held;

*“When a court called upon to set aside an arbitral award... has to decide is, whether the arbitral award was prima facie good or right on face of it, not whether the reasons (whether of law of facts or both) given by the arbitral tribunal for the award were right or sound, unless the reason(s) form part of the award.”*

The court was of the firm view that the purposes of the Act is to drastically reduce the extent of intervention of the court in the arbitral process. The court proceeded to hold that it may intervene on the ground of irregularity only when such irregularity is serious

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<sup>13</sup> Consolidated Misc. Commercial Cause Nos. 25 & 11 of 2021, M/s Marine Services Co. Limited versus M/s Gas Entec Company Limited, High Court of Tanzania (Commercial Division).

<sup>14</sup> Misc. Commercial Cause No. 1 of 2020, CATIC International Engineering (T) Limited versus University of Dar es Salaam

and could cause substantial injustice, The court is bound by the list of irregularities stated in section 75 (2) of the Act and that the grounds provided by the legislation is exhaustive and these irregularities are capable of faulting the arbitral award and indeed it is a closed list in the sense that courts cannot invent new grounds other than what is provided for in the said provision. This would mean that courts are bound by what is provided as irregularities by the Act and cannot invent new sets of irregularities as ground of setting aside an arbitral award. The person challenging the award on the ground of irregularity has a duty to establish that the irregularity alleged falls within the ambit of section 75(2) of the Act.

Under section 75(2)(g) of the Act, one of the ground for challenging the arbitral award is fraud or procurement of an arbitral award in a manner that is contrary to public policy. This appears to give courts wide room in interpretation of what actually can be considered to be contrary to public policy. While the High Court was of the view that the list of irregularities is exhaustive under the Act, there is still a number of sub-grounds that could qualify as being contrary to public policy. In the CATIC's case mentioned above<sup>15</sup>, the court held that illegality of the subject matter is against public policy and explained that the doctrine of illegality is based on the fact that illegality is against public interest. The High Court in the case of M/s Marine Services Limited cited earlier determined that variation of a contract initiated without complying with public procurement process was bad in law and this had disastrous effects occasioning an illegality. However, given the wording of Section 75 (2) of the new Act, one may argue that illegality alone is not sufficient to set aside the arbitral award but it is mandatory and necessary for a party to establish that such illegality caused or is likely to cause injustice.

Notably, what amounts to “contrary public policy” could attract wide and different interpretation by courts in future cases and without a clear definition of what amounts to public interest, the provision can be used to enlarge the list of what can be used to challenge enforcement of the arbitral award and at the end the list provided by legislation by effect shall not be a closed list or exhaustive.

One of the benefits of arbitration is for parties to obtain a fair resolution of disputes which entails avoiding unnecessary delays among others<sup>16</sup>. However, this advantage may be diluted by court process during enforcement of the arbitral award. While

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<sup>15</sup> *Supra*

<sup>16</sup> Dr. Julius Clement Mashamba, *International Arbitration in East Africa, Law and Practice*, Dar es Salaam, Lex Law Publishing & Dispute Resolution and Management Co, Ltd 2021

arbitration is assumed to be quick and less time consuming because of its finality when a decision is made, the situation changes once the court comes in during enforcement of the award. The decision of the court when a person challenges registration of an award under section 75 of the Act, is not final and conclusive. A party aggrieved with the decision whether to enforce the award or refusal to enforce the award, has the right to appeal subject to obtaining leave of the court<sup>17</sup>. While an appeal might be good for purposes of meeting ends of justice, the Act in this situation makes the process much longer by imposing the requirement to obtain leave of the court. This would mean that an aggrieved party must start with the application for leave to appeal and it is only after leave has been granted that the appeal is lodged. It is obvious that the process could have been shortened by giving parties the automatic right to appeal without necessarily imposing the requirement to obtain leave of the court. The process can be longer if the High Court refuses to grant leave and the aggrieved party decides to seek the leave at the Court of Appeal of Tanzania.

From what is discussed above, the Act generally provides clear grounds that can be used to challenge arbitral awards. However, it would have been great if the Act provided the scope of what matters contrary to public policy as this would restrict wider interpretation of the phrase hence provide an exhaustive list of grounds to challenge the arbitral awards.

#### **4. Conclusion**

The new Arbitration has generally made arbitration process in Tanzania more defined compared to the period before the enactment of the new Act. The Act has a lot of positive changes in the ADR system in Tanzania. The process of arbitration is well elaborated under the new Act and Rules made under it, however, there is room for further improvement that would have a better effect for parties that choose arbitration. The parties' autonomy to choose the arbitrator(s) of their choices is limited to a pool of accredited arbitrators which restricts resources and expertise of non-accredited members and this might not be very healthy in attracting investors. The law should allow parties to choose arbitrators of their choice without necessarily compromising the intention of regulating the conduct of arbitrators.

Furthermore, the Act is restrictive on the use of foreign arbitration institutions in matters of natural wealth resources. The law requires such arbitration proceedings to be conducted in Tanzania. This has an impact on investment as most investors would

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<sup>17</sup> Section 75(4) of the Act

prefer to exercise the right of parties to choose the place of arbitration and in most cases they would prefer a neutral ground.

Challenging an arbitral award is well defined both substantively and procedurally under the new Act, but the effect of this will mainly depend on how courts interpret the list of grounds which can be used to invalidate the arbitral awards. Courts should be mindful to exercise fairness in limiting their jurisdiction to the extent to which they can interfere with the validity of the arbitral award. For purposes of shortening the arbitral process and allowing the winner to enjoy the fruits of the award, it is a call that the Act should be amended to simplify the appeal process against decision of the High Court by removing the requirement to obtain leave of the court before a party can institute an appeal against challenging enforcement of the award.

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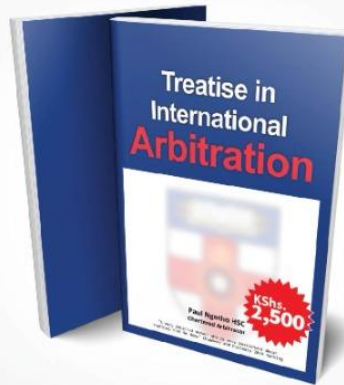
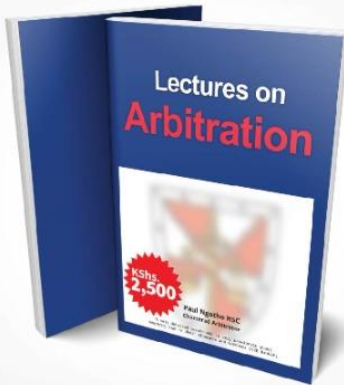
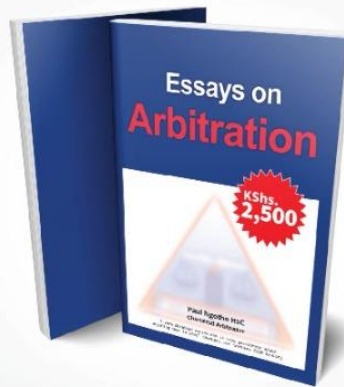
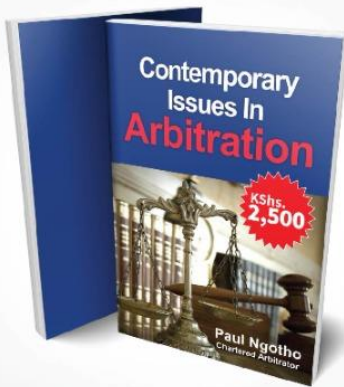


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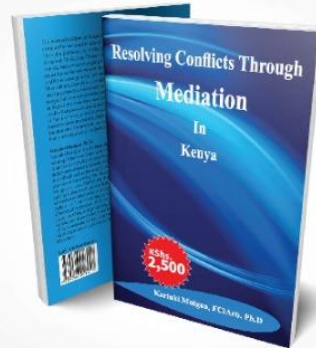
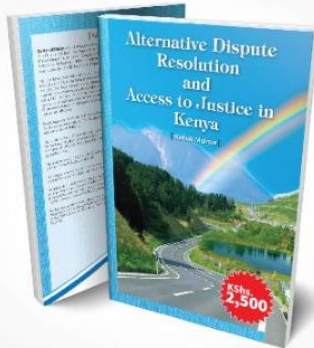
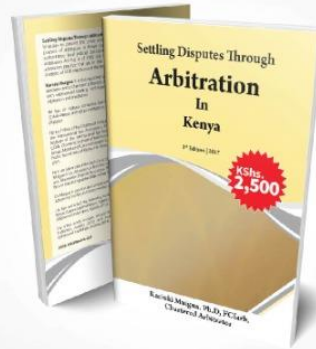
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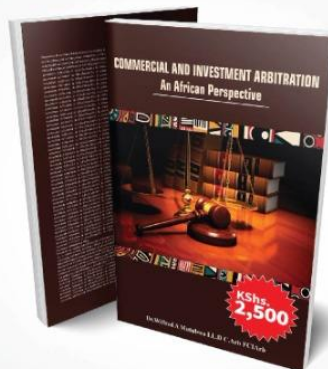
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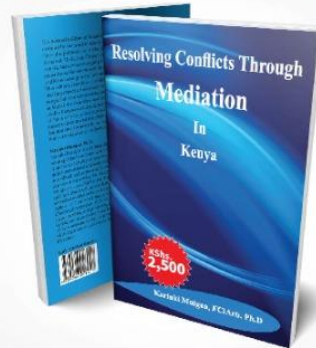
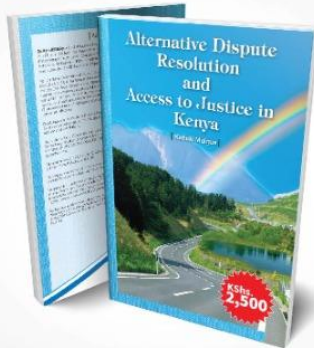
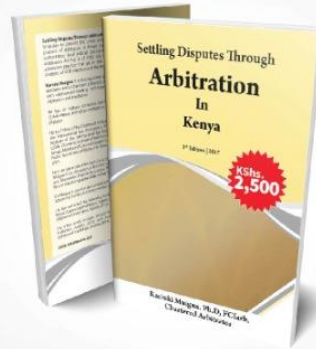
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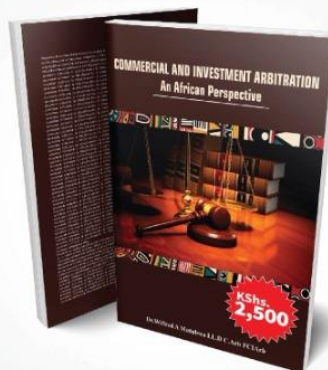
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