

# Alternative Dispute Resolution



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**ALTERNATIVE DISPUTE RESOLUTION**

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**Volume 6 Issue 2**

**2018**

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

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**Typesetting by:**

New Tech Edge Solutions Ltd,  
P.O. Box 60561 – 00200,  
Tel: +254 721 262 409/ 737 662 029,  
Nairobi, Kenya.

**Printed by:**

Mouldex Printers  
P.O. Box 63395,  
Tel – 0723 366839,  
Nairobi, Kenya.

**Published by:**

Glenwood Publishers Limited  
P.O. Box 76115 - 00508  
Tel +254 2210281,  
Nairobi, Kenya.

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*This Journal should be cited as (2018) 6(2) Alternative Dispute Resolution*

**ISBN 978-9966-046-14-7**

## Editor's Note

Welcome to the *Alternative Dispute Resolution Journal*, Vol. 6, No. 2, a publication of the Chartered Institute of Arbitrators Kenya Branch (CI Arb-K). The Journal is published in hard copy and also online at <http://www.ciarbkenya.org/publications/>

It has a global reach and scholars have continued to relate with it and cite it accordingly. Recent years have seen tremendous growth and awareness of conflict management mechanisms such as negotiation, mediation, adjudication, conciliation and arbitration. Indeed, the debate has shifted to the question whether Alternative Dispute Resolution (ADR) is really alternative. It appears to be the first option for many people either in business, family or other spheres.

This Journal is peer reviewed and refereed so as to maintain high standards and quality. This volume contains articles dealing with various ADR mechanisms in the contemporary context.

This Edition covers themes such as the concept of international public policy in arbitration; the promotion of Alternative Dispute Resolution Mechanisms by the Judiciary in Kenya and its impact on party autonomy; ADR at the workplace; the Alternative Dispute Resolution Movement in the postcolonial state; jurisprudential foundations of ADR; challenges facing international commercial arbitration in Africa; Security for costs in international arbitrations; mediation as a tool of conflict management in Kenya; and dealing with conflicts in project management.

ADR is a necessary ingredient in the quest for Access to Justice. Access to Justice is a key pillar to sustainable development. In the Kenyan context, there is need to legitimise and institutionalise ADR; it is necessary to have an overarching policy and legal framework governing the same. The same should take into account pertinent constitutional provisions and the Bill of Rights.

We as the Editorial Team have strived to publish papers that address contemporary and emerging issues in the legal environment and practice of ADR. Alternative Dispute Resolution Journal is now a rich resource for scholars, ADR practitioners and other academics seeking to engage in conflict management discourse. We believe in continuous improvement. Each Edition of this Journal takes on board feedback from the readers.

CIArb-K takes this opportunity to thank the publisher, contributing authors, Editorial Team, Reviewers, scholars and those who have made it possible to publish, disseminate knowledge and spur debate on ADR among practitioners and general readers all over the world.

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

Editor.

**Nairobi, June, 2018**

# Alternative Dispute Resolution

A Journal Published Twice a Year

## Volume 6 Issue 2 - 2018

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## **Dealing with Conflicts in Project Management**

*By: Kariuki Muigua\**

### **Abstract**

*This paper addresses the issue of dealing with conflicts in project management. It looks at the range of conflict management mechanisms available to parties in the course of project management in Kenya. Their various merits and demerits are examined. The challenges facing the legal and institutional infrastructure for management of conflicts in Kenya are discussed. These challenges are likely to impact on project implementation and delivery. The paper examines the opportunities afforded by various mechanisms in dealing with conflicts expeditiously and hence ensuring smooth and timely implementation and delivery of projects.*

### **1. Introduction**

#### **1.1 Definition and Nature of Project Management**

Project management is a methodological approach to achieving agreed upon results within a specified time frame with defined resources and involves the application of knowledge, skills, tools, and techniques to a wide range of activities in order to meet the requirements of a project.<sup>1</sup> Scholars have argued

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The Paper was first presented at the Continuous Professional Development Workshop for Architects and Quantity Surveyors held on 22<sup>nd</sup> & 23<sup>rd</sup> September 2011.

<sup>1</sup> Amy Ohlendorf, Conflict Resolution in Project Management, Information Systems Analysis MSIS 488, Fall 2001, available at

<[http://www.umsl.edu/~sauterv/analysis/488\\_f01\\_papers/Ohlendorf.htm](http://www.umsl.edu/~sauterv/analysis/488_f01_papers/Ohlendorf.htm)> accessed on 24/08/2011; See also Atkinson, R., "Project Management: Cost, Time And Quality, Two



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that project management is premised on performance, cost and time as its main goals wherein the focus is to meet customer expectations, deliver projects within budget, and complete projects on time.<sup>2</sup> Notably, recent literature on the subject takes the view that while earlier debates on definitions of project management focused on the variables of time, cost, and scope—otherwise known as the “iron triangle”, recent definitions of project management are more inclusive and emphasize the importance of working with stakeholders to define needs, expectations, and project tasks.<sup>3</sup> Thus, these definitions describe project management as involving cultural, structural, practical, and interpersonal aspects, making “project management about managing people to deliver results, not managing work”.<sup>4</sup>

Based on the broadened scopes in definition, it follows that the success of a project will rely on a number of factors, including managing conflicts and problems in projects as an important determinant of project success.<sup>5</sup> This,

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Best Guesses And A Phenomenon, It's Time To Accept Other Success Criteria," *International Journal of Project Management*, Vol.17, no. 6 (1999), pp. 337-342 at p.337: .... Project Management is the application of a collection of tools and techniques (such as the CPM and matrix organisation) to direct the use of diverse resources toward the accomplishment of a unique, complex, one-time task within time, cost and quality constraints. Each task requires a particular mix of these tools and techniques structured to the task environment and life cycle (from conception to completion) of the task (p.337).

.....The planning, organisation, monitoring and control of all aspects of a project and the motivation of all involved to achieve the project objectives safely and within agreed time, cost and performance criteria. The project manager is the single point of responsibility for achieving this (p.338).

<sup>2</sup> Atkinson, R., "Project Management: Cost, Time and Quality, Two Best Guesses and A Phenomenon, It's Time to Accept Other Success Criteria," *op cit.*, p. 338; See also

<sup>3</sup> Jugdev, Kam, and Müller, R., "A retrospective look at our evolving understanding of project success," *Project management journal*, Vol.36, no. 4 (2005), pp.19-31 at p.20.

<sup>4</sup> *Ibid.*, at p.20.

<sup>5</sup> Anantamula, V.S, "Project Manager Leadership Role in Improving Project Performance," *Engineering Management Journal*, Vol.22, No. 1 (2010), pp.13-22 at p.15.

according to scholars, involves people skills which focus on fostering a climate of active participation and minimal dysfunctional conflict and implies an environment of trust, consistent processes without ambiguity, communicating expectations, and clarity in communications.<sup>6</sup> It also considered as involving defining roles and responsibilities of project team members without ambiguity to avoid conflict and encourage teamwork.<sup>7</sup> Empirical studies on the criteria for effective project team management have shown these as including understanding the tasks and roles of the project team members; defining each team member's individual responsibilities, role and level of accountability; creating an environment of trust and support in problem solving; motivating team members; encouraging open, effective communication; and providing appropriate communication tools, techniques, and systems.<sup>8</sup> The studies also supported the hypothesis that satisfying personal and professional needs of team members will have the strongest effect on team performance, and identified some other factors, which include ability to resolve conflict, mutual trust and respect, and communications across organizational lines.<sup>9</sup> It therefore follows that conflict management is an important aspect of project management, and while it may not always be possible to avoid conflicts, the arising conflicts can be managed effectively in an atmosphere of mutual respect, trust, understanding and open communication for the success of the project.

It is on the basis of the above findings on what drives success in project management that this paper explores some of the most viable mechanisms, based on their characteristics, that project managers can use to deal with potential conflicts and enhance the chances of the project success.

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<sup>6</sup> Ibid, at p.15.

<sup>7</sup> Ibid, at p.15.

<sup>8</sup> Anantatmula, V.S, "Project Manager Leadership Role in Improving Project Performance," op cit., at p.15.

<sup>9</sup> Anantatmula, V.S, "Project Manager Leadership Role in Improving Project Performance," op cit., at p.15.

## **1.2 Need for Conflict Management in Project Management**

A conflict is a situation that exists when persons pursue goals that are incompatible and end up compromising or contradicting the interests of another.<sup>10</sup> In a conflict situation, each party wants to pursue its own interests to the full, and in so doing ends up contradicting, compromising, or even defeating the interests of the other.<sup>11</sup> Conflict is also viewed as a process of adjustment, which itself can be subject to procedures to contain and regularize conflict behaviour and assure a fair outcome.<sup>12</sup>

Conflicts are inevitable in project management and can be time consuming, expensive and unpleasant in that they can destroy the relationship between the contractual parties and also add to the cost of the contract.<sup>13</sup> They can bog down and impede the smooth implementation of projects. Some scholars have argued that disputes and conflicts in projects divert valuable resources from the overall aim, which is completion of the project on time, on budget and to the quality specified.<sup>14</sup> Furthermore, they generally cost money, take time and destroy relationships, which may have taken years to develop.<sup>15</sup>

Protracted disputes that remain unsettled can negatively impact on the progress of a project and ultimately delay its delivery. They have attendant negative impact on projects. A delayed project continues to attract costs, fees, penalties and numerous other charges that would otherwise be avoided. For instance a

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10 Odhiambo, M.O., *The Karamoja Conflict: Origins, impacts and solutions*, (Oxfam GB, 2003), p.15. Available at

<https://oxfamilibrary.openrepository.com/oxfam/handle/10546/121081> [Accessed on 7/06/2018].

11 *Ibid.*, p.15.

12 Rummel, R.J., 'Principles of Conflict Resolution,' Chapter 10, *Understanding Conflict and war: Vol. 5: The Just Peace*. Available at

<http://www.mega.nu/ampp/rummel/tjp.chap10.htm> [Accessed on 7/06/2018].

13 Amy Ohlendorf, *Conflict Resolution in Project Management, Information Systems Analysis*, op. cit.

14 Fenn, P., "Introduction to Civil and Commercial Mediation", in *Chartered Institute of Arbitrators, Workbook on Mediation*, (CI Arb, London, 2002), at p. 12.

15 *Ibid.*, at p. 12.

project that is finalized through a loan needs to be implemented and delivered expeditiously so as to minimize financial losses occurring due to interest and other charges.

Disputes and conflicts impact negatively on relationships. Projects need teamwork in order to be implemented and delivered as planned. They occur in any social setting and when they do the need of a speedy, efficient and cost effective dispute resolution mechanism cannot be gainsaid. Even in project management, disputes do occur, and indeed, they are envisaged in contracts hence the Dispute Resolution Clause found in various standard form contracts<sup>16</sup>. For example, in construction disputes, the most common disagreement will be between the contractor and employer or sub-contractor and the main contractor. It is important for the parties to choose a dispute settlement mechanism that is practicable and effective. It is therefore crucial to work towards avoiding disputes at the first instance.

Consequently, it is to be noted that the contract negotiation stage is of the greatest importance since it is during this stage that parties agree on the dispute settlement method to be applied in the event of a dispute. If the parties agree in the contract to adopt certain procedures in the event of a dispute arising, one party cannot insist on the use of other procedures, or even any other methods of implementing agreed procedures, without the consent of the second party.<sup>17</sup>

## **2. Overview of the Conflict Management Mechanisms**

Conflict management has been defined as the practice of identifying and handling conflicts in a sensible, fair and efficient manner that prevents them

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<sup>16</sup> See, Clause 20 of the FIDIC Conditions of Contract for Construction, First Edition 1999; Clause 45.0 of The Joint Building Council, Agreement and Conditions of Contract for Building Works, 1999 Edition and Clause 31.0 of The Kenya Association of Building and Civil Engineering Contractors, Agreement and Conditions of Sub- Contract for Building Works, 2002 Edition.

<sup>17</sup> See generally, Dispute Resolution Guidance at [http://www.ogc.gov.uk/documents/dispute resolution.pdf](http://www.ogc.gov.uk/documents/dispute%20resolution.pdf), accessed on 19/08/2011.

from escalating out of control and becoming violent.<sup>18</sup> It is considered as a multidisciplinary field of research and action that addresses how people can make better decisions collaboratively, through ensuring that the roots of conflict are addressed by building upon shared interests and finding points of agreement.<sup>19</sup>

In the widest sense conflict management mechanisms include any process which can bring about the conclusion of a dispute ranging from the most informal negotiations between the parties themselves, through increasing formality and more directive intervention from external sources, to a full court hearing with strict rules of procedure.<sup>20</sup> It has rightly been pointed out that there are many factors that determine the emergence, persistence, and even management of conflicts, and, the understanding of these factors which range from internal to relational and contextual ones, is thus important in developing policies that effectively limit and manage conflict.<sup>21</sup> It is arguable that the unique circumstances and needs of a conflict dictate the mechanism to be employed it

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<sup>18</sup> Engel, A. & Korf, B., 'Negotiation and mediation techniques for natural resource management,' Prepared in the framework of the Livelihood Support Programme (LSP), An interdepartmental programme for improving support for enhancing livelihoods of the rural poor, (Food and Agriculture Organization of the United Nations, Rome, 2005), available at

[http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement\\_FAO2005.pdf](http://peacemaker.un.org/sites/peacemaker.un.org/files/NegotiationandMediationTechniquesforNaturalResourceManagement_FAO2005.pdf) [Accessed on 7/06/2018].

<sup>19</sup> Anderson, J., et al, 'Addressing Natural Resource Conflicts through Community Forestry: Setting the Stage,' available at

<http://www.fao.org/docrep/005/ac697e/ac697e13.htm#TopOfPage> [Accessed 7/06/2018].

<sup>20</sup> Sourced from, <<http://www.buildingdisputestribunal.co.nz/.html>> accessed on 24/08/2011.

<sup>21</sup> Louis, K., "Factors Shaping the Course of Intractable Conflict." *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003.

<[http://www.beyondintractability.org/essay/factors\\_shaping\\_intractable\\_conflict/](http://www.beyondintractability.org/essay/factors_shaping_intractable_conflict/)>.

its management. The discourse in this paper contemplates the following conflict management mechanisms in the context of project management;

## **2.1 Negotiation**

Negotiation is defined as a process that involves parties meeting to identify and discuss the issues at hand so as to arrive at a mutually acceptable solution without the help of a third party. It is also described as a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.<sup>22</sup> Negotiation is also defined as a process by which involved actors communicate and exchange proposals in an attempt to agree about the dimensions of conflict termination and their future relationship.<sup>23</sup>

Negotiation is considered by far the most efficient conflict management mechanism in terms of management of time, costs and preservation of relationships and has been seen as the preferred route in most disputes.<sup>24</sup> In negotiation the parties themselves attempt to settle their differences using a range of techniques from concession and compromise to coercion and confrontation.<sup>25</sup> Its advantages include, *inter alia*, that it is fast; cost saving; confidential; preserves relationships; provides a range of possible solutions and there is autonomy over the process and the outcome. The outcome of a collaborative approach to negotiations is considered to be: improved relationships; a better chance of building trust and respect; self-confidence;

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<sup>22</sup> Negotiations in Debt and Financial Management 'Theoretical Introduction to Negotiation: What Is Negotiation?', Document No.4, December 1994, Available at [http://www2.unitar.org/dfm/Resource\\_Center/Document\\_Series/Document4/3Theoretical.htm](http://www2.unitar.org/dfm/Resource_Center/Document_Series/Document4/3Theoretical.htm) [Accessed on 7/06/2018].

<sup>23</sup> Bercovitch, J. & Jackson, R., 'Negotiation or Mediation?: An Exploration of Factors Affecting the Choice of Conflict Management in International Conflict,' *Negotiation Journal*, January 2001, Vol. 17, Issue 1, pp 59-77, p. 60.

<sup>24</sup> See Dispute Resolution Guidance op. cit.

<sup>25</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p. 14.

more enjoyment; less stress; and more satisfactory results.<sup>26</sup> Its disadvantages are, *inter alia*, it requires the goodwill of the parties; endless proceedings; can create power imbalances; it is non-binding unless parties reduce the agreement into writing; creates no precedents and it is not suitable when one party needs urgent protection like an injunction.

If the parties do not reach an agreement through negotiation, they will need to consider what other method or methods of dispute resolution would be suitable. However, it will still be possible or may be necessary to continue with negotiations as part of or alongside other forms of dispute resolution.<sup>27</sup> Negotiation with the help of a third party is called mediation, where negotiation leads to mediation in the sense that the need for mediation arises after the conflicting parties have attempted negotiation, but have reached a deadlock.<sup>28</sup>

## **2.2 Mediation**

Mediation is a voluntary, non-binding dispute resolution process in which a third party helps the parties to reach a negotiated solution.<sup>29</sup> Mediation is also defined as the intervention (often at different levels of development or intensity) in a standard negotiation or conflict of an acceptable third party who has limited or no authoritative decision-making power but who assists the involved parties in voluntarily reaching a mutually acceptable settlement of issues in dispute.<sup>30</sup>

It has all the advantages of conventional negotiation as set out above but the involvement of the third party can make the negotiation more effective. It is also

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<sup>26</sup> French, A., *Negotiating Skills*, (Alchemy, 2003), p. viii.

<sup>27</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", *op. cit*, p. 14.

<sup>28</sup> Mwangi, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

<sup>29</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", *op. cit*, p.10.

<sup>30</sup> Moore, C., *The Mediation Process: Practical Strategies for Resolving Conflict*, 3rd, (San Francisco: Jossey-Bass Publishers, 2004).

seen as the preferred dispute resolution route in most disputes when conventional negotiation has failed or is making slow progress.<sup>31</sup>

### **2.3 Conciliation**

Conciliation<sup>32</sup> is a process in which a third party, called a conciliator, restores damaged relationships between disputing parties by bringing them together, clarifying perceptions, and pointing out misperceptions.<sup>33</sup> The difference between mediation and conciliation is that the conciliator, unlike the mediator who may or may not be totally neutral to the interests of the parties. Successful conciliation reduces tension, opens channels of communication and facilitates continued negotiations.<sup>34</sup> Frequently, conciliation is used to restore the parties to a pre-dispute *status quo*, after which other ADR techniques may be applied. Conciliation is also used when parties are unwilling, unable, or unprepared to come to the bargaining table.<sup>35</sup>

This process is similar to mediation save that the third party can propose a solution. Its advantages are similar to those of negotiation. It has all the advantages and disadvantages of negotiation save that the conciliator can propose solutions making parties lose some control over the process.

### **2.4 Med-Arb**

Med-Arb is a combination of mediation and arbitration, where the parties agree to mediate, and if that fails to achieve a settlement, the dispute is referred to

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<sup>31</sup> See Dispute Resolution Guidance op. cit.

<sup>32</sup> Peter Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.14.

<sup>33</sup> Hajdú, J., The methods of alternative dispute resolution (ADR) in the sphere of labour law. na, 1998.

<sup>34</sup> Oluwabiyi, A.A., "A Comparative Legal Analysis of the Application of Alternative Dispute Resolution (ADR) to Banking Disputes." *JL Pol'y & Globalization*, Vol.38 (2015): 1, at p.2.

<sup>35</sup> *Ibid.*, p.2.



arbitration.<sup>36</sup> Med-Arb process is intended to allow the parties to profit from the advantages of both procedures of dispute settlement.<sup>37</sup> It has been asserted that through incorporating mediation and arbitration, Med-Arb, therefore, strikes a balance between party autonomy and finality in dispute settlement.<sup>38</sup>

It is considered best to have different persons mediate and arbitrate. This is because the person mediating becomes privy to confidential information during the mediation process and may be biased if he or she transforms himself or herself into an arbitrator. The other risks have been identified as obtaining less-than-optimal assistance from the third party due to different competencies' requirement for mediation and arbitration.<sup>39</sup> This is because the arbitrator's strength is believed to be in intellectual analysis and evaluation, while the mediator's strength is in balancing the legal evaluation with the creative work

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<sup>36</sup> Osborne, C., *Civil Litigation 2007-2008: Legal practice course guides; 2007-2008*, (Oxford University Press, 2007), p. 461; Lowe, D., & Leiringer, R., (eds), *Commercial Management of Projects: Defining the Discipline*, (John Wiley & Sons, 2008), p. 238; Chartered Institute of Arbitrator, *ADR, Arbitration, and Mediation*, (Author House, 2014), p. 247.

<sup>37</sup> De Vera C, 'Arbitrating Harmony: Of Culture and Rule of Law in the Resolution of International Commercial Disputes in China' *Columbia Journal of Asian Law*, Vol. 18, No.1, 2004, 149, p. 156.

<sup>38</sup> Bridge, C., 'Mediation and Arbitration - Are They Friends or Foes?' *Paper Prepared For Bani / Rodyk & Davidson Conference Shangri-La Hotel Jakarta*, 1 November 2012, p. 13. Available at <http://campbellbridge.com/wp-content/uploads/2012/12/MEDIATION-AND-ARBITRATION.pdf> [Accessed on 3/12/2015]; Chornenki BGA & Linton, H, 'Should Lawyers Be Recommending More Mediation-Arbitration? Is It Really Mandatory Mediation?' *The Lawyer's Weekly*, December, 2005.

<sup>39</sup> Bridge, C., 'Mediation and Arbitration - Are They Friends or Foes?' *Paper Prepared For Bani / Rodyk & Davidson Conference Shangri-La Hotel Jakarta*, 1 November 2012, p. 13. Available at <http://campbellbridge.com/wp-content/uploads/2012/12/MEDIATION-AND-ARBITRATION.pdf> [Accessed on 3/12/2015]; Chornenki BGA & Linton, H, 'Should Lawyers Be Recommending More Mediation-Arbitration? Is It Really Mandatory Mediation?' *The Lawyer's Weekly*, December, 2005.

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necessary to meet the parties' underlying business, personal and emotional interests.<sup>40</sup> There is also the risk of delay should the mediation fail; it will take some time to get the arbitration back on track, especially if a party decides a different third party is needed to serve as the arbitrator.<sup>41</sup>

However, at times the same person acting as mediator "switches hat" to act as the arbitrator.<sup>42</sup> The disputing parties however agree in advance whether the same or a different third party conducts both the mediation and arbitration processes. It is argued that it is also important to let the parties know at the outset that particularly sensitive information, which they might identify in their deliberations with the Med-Arbitrator as to matters not to be shared with the opposition, would be used only in mediation and would be ignored in arbitration.<sup>43</sup> That way, parties may gain confidence in the process and chances of the parties readily accepting the outcome are enhanced.

There are those who still hold that the Mediation/Arbitration process can be an effective alternative dispute resolution method if parties, counsel, and neutrals alike understand the pros and cons of merging the two processes and the nuances inherently involved in the resultant combination.<sup>44</sup>

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Lieberman, A., 'MED-ARB: Is There Such a Thing?' *Attorney At Law Magazine*, (Greater Phoenix Edition), available at <http://www.attorneyatlawmagazine.com/phoenix/med-arb-is-there-such-a-thing/> [Accessed on 7/06/2018].

<sup>43</sup> Ibid.

<sup>44</sup> Flake, RP, 'The Med / Arb Process : A View from the Neutral's Perspective,' *ADR Currents: The Newsletter of Dispute Resolution Law and Practice*, June, 1998, p. 1; See also Weisman, MC, 'Med/Arb-A Time And Cost Effective Hybrid For Dispute Resolution,' *Michigan Lawyer's Weekly*, October 10, 2011. Available at [http://www.wysr-law.com/files/med-arb\\_-\\_a\\_cost\\_effective\\_hybrid\\_for\\_dispute\\_resolution.pdf](http://www.wysr-law.com/files/med-arb_-_a_cost_effective_hybrid_for_dispute_resolution.pdf) [Accessed on 1/12/2015].

Parties should appreciate the challenges that are likely to arise in Med-Arb before settling for it. To facilitate this, the proposed Mediator-Arbitrator should be well trained in both mediation and arbitration. They should also be able to advise the parties accordingly on the consequences of taking up Med-Arb as the conflict management mechanism of choice.

## **2.5 Arb-Med**

Arb-Med<sup>45</sup> is where parties start with arbitration and thereafter opt to resolve the dispute through mediation. Arb-Med begins with the parties presenting their case to the neutral third-party arbitrator who renders a decision, which is not revealed, and then the parties commence a standard mediation facilitated by the same person.<sup>46</sup> If they are able to resolve their issues, the arbitration award is discarded. If the parties are unable to resolve the issue in mediation, the arbitration award is revealed and generally becomes binding.<sup>47</sup>

The same ethical issues of caucus communications and confidentiality, the parties' perception of impartiality of both the mediator and the arbitrator, and the tendency to have a more restrained mediation process because of inhibitions of the parties to be openly candid are also likely to arise in this process.<sup>48</sup> The arbitrator-mediator should, thus, be knowledgeable in both processes so as to effectively handle all arising ethical issues as well as delivering satisfactory outcomes.

## **2.6 Dispute Review Boards**

In other jurisdictions, and indeed across the world, scholars argue that the ubiquity of disputes on construction projects and the accompanying expense

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<sup>45</sup> See Dispute Resolution Guidance op. cit.

<sup>46</sup> Weisman, MC, 'Med/Arb-A Time and Cost-Effective Hybrid for Dispute Resolution,' *Michigan Lawyer's Weekly*, October 10, 2011, op cit, p. 2.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

and disruption of litigation, led to the development of dispute review boards (DRBs) specifically for the challenges of large construction projects and have become the ADR of choice on substantial, high-profile work in the construction industry.<sup>49</sup> However, it must be pointed out that although the origins of DRB's are found in the construction industry, their ambit is far wider than construction and DRB's are now found in financial services industry, long-term concession projects, operational and maintenance contracts.<sup>50</sup> Dispute Boards are normally set up at the outset of a contract and remain in place throughout its duration to assist the parties, if they so desire, in resolving disagreements arising in the course of the contract and make recommendations or decisions regarding disputes referred to it by any of the parties.<sup>51</sup>

The key features of a Dispute Review Board (DRB) have been identified as follows:<sup>52</sup> the three members of the DRB are appointed for their extensive expertise in the type of project on which the DRB is established; the DRB members must not have conflicts of interest and must act as objective, neutral third parties under a Three Party Agreement with the Employer and Contractor; the DRB is appointed at the beginning of the project, visits the project on a periodic basis depending on the pace of construction, and is kept apprised of the project's progress between site visits; at the periodic site visits the DRB explores with the parties all open issues and urges the parties to resolve disputes

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<sup>49</sup> McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," *Construction Lawyer*, Vol.25, no. 2 (2005), p.1.

<sup>50</sup> Chapman, P.H.J., "Dispute Boards," p.2, available at <http://fidic.org/sites/default/files/25%20Dispute%20Boards.pdf> [Accessed on 11/06/2018].

<sup>51</sup> Sourced from <http://www.buildingdisputestribunal.co.nz/DRBS.html>, accessed on 24/08/2011

<sup>52</sup> Dettman, K. and Christopher Miers, C., "Dispute Review Boards and Dispute Adjudication Boards: Comparison and Commentary," *Forum*, February 2012 (Special Edition Reprint), p. 1. Available at <https://www.scmmediation.org/wp-content/uploads/2013/09/DRBF-Forum-Kings-College-02-12-DRB-DAB-Reprint.pdf>.

that may otherwise eventually become formal claims. The DRB can also be asked to give non-binding, very informal “advisory opinions” on issues that have not become formal claims under the contract; the DRB hears claims as part of an informal hearing process where the parties themselves (as opposed to legal representatives) present their positions. The informal hearing process has none of the trappings of a legal process, such as a formal record, swearing of witnesses, or cross-examination; the DRB issues detailed non-binding findings and recommendations that analyze the parties’ arguments, the contract documents, the project records, and the supporting information presented at the hearing.<sup>53</sup>

In addition to the foregoing, since the DRB’s findings and recommendations are non-binding, the parties are free to accept them, reject them, or keep negotiating based on the parties’ respective risk exposure, taking into account the DRB’s analysis.<sup>54</sup> The DRB’s findings and recommendations (but not other records) usually are also admissible in subsequent proceedings.<sup>55</sup> The technical competence of DRB members is considered as the one that enhances the credibility of their recommendations.<sup>56</sup>

The DRB is considered a hybrid form of ADR, which shares some attributes of adjudication as well as some traits of mediation.<sup>57</sup> Some authors have however opined that the significant difference between DRB's and most other ADR techniques (and possibly the reason why DRB's have had such success) is that the DRB is appointed at the commencement of a project and, by undertaking

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<sup>53</sup> Ibid, p.1.

<sup>54</sup> Ibid, p.1.

<sup>55</sup> Ibid, p.1.

<sup>56</sup> McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," op cit,, p.1.

<sup>57</sup> McMillan, D.D., and Rubin, R.A., "Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements," op cit,, p.1.

regular visits to site, is actively involved throughout construction. It becomes part of the project and thereby can influence, during the contract period, the performance of the contracting parties. It has 'real-time' value.<sup>58</sup>

It has been suggested that the expanding use of DRBs on major construction projects requires that construction lawyers become more familiar with the DRB process, standard DRB agreements, and the varied roles lawyers may play in the DRB process.<sup>59</sup>

### **2.7 Early Neutral Evaluation**

Early Neutral Evaluation<sup>60</sup> is a private and non-binding technique where a third party neutral (often legally qualified) gives an opinion on the likely outcome at trial as a basis for settlement discussions.<sup>61</sup> The aim of a neutral evaluation is to test the strength of the legal points in the case. It can be particularly useful where the dispute turns on a point of law.

### **2.8 Expert Determination**

Expert Determination<sup>62</sup> is where the parties submit their dispute to an expert in the field of dispute for determination. The expert determinant gives his decision based on his expertise e.g., accountants valuing shares in a company, a jeweler assessing the carat content of a gold bracelet, etc.<sup>63</sup>

Expert Determination is defined as a process for settling disputes about facts (value of works done - satisfactory works and issue of certificates - including

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<sup>58</sup> Chapman, P.H.J, "Dispute Boards," p.1, available at <http://fidic.org/sites/default/files/25%20Dispute%20Boards.pdf> [ Accessed on 11/06/2018].

<sup>59</sup> Ibid, p.1.

<sup>60</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p. 15.

<sup>61</sup> Ibid.

<sup>62</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p. 16.

<sup>63</sup> Ibid.

extensions of time – variations, amongst other technical issues.<sup>64</sup> Furthermore, Expert Determination may be contracted into before the event by the parties as a contractual mechanism for settling disputes about facts between the parties to a contract. Alternatively, the parties to a dispute about facts may refer that dispute to an expert for determination.<sup>65</sup> The crucial distinction between expert and judicial / quasi-judicial determination is believed to lie in the fact that the scope of the dispute is limited to questions of fact and does not extend to questions of law or involve mixed questions of law and fact.<sup>66</sup> Notably, after an expert has made a determination, the next step depends upon the procedure set out in the contract.<sup>67</sup>

It has been suggested that Expert Determination is potentially the cheapest and quickest form of Dispute Resolution particularly in technically complex areas. Consequently, there is increasing interest in this Dispute Resolution method in high-tech areas or industries such as IT, pharmaceuticals, chemicals etc.<sup>68</sup> The coffee and tea industries also often rely on Expert Determination to address some disputes.

## **2.9 Mini Trial (Executive Tribunal)**

This is a voluntary non-binding process where the parties involved present their respective cases to a panel comprised of senior members of their organisation

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<sup>64</sup> CHSpurin, “Expert Determination Q&A,” *ADR News: The NADR Quarterly News Letter*, Vol. 5 Issue No2, July 2005, p.1. Available at <http://www.nadr.co.uk/articles/published/construction/Expert%20determination%20CHS%202005.pdf> [ Accessed on 11/06/2018].

<sup>65</sup> *Ibid.* p.1.

<sup>66</sup> *Ibid.* p.1.

<sup>67</sup> *Ibid.* p.1.

<sup>68</sup> Engineers Ireland, “Expert Determination,” available at <https://www.engineersireland.ie/EngineersIreland/media/SiteMedia/services/employment-services/Expert-Determination-Explained.pdf> [Accessed on 11/06/2018].

assisted by a neutral third party and has decision making powers.<sup>69</sup> After hearing presentations from both sides, the panel asks clarifying questions and then the facilitator assists the senior party representatives in their attempt to negotiate a settlement.<sup>70</sup>

## **2.10 Adjudication**

Adjudication is defined under the *CI Arb (K) Adjudication Rules* as the dispute settlement mechanism where an impartial, third-party neutral person known as adjudicator makes a fair, rapid and inexpensive decision on a given dispute arising under a construction contract.<sup>71</sup>

Adjudication is an informal process, operating under very tight time scales (the adjudicator is supposed to reach a decision usually within 28 days or the period stated in the contract)<sup>72</sup>, flexible and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The decision of the adjudicator is binding unless the matter is referred to arbitration or litigation.<sup>73</sup>

It has been argued that adjudication must be distinguished from litigation, arbitration and mediation in that, unlike litigation, adjudication is not generally

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<sup>69</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.16.

<sup>70</sup> Lowe, D., & Leiringer, R., (eds), *Commercial Management of Projects: Defining the Discipline*, (John Wiley & Sons, 2008), p. 239.

<sup>71</sup> The CI Arb (K) Adjudication Rules, Rule 2.1

<sup>72</sup> Ibid, Rule 23.1. Notably, FIDIC Rules provide for up to 84 working days within which the decision can be rendered. (See the International Federation of Consulting Engineers (FIDIC), Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer and the Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor, Appendices).

<sup>73</sup> CI Arb (K) Adjudication Rules, Rule 29.



controlled by legislation or a common law regime, nor is it administered by the state. Decisions are not immediately binding.<sup>74</sup> Furthermore, unlike arbitration, adjudication is not generally undertaken under the protection and within the confines of an Arbitration Act or subject to international conventions. Also, unlike mediation, adjudicators are required to decide matters in accordance with contractual and legal frameworks.<sup>75</sup> Adjudication is thus effective in construction disputes that need to be settled within some very strict time schedules. However, it may not be suitable to non-construction disputes; the choice of the adjudicator is also crucial as his decision is binding and it does not enhance relationships between the parties.

Notably, the International Federation of Consulting Engineers (FIDIC), *Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer* and the *Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and For Building and Engineering Works, Designed by the Contractor*, also contemplate the use of adjudication in construction disputes and the procedure therein is widely used internationally, where parties incorporate a dispute adjudication agreement into their contract. Adjudication usually leads to arbitration, if parties are not satisfied with the decision.

## **2.11 Arbitration**

Arbitration in Kenya is governed by the Arbitration Act, 1995, the Arbitration Rules 1997, the Civil Procedure Act<sup>76</sup> and the Civil Procedure Rules 2010. It is also one of the ADR mechanisms contemplated under the Constitution of Kenya 2010<sup>77</sup>, which provides that in exercising judicial authority, the courts and

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<sup>74</sup> Chapman, P.H.J, "Dispute Boards," op cit. p.1.

<sup>75</sup> Chapman, P.H.J, "Dispute Boards," op cit., p.1.

<sup>76</sup> Cap 21, Laws of Kenya; Section 59 of the Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.

<sup>77</sup> Order 46 of the Civil Procedure Rules, inter alia, provides that at any time before

tribunals should be guided by certain principles. One of these principles is that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional conflict resolution mechanisms should be promoted, provided that they do not contravene the Bill of Rights, they are not repugnant to justice and morality or results to outcomes that are repugnant to justice or morality and if they are not inconsistent with the constitution or any written law.<sup>78</sup> Arbitration arises where a third party neutral is appointed by the parties or an appointing authority to determine the dispute and give a final and binding award. The Arbitration Act, 1995 defines arbitration to mean “any arbitration whether or not administered by a permanent arbitral institution.” This is not very elaborate and regard has to be had to other sources. According to Khan<sup>79</sup>, arbitration is a private consensual process where parties in dispute agree to present their grievances to a third party for resolution. It is an adversarial process and in many ways resembles litigation.

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

## **2.12 Litigation**

This is an adversarial process where parties take their claims to a court of law adjudicated upon by a judge or a magistrate. The judge/ magistrate gives a judgment which is binding on the parties subject to rights of appeal. The judicial authority in Kenya is exercised by the courts and tribunals.<sup>80</sup>

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judgment is pronounced, interested parties in a suit who are not under any disability may apply to the court for an order of reference wherever there is a difference.

<sup>78</sup> Article 159 (2) (c) of the Constitution of Kenya, (*Government Printer, Nairobi, 2010*).

<sup>79</sup> Khan, F., *Alternative Dispute Resolution*, a paper presented Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

<sup>80</sup> See Article 159 of the Constitution of Kenya, *Government Printer, Nairobi*.

In litigation, the parties to the dispute have minimum or no control at all over the forum, the process and outcome of the process and as such the outcome may not satisfy both parties. Litigation has its advantages in that precedent is created and issues of law are interpreted.<sup>81</sup> It is also useful where the contract between the parties does not stipulate a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation, it is possible to bring an unwilling party into the process and the result of the process be enforceable without further agreement.<sup>82</sup>

### **2.13 Ombudsman (Ombudsperson)**

An Ombudsman (Ombudsperson) is an organizationally designated person who confidentially receives, investigates, and facilitates resolution of complaints.<sup>83</sup> The ombudsman may interview parties, review files, and make recommendations to the disputants, but normally is not empowered to impose solutions. Ombudsmen often work as management advisors to identify and recommend solutions for systemic problems in addition to their focus on disputes from individual complainants.

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<sup>81</sup> See the argument by Calkins, R.M., 'Mediation: A Revolutionary Process That is Replacing the American Judicial System,' *Cardoza Journal of Conflict Resolution*, Vol. 13, No. 1, 2011; cf. Ray, B., 'Extending The Shadow Of The Law: Using Hybrid Mechanisms To Develop Constitutional Norms In Socioeconomic Rights Cases,' *Utah Law Review*, No. 3, 2009, pp. 797-843, p. 799.

<sup>82</sup> See generally, *Dispute Resolution Guidance*, available at [http://www.ogc.gov.uk/documents/dispute resolution.pdf](http://www.ogc.gov.uk/documents/dispute%20resolution.pdf), [Accessed on 05/01/2012].

<sup>83</sup> For instance, see Commission on Administrative Justice (CAJ) also known as the Office of the Ombudsman is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, No. 23 of 2011, Laws of Kenya. The Commission has a mandate, inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. (Website: <http://www.ombudsman.go.ke/ombudsman/about-us-page/>).

## **2.14 Conflict Avoidance**

It has been suggested<sup>84</sup> that due to the expense and disruption caused to any contract when a dispute arises and the damage to the relationship of the parties the importance of dispute avoidance techniques cannot be over-emphasized. Conflict avoidance in the construction industry can take various dimensions:

1. Firstly, the contractual parties must ensure a clear wording in the contract that reflects the intention of the parties. The wording of the contract should include provision for the appropriate dispute resolution techniques to be applied in the event of a dispute arising, with suitable arrangements for escalation.<sup>85</sup>
2. Secondly, once the contract is in place good contract management is essential. Contract management techniques should include monitoring for the early detection of any problems where parties should give at the earliest possible warnings of any potential dispute and regular discussions between parties including reviews of possible areas of conflict.<sup>86</sup> This may include meetings to resolve issues such as change orders, extension of time to contractors and assessment of liquidated damages payable.
3. Thirdly, when a contract is initially established the parties should bear in mind how the expiry of the contract is to be managed (especially if there is a need for ongoing service delivery, not necessarily by the contractor) should be borne in mind and reflected in the contract.<sup>87</sup>

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<sup>84</sup> See Dispute Resolution Guidance op. cit.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

Whenever a dispute arises it is important to manage it actively and positively and at the right level in order to encourage early and effective settlement. There are various techniques that can be used either consciously or end product to avoid disputes. According to Fenn<sup>88</sup> these techniques include: risk management to ensure that risks are identified, analyzed and managed; procurement strategies to ensure that risks are appropriately allocated and contractual arrangements to allow sensible administration.

### **3. Dispute Settlement Clauses in Standard Form Contracts**

Clause 20.4 of the FIDIC Conditions of Contract for Construction<sup>89</sup> provides that if a dispute arises either party may refer it to a Dispute Adjudication Board (DAB), amicable settlement and arbitration as the dispute settlement avenues. This clause envisages a dispute of any kind whatsoever arising in connection with or arising out of the contract or the execution of the works, any dispute as to any certificate, determination, instruction, opinion or valuation of the engineer. Notably, the DAB is required to render its decision within 84 days of receiving such a reference.<sup>90</sup>

A party dissatisfied by the decision of the Dispute Adjudication Board should first resort to amicable settlement before the commencement of arbitration.<sup>91</sup> In other jurisdictions, courts have supported Board decisions through upholding the outcomes when challenged in court. For instance, in *PT Perusahaan Gas*

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<sup>88</sup> Fenn, P., "Introduction to Civil and Commercial Mediation", op. cit, p.14.

<sup>89</sup> The International Federation of Consulting Engineers (FIDIC) Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer (First Edition, 1999, FIDIC).

<sup>90</sup> The International Federation of Consulting Engineers (FIDIC), Conditions of Contract for Construction: for Building and Engineering Works Designed by the Employer, Clause 20.4; See also The International Federation of Consulting Engineers (FIDIC), Conditions of Contract for Plant and Design Build: For Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor, (First Edition, 1999, FIDIC), Clause 20.4.

<sup>91</sup> The International Federation of Consulting Engineers (FIDIC) *Conditions of Contract for Construction*, Clause 20.5.

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*Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30*, the Singapore Court of Appeal held that parties under a contract containing the Red Book's dispute resolution provision (clause 20.4) must comply with any decision by a dispute adjudication board in a prompt manner, even if the merits of the dispute have not been determined.<sup>92</sup>

The *Agreement and Conditions of Contract for Building Works*<sup>93</sup> provides that in the event of a dispute between the Employer or the Architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the Works, the dispute shall be referred to an arbitrator agreed upon by the parties. Where the parties fail to concur on the appointment of the Arbitrator, the Arbitrator shall be appointed by the Chairman or Vice Chairman of the Architectural Association of Kenya or by the Chairman or Vice Chairman of The Chartered Institute of Arbitrators, Kenya Branch, on the request of the applying party. The clause further provides that the arbitral proceedings shall not commence unless an attempt has been made to settle the dispute amicably. Moreover, the award of the arbitrator is final and binding upon the parties<sup>94</sup> and thus an aggrieved party has no further recourse.

The dispute settlement clause under the Kenya Association of Building and Civil Engineering Contractors, *Agreement and Conditions of Sub-Contract for Building Works, 2002* provides for similar avenues in the event of a dispute between the contractor and the sub-contractor. A model dispute resolution clause should include all avenues i.e. negotiations in good faith, mediation, adjudication, arbitration and litigation, within time frames on when each

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<sup>92</sup> Cia Ai Eng, Henry Winter and Stephanie Khan, "Singapore Court of Appeal upholds obligation to promptly comply with dispute adjudication board decisions," June 10, 2015. Available at <https://www.hlarbitrationlaw.com/2015/06/singapore-court-of-appeal-upholds-obligation-to-promptly-comply-with-dispute-adjudication-board-decisions/> [ Accessed on 8/6/2018].

<sup>93</sup> The Joint Building Council, *Agreement and Conditions of Contract for Building Works*, 1999 Edition.

<sup>94</sup> *Ibid*, Clause 45.10.

mechanism is to be tried to facilitate timely project implementation and delivery.

Notably, the main difference between a DRB and DAB is that if the decisions are non-binding and merely advisory, this is generally referred to as a dispute review board (DRB). In contrast, if the decisions are agreed to have binding effect between the parties, this is known as a dispute adjudication board or DAB. In the 1999 "rainbow suite" of FIDIC contracts, FIDIC opted to use the DAB form—accordingly, due to the widespread use of FIDIC forms internationally, this has become the dominant form.<sup>95</sup>

#### **4. Challenges Facing the Conflict Management Framework in Kenya**

There are various challenges facing the conflict management framework in Kenya. The mediation process has been criticised as being indefinite, time consuming and does not encourage expediency.<sup>96</sup> This is a big challenge in project implementation and delivery owing to the fact that projects are time bound and thus require a speedy, efficient and cost effective dispute resolution mechanism. Kenya does not as yet have a comprehensive and integrated policy framework to govern the application of ADR mechanisms in the resolution of disputes.

Kenya does not also have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules framed by the Chartered Institute of Arbitrators and other professional bodies. There is need to expand the scope of the Civil Procedure Act and entrench adjudication as a means of dispute resolution. There is also need for a constitutional provision on court ordered adjudication to avoid a situation where attempts to order adjudication

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<sup>95</sup> Goodrich, M., "Dispute Adjudication Boards: Are they the future of dispute resolution?" 2 September 2016, available at <https://www.whitecase.com/publications/article/dispute-adjudication-boards-are-they-future-dispute-resolution> [Accessed on 11/06/2018].

<sup>96</sup> Murithi, T. & Ives, P.M., Under the Acacia: Mediation and the dilemma of inclusion, *Centre for Humanitarian Dialogue*, April 2007, p. 77.

by court are thwarted by constitutional references. These Adjudication Rules provide for the basic procedure for adjudication and for adjudication to be applicable, the subject construction contract must have an adjudication clause.<sup>97</sup> This is because at present, adjudication cannot be imposed by the law even where the contract in question is ideal for it. In any case, given that adjudication is not legislated for in Kenya, there is no provision for stay of proceedings for parties to undertake adjudication as provided for in the case of arbitration under the Arbitration Act 1995. Rule 29 of the CIArb Adjudication Rules makes it feasible to refer the matter to arbitration or litigation. The effect is that whether or not a dispute will be referred to adjudication in Kenya presently depends on the parties' willingness to participate in the process. This reality has hindered the application and attainment of full potential of adjudication as a mechanism for dispute resolution in Kenya.<sup>98</sup>

Arbitration, as practiced in Kenya, is increasingly becoming more formal and cumbersome as lawyers enter the practice of arbitration applying delay tactics and importation of complex legal arguments and procedures into the arbitral process.<sup>99</sup> The Civil Procedure Act does not help matters as it leaves much leeway for parties bent on frustrating the arbitral process to make numerous applications in court. It is hardly feasible to describe arbitration in Kenya as an expeditious and cost effective process which can be used in settling disputes arising out of the construction contracts where project implementation and delivery is at the heart of the contract. In essence arbitration is really a court

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<sup>97</sup> See generally, Muigua, K., Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: It's Development and Lessons for Kenya, A Paper presented at Nairobi Club on 23<sup>rd</sup> September, 2008.

<sup>98</sup> Ibid.

<sup>99</sup> See Muigua, K., "Overview of Arbitration and Mediation in Kenya"; A Paper Presented at a Stakeholder's Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations in Kenya, held at the Kenyatta International Conference Centre, Nairobi, on 4th – 6th May, 2011.



process since once it is over an award has to be filed in court and thus the shortcomings of the court system apply to the arbitration process.

Litigation in Kenya is characterized with many problems related to access to justice for instance high court fees, geographical location, complexity of rules and procedure and the use of legalese. The court's role is also 'dependent on the limitations of civil procedure, and on the litigious courses taken by the parties themselves.'<sup>100</sup> As a result litigation may take several years before settlement of disputes hence hampering the effective implementation and delivery of projects which are justice in environmental issues to be inaccessible to many people. This is due to the formality and resource limitations placed on the legal system by competing fiscal constraints and public demands for justice, litigation is so slow and too expensive and it has largely lost commercial and practical credibility necessary in project implementation.

## **5. Opportunities Offered by various Dispute Settlement Mechanisms in Project Management**

### **5.1 Negotiation**

Negotiation can be, and usually is, the most efficient form of conflict resolution in terms of time management, costs and preservation of relationships. It should be seen as the preferred route in most disputes arising out of construction contracts owing to the fact projects are time bound and thus need timely implementation and delivery. It prides itself on speed, cost saving, confidentiality, preservation of relationships, range of possible solutions and control over the process and outcome which attributes are vital in ensuring the expeditious handling of disputes and the overall management and implementation of the project. Moreover, even if parties are unable to achieve a

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<sup>100</sup> Ojwang, J.B., "The Role of the Judiciary in Promoting Environmental Compliance and Sustainable Development," 1 *Kenya Law Review Journal* 19 (2007), p. 29.

settlement through negotiation, it will still be possible or may be necessary to continue negotiating as part of or alongside other forms of dispute resolution.<sup>101</sup>

## **5.2 Mediation**

Mediation should be seen as the preferred conflict resolution route when conventional negotiation has failed or is making slow progress.<sup>102</sup> It is a cost effective, flexible, speedy, confidential process that allows for creative solutions, fosters relationships, enhances party control and allows for personal empowerment and hence suitable in settling disputes to ensure effective project management and implementation. Mediation is particularly useful in projects because of the need to preserve the ongoing relationship between the parties and enhance communication.<sup>103</sup>

## **5.3 Adjudication**

Adjudication is an informal process, operating under very tight time scales, flexible, fast and inexpensive process; which allows the power imbalance in relationships to be dealt with so that weaker sub-contractors have a clear route to deal with more powerful contractors. The adjudicator is supposed to reach a decision within 28 days or the period stated in the contract.<sup>104</sup> To guarantee impartiality and neutrality of the adjudicator, the Rules provide that s/he must not be involved in implementation or administration of the contract under which the dispute arises; be knowledgeable and experienced in the matter in dispute, preferably a construction expert and be well versed in dispute resolution procedures.<sup>105</sup> The CI Arb Adjudication Rules provide for procedural fairness, natural justice, courts procedures, jurisdiction of the arbitrators,

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<sup>101</sup> See Dispute Resolution Guidance op. cit.

<sup>102</sup> Ibid.

<sup>103</sup> Sourced from < <http://www.buildingdisputetribunal.co.nz/.html> > accessed on 24/08/2011.

<sup>104</sup> Adjudication Rules, Rule 23.1.

<sup>105</sup> See Muigua, K., "Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: its Development and Lessons for Kenya," op. cit.

definition of construction adjudication, scope of the adjudicators powers, timeframe and extension of time, enforcement of adjudication awards, stay of court proceedings pending adjudication, appointment of adjudicators, misconduct of adjudicators and other ethical issues, adjudication fees per scale or as agreed by the parties, recognition of adjudication awards, correction of slips or errors, points of law, extent of court intervention, failure to adjudicate and adjudication agreement.<sup>106</sup> Since adjudication is flexible, fast, expeditious, cost effective and informal, it may be the way to go if effective project implementation and delivery is to be realized in the construction and building industry in Kenya.

#### **5.4 Early Neutral Evaluation**

Although settlement is not the primary objective, the purpose of early neutral evaluation is to promote settlement discussions at an early stage in the litigation process, or at the very least to assist parties avoid the significant time and expense associated with further steps in litigation of the dispute.<sup>107</sup> The opinion can then be used as a basis for settlement or for further negotiation. It would save time and costs that would be expended in dispute settlement and hence effective project implementation and delivery.

#### **5.5 Expert determination**

This is a fast, informal and cost efficient technique which is applicable where there are disputes of a technical nature for example between the contractor and the architect or employer. It has become a popular method of resolving disputes in the building and construction industry involving qualitative or quantitative issues, or issues that are of a specific technical nature or specialized kind, because it is generally quick, inexpensive, informal and confidential. Expert

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<sup>106</sup> Muigua, K., "Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of the U.K: Its Development and Lessons for Kenya," op. cit.

<sup>107</sup> Building Disputes Tribunal, New

Zealand<<http://www.buildingdisputestribunal.co.nz/.html>>accessed on 24/08/2011.

determination is an attractive method of resolving disputes in building and construction contracts as it offers a binding determination without involving the formalities and technicalities associated with litigation and arbitration; and at the same time it assists in preserving relationships where litigation would not<sup>108</sup>. Expert determination can be used in disputes related to; measure and value claims; variation claims; value of additional building and civil works; the standard of work completed i.e. concrete finishes, stopping, painting and specialist finishes, flooring, tiling, waterproofing; extension of time claims; delay and disruption claims, amongst others.

### **5.6 Arbitration**

Even though closely related to litigation, there are certain salient features of arbitration which make it an important and attractive alternative to litigation. In arbitration the parties have autonomy over the choice of the arbitrator, place and time of hearing, and as far as they can agree, autonomy over the arbitration process which may be varied to suit the nature and complexity of the dispute.<sup>109</sup>

### **5.7 Litigation**

Where the contract between the parties does not stipulate for a consensual process and the parties cannot agree on one, the only alternative is litigation. Through litigation it is possible to bring an unwilling party into the process and the result of the process is enforceable without further agreement.<sup>110</sup> The constitution postulates that the courts and tribunals should do justice to all irrespective of status; justice should not be delayed; alternative forms of dispute resolution should be promoted and justice should be administered without undue regard to procedural technicalities.<sup>111</sup> With a significantly reforming

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid

<sup>110</sup> See Dispute Resolution Guidance op. cit.

<sup>111</sup> See Article 159 (2) of the Constitution of Kenya 2010, Government Printer, Nairobi.

judiciary, litigation may become an efficacious process once again and parties to a contract may resort to it. Litigation should not be entirely condemned as it comes in handy for instance where an expeditious remedy in the form of an injunction is necessary.

## **6. Recommendations and Way Forward**

Projects are time bound thus the conflict resolution procedure selected should be one that can manage conflicts in an expeditious, transparent, impartial, objective and constructive manner within the projected timelines. The mechanism should be easily accessible by the contractual parties from project planning, implementation and completion and where possible the mechanism should not interfere with the progress of the project. This is the need for early dispute settlement and application of dispute avoidance techniques in project implementation. It should be predictable allowing actions taken in response to complaints to be efficiently monitored and timely reported to the disputants. The following recommendations are essential in settling disputes in project management:

### **6.1 Constructing a Dispute Resolution Clause**

It has been said that the inclusion of an alternative dispute resolution clauses in a contract allows the settlement process to begin at an early stage and obviates the frequent problem of persuading the other party to the dispute to engage in an ADR process thus saving on time. A model dispute resolution clause should include all avenues i.e. negotiations in good faith, mediation, adjudication, arbitration and litigation. Such a dispute resolution clause should provide timelines within which each mechanism is to be tried so as to avoid a scenario whereby the projected timeframes for completion are jeopardized.

### **6.2 Improving the Policy, Legal and Institutional Framework for Managing Conflicts in Project Management**

There is a need to restore speed, flexibility and public confidence in the existing policy, legal and institutional mechanisms. The legal system has been criticized

for being too slow and expensive and has thus lost commercial and practical credibility necessary in project implementation. The flexibility, speed and cost effectiveness of ADR techniques such as negotiation, mediation and adjudication is what can lead to expeditious settlement of disputes in projects and thus these mechanisms need formal incorporation in the legal system.

Kenya does not yet have an Act dealing with Construction Adjudication and parties rely on the Construction Adjudication Rules framed by the Chartered Institute of Arbitrators. An Adjudication Bill should be introduced in parliament to provide the legal framework for the application of adjudication in construction contracts in Kenya. There is a need to have a comprehensive and integrated framework providing for mediation in Kenya in the resolution of disputes as mediation has been linked to the court process and hence subject to the shortcomings of litigation.

### **6.3 Working as a Team to Achieve Project Goals**

Need for transparency and open communication through continuous dialogue and focused site meetings between the contractors and the employers; sub-contractors and contractors, amongst others, to facilitate early dispute resolution and avoidance of disputes.

### **6.4 Need for Conflict Avoidance**

It is important to manage disputes actively and positively and at the right level in order to encourage early and effective settlement. Good risk management techniques to ensure that risks are identified analyzed and managed; procurement strategies to ensure that risks are appropriately allocated and contractual arrangements to allow sensible administration should be in the party's contemplation while contracting. Such techniques may include Strategic Impact Assessments and Environmental and Social Impact Assessments before the projects are undertaken and regular audits in the course of the projects.

### **6.5 Use of Scientific Technology for Certainty**

This may involve coming up with a critical path analysis of the project and represent this in gant charts. A critical path is a project-management technique that lays out all the activities needed to complete a task, the time it will take to complete each activity and the relationships between the activities. A critical path analysis can help predict whether a project can be completed on time and can be used to reorganize the project both before starting it, and as it progresses, to keep the project's completion on track and ensure that deliverables are ready on time.<sup>112</sup> A critical path can thus be useful in handling disputes as it takes into the account the eventualities that may arise in the course of the contractual performance.

### **7. Conclusion**

There is a need to have an efficacious conflict management mechanism in the course of projects in order to ensure effective project implementation and delivery. It is not possible to achieve efficient implementation in the face of unresolved disputes. There is a need to put in place mechanisms for effective management of conflicts. Kenya will benefit from a policy, legal and institutional framework that is flexible, speedy, cost effective, and efficacious to ensure that conflicts arising out of projects are disposed expeditiously. Since conflicts consume a lot of time, are expensive and may destroy the relationship of parties, the need of an effective mechanism is crucial.

Dealing with conflicts in project management cannot be wished away. It is an exercise that should be conceptualised and actuated throughout a project and even afterwards.

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<sup>112</sup> Definition of Critical Path Analysis. (2011). Retrieved from Investopedia, <http://www.investopedia.com/terms/c/critical-path-analysis.asp#axzz1iz4S84vW>

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**Pouring Old Wine into New Wineskins: The Alternative Dispute Resolution Movement in The Postcolonial State**

*By: Florence Shako\* & Caroline Lichuma\**

**Abstract**

*Disputes have existed since time immemorial. In any community, it is inevitable that mechanisms need to be put in place to aid in the resolution of these disputes. Before colonialism, there subsisted methods of resolving conflicts in Kenya that dealt with civil and criminal cases which arose among members of any given community. During colonialism, the court system was introduced as a more formal and 'superior' dispute resolution mechanism as a part of the Civilising Mission. In post-colonial Kenya, the court system took root as the mechanism that was suitable to the African circumstances. However, while the court system has had many positive contributions, it is marred with difficulties and suffers from case backlog. This has led to the introduction of Alternative Dispute Resolution (ADR) as a movement that will complement the courts in dispute resolution. This article examines the dispute resolution mechanisms which existed before colonialism and the introduction of the court system in Kenya. The authors argue that the colonial encounter shaped the structures utilized for dispute resolution in the post-colonial state with manifest subjugation of African methods of dispute resolution in favour of Western methods. The article analyses the shortcomings of the court system and argue that in the post-colonial state, its superiority is a fallacy. The authors posit that the introduction of ADR is not a new concept which has been introduced into the Kenyan justice system but is indeed reminiscent of mechanisms of dispute resolution utilized by indigenous institutions. The article concludes that ADR can be viewed as*

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repetition being introduced as reform which perpetuates the legacies of colonialism; a shiny new pin which should be adorned even though greater scrutiny reveals that it is indeed, an heirloom.

## **1. Introduction**

Conflict is the condition of opposition or antagonism which arguably emerges in human society due to clashes of varied interests.<sup>1</sup> There are always competing interests for the resources available to a given society resulting in disputes. Equally, humans have sought, as long as there has been conflict, to handle conflict effectively, by containing or reducing its negative consequences.<sup>2</sup> Therefore, conflict resolution is critical to the maintenance of peace and harmony in the community and for the determination of distribution of resources in an equitable manner.

Kenya, during the pre-colonial period, conflicts among the different ethnic communities were resolved using various indigenous conflict resolution mechanisms. The main mechanisms included negotiation, mediation, and arbitration administered by indigenous institutions such as councils of elders. Indigenous conflict resolution mechanisms determined a community's well-being and health in terms of success or failure, competitiveness or non-competitiveness, growth or stagnation, prosperity or decline, survival or demise and superior or inferior performance.<sup>3</sup> African customary law was the law applied by these indigenous institutions in the resolution of disputes.

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<sup>1</sup> Hilal Ahmad Wani, 'Understanding Conflict Resolution' [2011] International Journal of Humanities and Social Science, Volume 1, Number 2, 110.

<sup>2</sup> Ibid.

<sup>3</sup> Jackline Apiyo Adhiambo, 'Indigenous Conflict Resolution Mechanisms Among the Pastoralist Communities in the Karamoja Cluster – A Case Study of the Turkana' [2014] University of Nairobi eRepository, 114, 115

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During colonialism, as part of the Civilising Mission, the British introduced the court system as the preferred approach to dispute resolution in Kenya. The court system was deemed to be a formal, superior and more civilized institution compared to the indigenous systems which were in place. African customary law was subjugated and considered an inferior source of law. English law was therefore applied by the courts and was considered to be a more civilized source of law that would be applied to resolve disputes arising among the different communities in Kenya.

In the post-colonial period, the court system subsisted with the use of African approaches of resolving disputes being minimally in use. African customary law was applied in civil cases in which one or more of the parties was subject to or affected by it and so far as it was not repugnant to justice and morality or inconsistent with any written law.<sup>4</sup> This in effect meant that African customary law was inferior to English law which was introduced by the British. However, with time, the court system suffered from a myriad of problems such as delays in resolution of cases leading to backlogs, high legal costs for disputants, too many technicalities in the court procedures *inter alia*. The superiority of the court system was a fallacy as it had its own failures that delayed and derailed the course of justice. The clamor began to search for methods of resolving disputes which could complement the court system and aid in the reduction of the severe backlog of cases.

This led to the Alternative Dispute Resolution (ADR) movement which has emerged to complement the court system in the postcolonial state. The primary ADR mechanisms utilized include negotiation, mediation, arbitration and traditional dispute resolution mechanisms. All these methods are by and large reminiscent of the mechanisms used in Kenya in the pre-colonial period to

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<sup>4</sup> Judicature Act, Cap 8, s. 3[2]

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resolve disputes. The central argument of this article is that ADR is repetition introduced into the Kenyan justice system as reform. What is termed as ADR largely mirrors the pre-colonial modes of resolving conflicts in Kenya which were indeed more appropriate to the African circumstance. However, its introduction as a new method of resolving conflicts from the West is continued subjugation of African dispute resolution mechanisms and worse, a continued form of colonization in the twenty first century.

Part I of this article examines dispute resolution in Kenya during the pre-colonial period and illustrates the mechanisms which were utilized to resolve criminal and civil cases. The authors argue that there were legitimate mechanisms for conflict resolution before the British set foot in Kenya which were suitable for each community. Part II analyzes the introduction of the court system during empire and the subjugation of indigenous institutions in favor of the western dispute resolution methods. This part also highlights the subjugation of African customary law as a legitimate source of law in favor of English law which was applied by the courts. Part III is an analysis of the post-colonial state and the adoption of the court system as the 'superior' and more appropriate mechanism for conflict resolution. With an increasing litigious society, the shortcomings of the court structures began to come to the light which is arguably indicative that its perceived superiority is, and has always been, an erroneous belief. Part IV evaluates the introduction of Alternative Dispute Resolution, a movement which is increasingly encouraged in the post-colonial state and is aimed at reforming the justice system in Kenya. The authors argue that this movement is reminiscent of the dispute resolution systems in the pre-colonial period, merely old wine being poured into new wine skins. The authors further argue that ADR must be seen for what it is; recognition of the failure of the court system to wholly suit the African circumstance and a re-introduction of a semblance of the African dispute resolution mechanisms which ought to have been deemed as valid in the first place. The authors

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conclude that in the post- colonial state, there ought to be a shift in thinking to recognize African conflict resolution mechanisms as legitimate and equal and decolonize notions of the perceived inferiority of the African conflict resolution landscape as this perpetuates the legacies of colonialism.

**Part I**  
**Dispute Resolution: The Pre-Colonial Period**

*The darkest thing about Africa has always been our ignorance of it – George Kimble*

Before the British arrived in Kenya, there subsisted legitimate mechanisms for conflict resolution which were akin to the alternative dispute resolution mechanisms which exist in present times. Kenya is a multi-ethnic state with a total of forty three tribes, majority of which have several sub-tribes. Disputes in the pre-colonial period were resolved through various indigenous mechanisms utilized by indigenous institutions which varied from community to community. Despite their diversity, these institutions all applied customary law in the resolution of disputes.

Customary law is the indigenous law of the various ethnic groups of Africa.<sup>5</sup> The pre-colonial law in most African states was essentially customary in character, having its sources in the practices and customs of the people.<sup>6</sup> It should be appreciated that the use of the term ‘African customary law’ does not indicate that there is a single uniform set of customs prevailing in any given country.<sup>7</sup> During the pre-colonial period, customary law, both substantive and

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<sup>5</sup> Muna Ndulo, ‘African Customary Law, Customs, and Women’s Rights’ [2011] Indiana Journal of Global Legal Studies, Volume 18, Issue 1, 88

<sup>6</sup> Ibid

<sup>7</sup> Ibid



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procedural, was applied in the resolution of criminal and civil cases and it reflected the morals of the society at that time. However, each community had its diverse set of customs.

Indigenous institutions used by pastoral communities such as the Turkana were oriented towards emphasis on justice, social change and stressed the necessity of transforming behaviour and improving relationships among the pastoralist communities.<sup>8</sup> The top leadership that included the military, political and religious leaders was involved in various established peace building initiatives like high level negotiations and ceasefires.<sup>9</sup> Indigenous mechanisms used by pastoralists in prevention, management and resolution of conflicts include negotiation, mediation, adjudication among others.<sup>10</sup> Various conflict resolution mechanisms comprising of mediation, dialogue, negotiations, public forums, use of elders and diviners as warning systems were applied in the community.<sup>11</sup>

The Abakuria community also had an indigenous conflict management system comprising of five major arms; *Inchama*, *Avaragoli*, *Iritongo*, *Sungusungu* and *Ihama* which applied customary law in the community to ensure there was rule of law.<sup>12</sup> The roles of *Inchama* and *Avaragoli* in conflict management included protecting the community against evil spirits, administering oaths, excommunicating errant members, imposing fines, holding reconciliatory

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<sup>8</sup> Jackline Apiyo Adhiambo, 'Indigenous Conflict Resolution Mechanisms Among the Pastoralist Communities in the Karamoja Cluster – A Case Study of the Turkana,' [2014] University of Nairobi eRepository, 114, 115

<sup>9</sup> Ibid

<sup>10</sup> Ibid

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meetings and making traditional rules.<sup>13</sup> The main task of *Iritongo* was dispensing justice, dispute resolution, conducting investigations, presiding over peace meetings and conducting traditional disarmament.<sup>14</sup> The *Sungusungu* had the role of punishing offenders while the *Inchama* tracked stolen livestock.<sup>15</sup> Negotiation and mediation were mechanisms primarily used in these processes.

Although the Agikuyu community had no formally recognized courts or judges, elders settled disputes and issued judgments in disputes.<sup>16</sup> The community was divided into three main segments namely, the family (*mbari* or *nyumba*), the clan (*muhiriga*), and age grade (*riika rimwe*); minor conflicts were resolved by the fathers of each *mbari* or *nyumba*.<sup>17</sup> If they were not resolved at this level, they could be taken to *muhiriga* and after that, to the *kiama*, the council of elders.<sup>18</sup> This system of dispute resolution employed arbitration, mediation, negotiation, conciliation and adjudication.<sup>19</sup> Mediation and negotiation were the most preferred methods of dispute resolution as they were effective in arriving at a win-win outcome thus enhancing relations between disputants.<sup>20</sup>

When negotiation and mediation failed, the *kiama* acted as a court to resolve disputes through arbitration.<sup>21</sup> Disputes were heard in public and every person

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Njeri A, Osamba J and Murage J, 'Agikuyu Indigenous Methods of Conflict Resolution- the Case of Tetu Sub-County' [2017] 6 International Journal of Innovative Research & Development, 124.

<sup>17</sup> Drake D, 'Criminal Justice: Local and Global'[2010] 77.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Luongo K, 'Witchcraft and Colonial Rule in Kenya, 1900 – 1955' [2015] Cambridge University Press, 78.

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attending was allowed to give their opinion on the dispute.<sup>22</sup> Under the *kiama*, compensation was the main method of remedying wrongs committed by a member of the community.<sup>23</sup> Like modern juridical systems, the *kiama* system entrenched the principle of fair trial and accused persons were entitled to be heard by a fair and neutral bench of elders.<sup>24</sup> The Agikuyu therefore relied heavily on arbitration, mediation, negotiation, conciliation and adjudication to resolve the disputes which arose in their community.

Prior to colonization, the Akamba community had a council of elders known as *Nzama* which was in charge of dispute resolution.<sup>25</sup> But before disputes could be determined by *Nzama*, they would be resolved at the family level where the oldest son of the family was responsible for determining all the disputes within the household.<sup>26</sup> Where a matter fell for determination by *Nzama*, heads of families of the disputants would be required to appear before them for hearing, parties would also be entitled to call witnesses to testify in support of their case and ultimately, the *Nzama* would hand down a judgment which was binding on all parties.<sup>27</sup> Compensation was a standard outcome for almost all cases depending on the magnitude of the offence in question.<sup>28</sup>

The Meru community also had an indigenous institution known as *Njuri-Ncheke* which was the governing council of elders for the entire Meru Community made

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<sup>22</sup> Ibid.

<sup>23</sup> Cagnolo C and others, 'The Agĩkũyũ, Their Customs, Traditions, and Folklore' [2006] Wisdom Graphics Place.

<sup>24</sup> Ibid.

<sup>25</sup> Luongo K, 'Witchcraft and Colonial Rule in Kenya, 1900 – 1955' [2015] Cambridge University Press, 78.

<sup>26</sup> Trujillo MA, 'Re-Centering Culture and Knowledge in Conflict Resolution Practice' [2008] Syracuse University Press, 50.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

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up of seven sub-groups: Igembe, Tigania, Imenti, Tharaka, Mwimbi, Muthambi and Chuka.<sup>29</sup> *Njuri Ncheke* was the institution whose responsibility was to make laws, issue orders and decrees affecting the entire Meru society.<sup>30</sup> The council enforced the rules and regulations aimed at conserving the environment.<sup>31</sup> It also upheld principles of fair hearing by making trials public, allowing parties to a dispute to call witnesses, to give their perspective of the case and to be represented by third parties.<sup>32</sup> *Njuri Ncheke* is still in operation and helps to resolve disputes, using customary laws, among members of the Meru community as well as between the Meru community and its neighbours. The *Njuri Ncheke* utilized negotiation, mediation and forms of arbitration to resolve disputes.

Councils of elders in various communities were respected as trustworthy mediators because of their accumulated experience and wisdom.<sup>33</sup> The roles of these mediators would depend on traditions, circumstances and personalities and included: facilitation, through clarifying information, promoting clear communication, interpreting standpoints, summarising discussions, emphasising relevant norms or rules, envisaging the situation if agreement is not reached, or repeating of the agreement already attained.<sup>34</sup> The mediators could also remain passive, as they were there to represent important shared

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<sup>29</sup> Kirema Nkanata Mburugu, 'Resolving Conflict Using Indigenous Institutions: A Case Study of Njuri-Ncheke of Ameru, Kenya' [2016] International Journal of Science, Arts and Commerce, Volume 1, Number 4, 20.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Mburugu K and Macharia D, 'Resolving Conflicts Using Indigenous Institutions: A Case Study of Njuri-Ncheke of Ameru, Kenya' [2016] 1 International Journal of Science Arts and Commerce 24.

<sup>33</sup> Birgit Brock-Utne, *Indigenous Conflict Resolution in Africa*, University of Oslo <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.460.8109&rep=rep1&type=pdf> last accessed 12<sup>th</sup> January, 2018.

<sup>34</sup> Ibid.

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values; there was no predetermined model, so they are entitled to change their roles from time to time as they perceive needs at various times.<sup>35</sup>

These are but a few illustrations of the pre-existing indigenous institutions in the pre-colonial period. Many Kenyan communities had different indigenous institutions which utilized mechanisms which would be referred to as ADR in the postcolonial state such as negotiation, mediation and arbitration. Indigenous institutions effectively applied customary law to resolve disputes that were presented before them. This means that the African methods of resolving conflict were neither primitive nor barbaric. On the contrary, they were legitimate and effective. While these mechanisms might have appeared foreign to the British, they were and continue to be legitimate methods of resolving disputes.

Even with changes in the forms of these institutions in the postcolonial state, the mechanisms utilized remain valid. However, when the British arrived in Kenya, these institutions and mechanisms were subjugated and as part of the Civilizing mission, the court system was introduced into the country's justice system. This was because the court system was the Western perception of a legitimate dispute resolution and was deemed to be a superior system. English law was to be applied by the courts in preference to customary law. The latter was also subjugated as it was viewed as an inferior source of law.

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<sup>35</sup> Ibid

## **Part II**

### **The Western Approach: Introduction of The Court System**

*If you don't like someone's story, you write your own – Chinua Achebe*

Effective colonization in Africa demanded a legal system to maintain control of a country and resolve disputes within it.<sup>36</sup> Everywhere the colonial metropolises established their own systems of law and dispute resolution, disregarding pre-existing mechanisms of conflict resolution as primitive or appropriate for 'natives' only.<sup>37</sup> Kenya was no exception. With colonization came the subjugation of customary law in favor of English law and the introduction of the court system in preference to indigenous institutions and mechanisms.

The reason for this subjugation was that it was part of the Civilising Mission. Unlike the European idea of justice, which was fought on an adversarial contestation of evidence with a view to determine right from wrong and penalise the party in the wrong, the African outlook implored the accused to confess in order to start a healing process of reconciliation.<sup>38</sup> The colonial administration of justice also sought to act as a deterrent and had, in its arsenal, structural violence that included the death penalty, whipping, severing body parts, confiscating property in fines, forced labour and imprisonment.<sup>39</sup> The purpose of hearing a case under many indigenous African justice systems was mainly to establish where the truth rested in order to help the community

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<sup>36</sup> Sandra F. Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' [2001] Political Science Faculty Publications, 2, 3

<sup>37</sup> Ibid

<sup>38</sup> Peter Run, 'Reconsidering the Crisis of Confidence in Indigenous African Conflict Resolution Approaches: A Post-Colonial Critique,' *The Journal of Pan African Studies* [2013] 30

<sup>39</sup> Ibid

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restore peace and harmony.<sup>40</sup> The introduction of the court system was therefore in line with European notions of justice.

The subjugation of indigenous institutions and mechanisms was also part of the European justification of the colonization of Africa - that it was its moral duty to 'uplift' Africans from their primitive state.<sup>41</sup> The Civilising Mission was to ensure that the so-called 'dark continent' was brought into the light. The indigenous mechanisms and application of customary law was viewed as primitive and needed to be substituted with the seemingly more sophisticated court system which would apply English law. The African conflict resolution methods therefore began to be eroded.

The history of the Kenyan Judiciary, as it exists today, can be traced to 1895, when Kenya became a British Protectorate.<sup>42</sup> Kenya's judicial experience in the colonial days started with a pluralistic court system, with separate arrangements for Africans, Muslims and Europeans.<sup>43</sup> In 1895, the East Africa Protectorate was established with a Consular court to serve the British and other foreign persons.<sup>44</sup>

The East Africa Order in Council, 1897, established a tripartite division of subordinate courts namely, native, Muslim, and those operated by

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<sup>40</sup> Ibid

<sup>41</sup> Vincent Khapoya, 'The African Experience: An Introduction' Routledge, 4<sup>th</sup> edition, 106

<sup>42</sup> Njeri Thuki, 'A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England' [2013] Annual Survey of International and Comparative Law, Volume 19, Issue 1, 51-52

<sup>43</sup> Ibid

<sup>44</sup> The Judiciary, 'Our History' <https://www.judiciary.go.ke/about-us/our-history/> last accessed May 2, 2018

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Magistrates.<sup>45</sup> In addition, it established a dual system of superior courts; Her Majesty's Court for East Africa (later renamed 'the High Court of East Africa') and the Chief Native Court which served Europeans and Africans, respectively.<sup>46</sup> This system lasted in effect for five years before reorganization in 1902.

The East Africa Order in Council of 1902 established a more unified judicial system comprising of Her Britannic Majesty's Court of Appeal for East Africa and the High Court for the East Africa Protectorate.<sup>47</sup> The former had appellate jurisdiction over Uganda and the East Africa protectorate while the High Court had jurisdiction over 'all persons and things in the protectorate.'<sup>48</sup>

Subsequently, the East Africa Native Courts Amendment Ordinance of 1902 introduced special courts constituted by the collectors or assistant collectors of districts declared special.<sup>49</sup> With these developments, the place of traditional institutions remained controversial. The Village Headman Ordinance empowered the Commissioner to appoint official headmen of villages or groups of villages who were mandated with maintaining order in those villages.<sup>50</sup>

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<sup>45</sup> Ghai YP & McAuslan JP, *Public Law and Political Change in Kenya*, (Oxford University Press, 2001) 130

<sup>46</sup> Mbondenyei & Ambani, *The New Constitution of Kenya: Principles, government and human rights* (LawAfrica Publishers, 2013) 140

<sup>47</sup> Ghai YP & McAuslan JP, *Public Law and Political Change in Kenya*, (Oxford University Press, 2001) 132

<sup>48</sup> East Africa Order in Council [1902] Number 661.

<sup>49</sup> Ghai YP & McAuslan JP, *Public Law and Political Change in Kenya*, (Oxford University Press, 2001) 133

<sup>50</sup> *Ibid*



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The 1907 Native Courts Ordinance recognized traditional dispute settlement systems as tribunals.<sup>51</sup> Pursuant to the Ordinance, three classes of subordinate courts were established that is, first-class courts - held by Resident magistrates and Provincial Commissioners, exercising jurisdiction over provinces; second-class courts - held by District commissioners, and third-class courts - held by District officers.<sup>52</sup>

The Ordinance further drew a distinction between these subordinate courts and the subordinate native tribunals as the latter were presided over by headmen or elders appointed by the Governor.<sup>53</sup> The Native Tribunals Rules enacted in 1911 provided that the powers of headmen or elders could only be exercised by a council of elders in accordance with customary law recognized by the Governor.<sup>54</sup> Appeals from subordinate Courts lay with the Supreme Court.<sup>55</sup>

The enactment of the Africa Courts Ordinance marked an important step towards restructuring of the judicial system.<sup>56</sup> The Ordinance abolished the existing tribunals and created the office of the Chief Justice and Registrar of the Supreme Court to head the judiciary and to carry out administrative duties, respectively. The new courts were presided by experienced judges and

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<sup>51</sup> Native Courts Ordinance, [1907]

<sup>52</sup> Ghai YP & McAuslan JP, *Public Law and Political Change in Kenya*, (Oxford University Press, 2001) 134.

<sup>53</sup> *Ibid*, 135

<sup>54</sup> *Ibid*, 136.

<sup>55</sup> The Judiciary, 'Our History' <https://www.judiciary.go.ke/about-us/our-history/> last accessed May 2, 2018

<sup>56</sup> The African Courts Ordinance, [1950]

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magistrates.<sup>57</sup> A Chief Kadhi was appointed to head Muslim courts, which were categorized as subordinate courts.<sup>58</sup>

In 1920, Kenya officially became a colony and, to assist them, the British used the laws they had brought from Great Britain to India and finally took these same laws to Kenya.<sup>59</sup> The British set up two types of courts in Kenya, native and colonial; the former dealt with matters involving African parties and customary claims; while the official courts applied English law and statute law.<sup>60</sup> However, customary law remained an inferior source of law. Throughout the colonial period, the court system was the main system of dispute resolution and English law was applied by these courts. African indigenous institutions and African customary law were subjugated and deemed to be less civilised, ergo inferior.

Upon Kenya's independence in 1963, the judiciary was further reconstituted in line with the country's changing circumstances.<sup>61</sup> The Judicial Service Commission (JSC) was established as the independent appointing authority for judicial officers and the Court of Appeal was established following the renaming of the Supreme Court as the High Court in 1964.<sup>62</sup> A number of statutes were enacted to aid the process of restructuring the judiciary. Notably,

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<sup>57</sup> Mbondenyei & Ambani, *The New Constitution of Kenya: Principles, government and human rights* (LawAfrica Publishers, 2013) 141.

<sup>58</sup> Mbondenyei & Ambani, *The New Constitution of Kenya: Principles, government and human rights* (LawAfrica Publishers, 2013) 140.

<sup>59</sup> Njeri Thuki, 'A Comparative Analysis of Judicial Councils in the Reform of Judicial Appointments between Kenya and England' [2013] *Annual Survey of International and Comparative Law*, Volume 19, Issue 1, 51-52

<sup>60</sup> *Ibid*

<sup>61</sup> Mbondenyei & Ambani, *The New Constitution of Kenya: Principles, government and human rights* (LawAfrica Publishers, 2013) 141.

<sup>62</sup> Mbondenyei & Ambani, *The New Constitution of Kenya: Principles, government and human rights* (LawAfrica Publishers, 2013) 142.

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The Judicature Act,<sup>63</sup> the Kadhis Courts Act,<sup>64</sup> and the Magistrates' Court Act<sup>65</sup> were enacted. The court system and the application of English law and statutes were embraced in the postcolonial state as the preferred system of dispute resolution. The pre-existing indigenous institutions and African customary law, although still in use, were pushed to the periphery.

### **Part III**

#### **The Fallacy of Superiority: The Postcolonial State**

*When your conqueror makes you ashamed of your culture and your history, he needs no prison walls and no chains to hold you – John Henrik Clarke*

Colonisation did not simply impose institutions where none had previously existed; nowhere was there an institutional *tabula rasa*, particularly in the area of dispute resolution.<sup>66</sup> The court system was introduced by the imperialists and it led to subjugation of existing indigenous systems. Yet, the court system was adopted in the post colonial state as it was deemed to be a superior and more civilized system of conflict resolution. It was seemingly more appropriate and English common law was applied in preference to African customary law.

The late Professor Okoth-Ogendo recounted how, as the colonial era drew to a close in the 1950s and 1960s, British legal scholars organised a series of conferences to discuss the future of customary law in Africa and the need to construct a framework for the development of legal systems in the emerging

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<sup>63</sup> The Judicature Act, Cap 8 Laws of Kenya.

<sup>64</sup> The Kadhis Courts Act, Cap 11, Laws of Kenya.

<sup>65</sup> Magistrates' Court Act, Cap 10 Laws of Kenya.

<sup>66</sup> Sandra F. Joireman, 'The Evolution of the Common Law: Legal Development in Kenya and India' [2006] Political Science Faculty Publications, 5

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states.<sup>67</sup> These initiatives assumed that the indigenous legal systems of African countries and peoples of which they were well aware, were inadequate and inferior compared to the English common law.<sup>68</sup> These scholars must have felt vindicated when, upon independence, most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework’s ‘general ambivalence as regards the applicability of indigenous law’.<sup>69</sup> English common law was therefore adopted by the courts and African customary law was restricted to limited use as an inferior source of law.

Kenya embraced the English common law system because there were vested interests in sustaining the same legal system that had been established in the colonial era and it was seen as one of the privileges of independence and citizenship that all Kenyans now had full access to common law courts.<sup>70</sup> There was a sentiment of inclusiveness that the common law would no longer be restricted in its application to the privileged classes and that the citizens were all now Kenyans and not categorised as Muslims, Christians or animists each with their own set of laws.<sup>71</sup>

Over the years, as the court system was fully embraced and English common law applied by judges in resolving disputes, cracks began to emerge in the narrative that the court system was a superior system of conflict resolution. The court system was marred with a myriad of challenges. After taking over as head

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<sup>67</sup> Wilmien Wicomb and Henk Smith, ‘Customary Communities as ‘Peoples’ and Their Customary Tenure as ‘Culture’: What We Can Do With the Endorois Decision’ [2011] 11 African Human Rights Law Journal, 424, 425

<sup>68</sup> Ibid

<sup>69</sup> Ibid

<sup>70</sup> Sandra F. Joireman, ‘The Evolution of the Common Law: Legal Development in Kenya and India’ [2006] Political Science Faculty Publications, 14, 15

<sup>71</sup> Ibid

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of Kenya's judiciary, former Chief Justice Willy Mutunga delivered a speech outlining the challenges which the country's court system faced stating that, "we found an institution so frail in its structures; so thin on resources; so low on its confidence; so deficient in integrity; so weak in its public support that to have expected it to deliver justice was to be wildly optimistic. We found a judiciary that was designed to fail."<sup>72</sup> This statement echoes the host of issues faced by the courts.

By the year 2010, there were over a million cases pending in the Kenyan courts. A case audit and institutional capacity survey undertaken in 2013 revealed a case backlog of 316,441 cases, while that of February, 2016 showed a case backlog of 338,498 out of which 62,505 cases were over ten years old and 75,274 cases were between five to ten years old.<sup>73</sup> As at December 2016, there were a total of 505,315 pending cases in the court system up from 494,377 cases at the beginning of the 2016/2017 financial year.<sup>74</sup> The severe backlog of cases has been attributed to a number of factors. This includes factors such as cases taking a very long time to be finalized, the unpreparedness of litigants and advocates leading to delays in hearing of cases, missing files and corruption.

In addition, the court system is faced with other challenges such as the fact that the litigation process is expensive which limits access to justice. In practice, legal fees continue to be too high for many disputants even though in theory, the State is constitutionally mandated to ensure access to justice for all persons and if any

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<sup>72</sup> Maya Gainer, 'Transforming the Courts: Judicial Sector Reforms in Kenya 2011-2015' Princeton University

[https://successfulties.com/sites/successfulties.com/files/MG\\_OGP\\_Kenya.pdf](https://successfulties.com/sites/successfulties.com/files/MG_OGP_Kenya.pdf) last accessed 12th January, 2018

<sup>73</sup> The Judiciary, 'Sustaining Judiciary Transformation: A Service Delivery Agenda 2017-2021' 21 [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic\\_BluePrint.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf) last accessed 3rd May, 2018

<sup>74</sup> Ibid

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fee is required, to ensure that it is reasonable.<sup>75</sup> Further, the court process is usually a public process which does not afford litigants privacy in the hearing of their matters.

Court cases also tend to be acrimonious and can lead to the breakdown of relationships between parties as the outcomes tend to be zero sum results which leave one party disgruntled. The courts are therefore not suitable for all cases especially where parties want to maintain their business or family relationships beyond the duration of the case.

There have also been incidents of missing files which delays cases, lack of representation for parties and allegations of bribery and corruption among judicial officers which undermines the integrity of cases. The Task Force on Judicial Reforms mentioned unethical conduct on the part of judicial officers and staff as being an impediment to fair and impartial dispensation of justice citing unethical practises such as the practice of payment of bribes to hide files, abuse of office and bribing the judges, prosecutors and clerks for favorable judgment.<sup>76</sup> Yet judicial officers should ideally not be under the control or authority of any person or institution in order to carry their mandate effectively and ought to hear cases without fear or favor.

In the postcolonial state, the superiority of the court system over African mechanisms of dispute resolution is clearly a fallacy. As enumerated above, the court faces a lot of challenges which the judiciary is working hard to surmount. While the court system has its advantages, it is not a perfect system. This means that Kenya was quick to adopt colonial ideas of dispute resolution which are now proving to be problematic and not wholly suitable to the African

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<sup>75</sup> Article 48 of the Constitution of Kenya, 2010

<sup>76</sup> Ethics and Anti-Corruption Commission, 'A Study on Corruption and Ethics in the Judicial Sector,' [2014] 41

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circumstance. The court system has its advantages and disadvantages but should not be treated as superior to those mechanisms which have their roots in Africa.

These illustrated shortcomings led to the clamor for the introduction of alternative dispute resolution (ADR) in Kenya as an alternative to the court system. ADR has been promoted in order to complement the court's mandate as well as aid in the reduction of the backlog of cases.

#### **Part IV**

#### **Alternative Dispute Resolution: Repetition as Reform**

*Until the lions have their own historians, the history of the hunt will always glorify the hunters – Chinua Achebe*

Alternative Dispute Resolution is a movement that is increasingly taking root in the Kenyan justice system. Negotiation, mediation, arbitration, traditional dispute resolution mechanisms and hybrids of these processes are being lauded as methods which complement the court system and aid in the expeditious resolution of conflicts. These mechanisms have been entrenched in the Constitution which provides that in exercising judicial authority, the courts and tribunals shall be guided by various principles which include that they ought to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>77</sup> While this position rings true, and reduction of the backlog of cases in the courts is always welcome, this 'new' movement of resolving disputes is arguably repetition being introduced as reform. By packaging ADR as a movement that is from the West and being introduced into Kenya, this perpetuates the legacies

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<sup>77</sup> Article 159 (2) Constitution of Kenya, 2010

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of colonialism and continues to subjugate the African mechanisms of dispute resolutions which were pre-existing and ignored in favor of the court system.

Postcolonial legal theories are not about legal processes in the time after colonialism, when a former colonised state gains independence and presumably a measure of self-determination.<sup>78</sup> Rather, postcolonial legal scholarship underscores that even when colonialism has officially ceased to exist, the injustices of material practices endure over time and in many ways frame emergent legalities and legal consciousness.<sup>79</sup> Therefore, it is not the fact that Kenya now has self-determination and its people have the agency to determine which conflict resolution systems fit its circumstance. Rather it is that despite being an independent state, there is a need to shift the thinking from adopting Western ideas of conflict resolution as manifestly superior to that which is indigenous and understanding the legitimacy of African ideas of dispute resolution. It is also about understanding narratives that continue to entrench the thinking that African methods of dispute resolution such as traditional dispute resolution mechanisms as being manifestly inferior and inconsequential.

Post-colonialism is concerned with the worlds which colonialism in its multiple manifestations, confused, disfigured and distorted, reconfigured and finally transformed.<sup>80</sup> The effects of colonisation are felt from the moment of the first colonial impact and post-colonialism constitutes as its subject the way colonised societies adjusted and continue to adjust to the colonial presence: sometimes that presence was regarded as genuinely enriching; more often it was seen as

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<sup>78</sup> Eve Darian-Smith, 'Postcolonial Theories of Law' [2013] Reza Banakar, Max Travers (ed.) Law and Social Theory, Hart Publishing, Oxford 249

<sup>79</sup> Ibid

<sup>80</sup> Anthony Chennels, 'Essential Diversity: Post-Colonial Theory and African Literature' Brown University [1999] 110



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demeaning and impoverishing.<sup>81</sup> In terms of dispute resolution, colonialism subjugated indigenous institutions and mechanisms and transformed African thinking into viewing them as inferior modes of dispute resolution. The court system was presented as a more sophisticated and manifestly superior system of resolving conflicts. This thinking was not restricted to the colonial times, but still persists today.

Customary law is deemed to be an inferior source of law in comparison to English law. Traditional dispute resolution mechanisms continue to exist in the periphery and are not given the respect which would be afforded to the court system since the latter is a creature of the colonial encounter. Negotiation, mediation and arbitration, although in different hybrid forms, do have roots in African societies but there is no recognition of this and a single, dangerous narrative persists that it is a movement blowing in from the West to complement the Kenyan court system. There is a need to decolonize the idea that there were inferior and barbaric pre-existing mechanisms in Kenya for dispute resolution and that empire resulted in 'civilization' of the country's justice system. There is also need to decolonize the idea that African societies did not practice ADR and it is a Western notion being introduced into Kenya and the idea that African customary law is primitive and inferior – these are false narratives which perpetuate legacies of colonialism today.

Post colonialism also challenges the superiority of the dominant Western perspective and seeks to re-position and empower the marginalized and subordinated 'Other'.<sup>82</sup> It pushes back to resist paternalistic and patriarchal foreign practices that dismiss local thought, culture and practice as uninformed,

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<sup>81</sup> Ibid

<sup>82</sup> Jim B. Parsons and Kelly J. Harding, 'Post Colonial Theory and Action Research' Turkish Online Journal of Qualitative Inquiry, Volume 2(2), [2011] 2

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barbarian and irrational.<sup>83</sup> It identifies the complicated process of establishing an identity that is both different from, yet influenced by, the colonist who has left.<sup>84</sup> Negotiation, mediation and arbitration were mechanisms utilized by indigenous institutions in various local communities. This was not a 'primitive' form of alternative dispute resolution but a different type that took into account the local needs of the community and was effective in maintenance of law and order. It is a form of ADR that is subordinated to western notions and structures of the same concepts. The dispute resolution methods in Kenya which applied customary law take the shape of the marginalized 'Other' and are persistently, to date, dismissed as irrational or inadequate in comparison to western ideologies.

This mentality continues to be perpetuated in the postcolonial state, not because of political colonization, but due to continued colonization of the mind. As Ngugi wa Thiong'o stated, the biggest weapon wielded and actually daily unleashed by imperialism is the cultural bomb – the effect of annihilating a people's belief in their names, in their language, in their environment, in their heritage of struggle, in their unity, in their capacity and ultimately in themselves.<sup>85</sup>

This collective death wish to distance ourselves from the 'African' dispute resolution methods is denouncing our authentic selves and our rich heritage as a country. It is the belief that concepts such as 'traditional dispute resolution mechanisms' and 'customary law' are terms that the sophisticated litigator or practitioner of ADR in today's world should distance themselves from as they are inferior and irrational. It is the belief that the 'savior' succeeded in his

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<sup>83</sup> Ibid

<sup>84</sup> Ibid

<sup>85</sup> Ngugi wa Thiong'o, 'Decolonising the Mind: The Politics of Language in African Literature' London: Portsmouth [1938] 3

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Civilizing Mission and granted the country a perfect legal system that should be the center of our focus and ignores the fallacy of the superiority of the court system.

In the postcolonial state, ADR ought to be embraced as an alternative to the court system which complements its mandate and helps to reduce case backlog. However, it is redolent of African history and tradition and is far from a new concept in Kenya. Kenyan societies have long embraced negotiation, mediation, arbitration and traditional justice systems. The subjugation of African indigenous institutions and African customary law was unwarranted as the superiority of the court system and English law is a misleading notion. While the imperialists introduced this annihilation of African culture, as Kenyans we continue to believe it to date which means that even though we are politically free, we remain mentally in chains.

## **2. Conclusion**

Indigenous institutions and mechanisms utilized for resolving disputes in Kenya which existed in the pre-colonial period were legitimate and suitable for dispute resolution. They also mirrored what is known as ADR today in many respects. With colonialism, the court system was introduced as a sophisticated system of dispute resolution which was deemed to be superior and more civilized. African customary law was subjugated in favor of English law. This was part of the Civilising Mission to bring light into the 'Dark Continent' and civilize Kenyans from their perceived 'primitive' modes of dispute resolution. The court system which applied English law therefore became the mainstream dispute resolution system in Kenya.

After colonialism, in Kenya, the use of the court system subsisted as the main conflict resolution system only for its superiority to be revealed as a fallacy. Kenya wholly embraced the colonial framework and indigenous institutions

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remained subordinate. The court system has made many positive contributions but suffers from a myriad of flaws such as severe case backlog, missing files, unprepared litigants and advocates, lengthy and expensive cases, corruption in the judiciary, *inter alia*. Despite these issues, the court system is still looked upon as a 'refined' system of conflict resolution as it is a Western notion so ingrained in our systems and in our psyche that litigants and dispute resolution practitioners alike distance themselves from that which is labelled 'traditional' or 'customary.'

The ADR movement has also gained momentum as an alternative to the court system introduced from the West. ADR is embraced as a resolution to the case backlog and delays in the justice system. This perception of ADR as a western concept is a continued form of subjugation of pre-existing African modes of dispute resolution in the twenty first century. To perceive traditional justice systems as the only 'African' methods of resolving disputes while negotiation, mediation and arbitration as western ideas is continued colonization. These notions of ADR have long been embraced and utilized by African societies even before empire.

While this is not a 'do away with the courts' anthem, we ought to desist from the refrain that all things African are inferior and subordinate to Western notions. If we do not, as a country, then we are not truly independent. The court system is a system that has had many positive contributions and will continue to do so. It is, however, a creature of the colonial encounter. ADR is a great complement to the court system to address its shortcomings but it is far from a new movement of resolving disputes from that has swept in from the West.

The authors therefore argue for a shift in thinking; a decolonization of the mind and a rejection of narratives which erode African systems and thoughts. In this context, ADR has roots in indigenous institutions, in our communities and in

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our culture and should be embraced as such. African customary law is just as legitimate as English law and ought to be embraced. Traditional justice systems should take their rightful place at the dispute resolution table. The authors argue that ADR and the court system are legitimate and equal and one is not inferior to the other; that ADR has roots in Africa and indigenous institutions and mechanisms should not be looked down upon. Repetition masked as reform is merely perpetuation of the legacies of colonialism and should be rejected.

## **The Promotion of Alternative Dispute Resolution Mechanisms by the Judiciary in Kenya and its Impact on Party Autonomy**

*By: Francis Kariuki\* & Raphael Ng'etich\*\**

### **Abstract**

*One of the principles guiding the exercise of judicial authority according to Article 159 of the Constitution of Kenya is the promotion of alternative dispute resolution (ADR) processes. Since the Judiciary is a key player in the formal justice system (litigation), vesting it with the responsibility of promoting and administering ADR, spells dire consequences for ADR mechanisms in Kenya. The paper queries the effect of linking up ADR processes with the formal justice system in Kenya especially with regard to the principle of party autonomy.*

### **1. Introduction**

Article 159 of the Constitution of Kenya, 2010, has conferred upon the Judiciary the role of promoting the use of ADR mechanisms. This is a sigh of relief to ADR processes, which have ordinarily operated outside the ambit of the formal justice system.<sup>1</sup> However, there is cause for concern because the Judiciary is a key player in the formal justice system and promoting ADR processes within the Judiciary can have huge consequences on ADR mechanisms.

One feature of ADR that is likely to be affected is party autonomy. The principle of party autonomy requires that parties are left to construct their dispute resolution process in the manner they deem fit allowing them to pick the type of dispute resolution they require, the person to preside over the process, the

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<sup>1</sup> Forsyth M, 'A typology of relationships between state and non-state justice systems,' *Journal of Legal Pluralism & Unofficial Law*, (2007), 67.

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place and time of resolution of the dispute. However, party autonomy is tempered by public policy concerns, for instance, where parties use the dispute resolution process to engage in illegal activities. Party autonomy stands to face additional legal and practical limitations with the placing of the responsibility of promoting ADR mechanisms on the Judiciary.

Party autonomy will be affected since disputants will lose the options initially available to them under ADR mechanisms. The Judiciary is also facing some challenges, which are likely to reduce its efficiency. It has experienced serious case backlogs, and this is bound to spread to ADR mechanisms. ADR might therefore inherit these challenges and suffer from the resulting inefficiency.

This paper interrogates these issues by examining the role of the Judiciary in the promotion of ADR, and the principle of party autonomy. It then concludes by drawing some conclusions and offering suggestions on the way forward.

## **2. Responsibility of the Judiciary in Promoting ADR Mechanisms**

The Judiciary's responsibility to promote the use of ADR mechanisms derives from Article 159(2)(c) of the Constitution, which provides in part that:

*'In exercising judicial authority, the courts and tribunals shall be guided by the following principles— alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted...'*

This provision cements the legal foundation for use of ADR mechanisms in the resolution of disputes in Kenya.<sup>2</sup> It serves the purpose of recognizing ADR

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<sup>2</sup> See also Order 46, Civil Procedure Rules 2010 and Sec. 59A, Civil procedure Act, Cap 21, Laws of Kenya.

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mechanisms and bringing them officially into the dispute resolution process.<sup>3</sup> However, ADR processes have been in use by Kenyan communities even before the formation of the Kenyan state only that they were not known by the current terminologies.<sup>4</sup>

The official recognition of ADR mechanisms was out of the realisation that majority of Kenyans could not access justice within the formal justice processes. According to research by the Kenya Section of the International Commission of Jurists on formal and informal justice systems in Kenya,

*The formal justice system is riddled with many challenges and this has forced Kenyans to resort to Alternative Dispute Resolution mechanisms including the Informal Justice Systems. These challenges include the fact that the courts are largely inaccessible to most Kenyans since they are far apart, they follow procedures that are alien to the locals, are arbitrary and unfriendly, take too long to conclude matters, are susceptible to corruption, are inefficient. ADR includes dispute resolution processes and techniques by which disputing parties reach an agreement outside the normal litigation process. All over the world ADR is becoming more popular with some jurisdictions requiring mediation before a matter can be subjected to the normal court process. The increased use of ADR is also attributable to the increasing backlog of cases in the ordinary courts, the perception that ADR is less costly, the fact that ADR is mostly confidential and the desire of the disputing parties to determine who handles their case (the Mediator or Arbitrator).<sup>5</sup>*

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<sup>3</sup> Muigua K and Kariuki F, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' *Strathmore Law Journal*, 1(1), June 2015, 8.

<sup>4</sup> Muigua K, 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' July 2015, 4.

<sup>5</sup> The Kenya Section of the International Commission of Jurists, Interface between formal and informal justice systems in Kenya, Report, June, 2011, 11.



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The drafters of the Constitution, therefore, sought to solve this problem by guaranteeing the right of every Kenyan to have access to justice<sup>6</sup> and by entrenching ADR processes in the justice sector.

Whereas the recognition of ADR mechanisms is laudable, there is cause for concern when the responsibility for their promotion is placed on the Judiciary.<sup>7</sup> The issue of case backlogs is not new and has been highlighted in various reports by the Judiciary.<sup>8</sup> The State of the Judiciary and the Administration of Justice Annual Report, 2016 – 2017, acknowledges that ‘case backlog in courts has remained as one of the significant hurdles in promoting access to justice’.<sup>9</sup> As such, adding more responsibilities on the Judiciary, that is, taking charge of other forms of dispute resolution, is bound to burden it even more. The result is that ADR processes will inherit certain aspects from the court process that are likely to occasion further delays in dispensation of justice.

### **3. The Principle of Party Autonomy in ADR**

Party autonomy refers to the eligibility of persons to make their own decisions, and manage their own rights and obligations without disruption.<sup>10</sup> In ADR, this implies that ‘parties are entitled to freely settle their disputes’<sup>11</sup> and calls for the

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<sup>6</sup> Article 48, *Constitution of Kenya* (2010).

<sup>7</sup> The Kenya Section of the International Commission of Jurists, *Interface between formal and informal justice systems in Kenya*, 24.

<sup>8</sup> See, for example, Republic of Kenya, *Judiciary Transformation Framework, 2012 – 2016*.

<sup>9</sup> Republic of Kenya, *The State of the Judiciary and the administration of justice: Annual report, 2016-2017*, 55.

<sup>10</sup> Zhao M, ‘The Application Scope of the Rule of Autonomy of the Will’ *2 Political Science and Law Tribune* 014, (2004), 101.

<sup>11</sup> Salama N, “Nature, Extent, and Role of Parties’ Autonomy in the Making of International Commercial Arbitration Agreements” *Doctor of Philosophy Thesis, University of Manchester*, 2015, 70.

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disputants to construct the dispute resolution process in the manner they choose.<sup>12</sup>

It is primarily due to party autonomy that parties opt for ADR mechanisms: 'Party autonomy is the cornerstone of international arbitration and ADR.'<sup>13</sup> Parties move away from the formal system run by the state in order that they may resolve their disputes according to their agreement:

*'...ADR mechanisms such as arbitration, mediation and negotiation are predicated on the principles of party autonomy and voluntariness which give the parties wider roles in decision-making and in resolution of their disputes.'*<sup>14</sup>

The principle of party autonomy, based on contractual theory, requires that the agreement of the parties prevail over the will of the state.<sup>15</sup> It is, therefore, an affront to party autonomy when the state begins to creep into ADR mechanisms and begins to make rules on how parties ought to utilise these mechanisms. This is why the question is raised in regard to court-annexed alternative dispute resolution mechanisms with respect to the role of the parties in controlling the flow of the process.<sup>16</sup>

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<sup>12</sup> Sherman E, 'Court-Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required' 46 *SMU Law Review* 2079 (1993) 2089.

<sup>13</sup> Ross D, 'Med-Arb/Arb-Med: A More Efficient ADR Process or an Invitation to a Potential Ethical Disaster?' in Rovine A (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012*, Martinus Nijhoff Publishers, Leiden, 2013, 366.

<sup>14</sup> Muigua K, 'Access to Justice: Promoting Court and Alternative Dispute Resolution Strategies' 4 <http://www.kmco.co.ke/attachments/article/108/Access%20to%20Justice.pdf> on 25 May 2018.

<sup>15</sup> Koca E, Possibility of an autonomous international commercial arbitration, Master of Laws Thesis, University of Lapland, 2017, 13.

<sup>16</sup> Sherman, 'Court-Mandated Alternative Dispute Resolution', 2080.

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When the state, through the Judiciary, for example, enters the ADR scene and begins to regulate the process with regard to issues other than public policy concerns, the very reason as to why parties opted for ADR is negated. The state takes control of the process and in effect takes away the autonomy of the parties to design the process. This goes against the principle of party autonomy, which, as observed by Quinn, is at the core of ADR:

*In support of alternative dispute resolution (ADR) generally, it is frequently claimed that a prime benefit is the ability of the parties freely to choose mechanisms and procedures best suited to their particular circumstances. Such claims imply, and are usually intended to imply, that the parties have autonomy over the process they craft for themselves.<sup>17</sup>*

The principle has been part of Kenyan law and reflected in virtually all the provisions of the Arbitration Act.<sup>18</sup> It has also been recognised by courts in arbitration matters. For example, in *Nyutu Agrovet Limited v Airtel Networks Limited*,<sup>19</sup> the Court of Appeal, observed that:

*At the heart of that principle is the proposition that it is for the parties to choose how best to resolve a dispute between them.*

Clearly, Kenyan courts have recognised this principle and kept away from unnecessarily interfering with ADR processes. However, party autonomy is now at risk since the Judiciary is playing a key role in the implementation of ADR.

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<sup>17</sup>Quinn K, Party Autonomy in Relation to Dispute Resolution Clauses, A paper presented at the Arbitrators and Mediators Institute of New Zealand Inc(AMINZ) Conference held in Queenstown on 28-30 August 2014, 3.

<sup>18</sup> Act No. 4 of 1995.

<sup>19</sup> [2015] eKLR.

#### **4. Implications of the Court-Mandated Mediation Process on Party Autonomy**

The Court-Mandated mediation project in Kenya is governed by the Mediation (Pilot Project) Rules, 2015,<sup>20</sup> enacted pursuant to the Civil Procedure Act.<sup>21</sup> The Rules provide for mandatory screening in order to establish whether a civil action is suitable for referral to mediation.<sup>22</sup> However, this rule does not contemplate the participation or consent of the parties in the decision as to whether the case is suitable for referral to mediation. Rule 5 states that 'Where a case is referred to mediation, the Mediation Deputy Registrar shall notify the parties within seven (7) days of completion of the screening, that the case has been referred to mediation.' This implies that the Judiciary, as opposed to the parties, is making the decision as to whether to opt for mediation or not. This goes against the principle of party autonomy, as discussed above, which requires that parties decide the manner in which they wish to resolve their issues.

The Rules also prescribe a procedure for picking a person who would mediate the dispute. Rule 6(1) provides that 'Mediation under these Rules shall be conducted by a person registered as a mediator by [Mediation Accreditation Committee] MAC.' This reduces the choice of the parties as to the mediator under the court-mandated mediation to only those registered by the Mediation Accreditation Committee. In effect, the autonomy of the parties is limited since the parties may have an individual in mind whom they think would be a suitable mediator, but such person may not be registered by the Mediation Accreditation Committee. The Mediation Deputy Registrar is mandated to nominate three qualified persons from the register of mediators and notify the parties, who are to state their preference within seven days, after which the

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<sup>20</sup> Legal Notice No. 197 of 2015.

<sup>21</sup> Section 59A, 59B, and 81(2FF), Civil Procedure Act (Chapter 21 of the Laws of Kenya).

<sup>22</sup> Rule 4(1), Mediation (Pilot Project) Rules 2015 (Legal Notice No. 197 of 2015).

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Mediation Deputy Registrar will appoint a mediator.<sup>23</sup> Alternatively, the parties may, by consent, pick a registered mediator.<sup>24</sup> This appears to confer autonomy to the parties but the fact remains that parties have been confined to certain persons – those registered by the Mediation Accreditation Committee.

There are also timelines within which the mediation process has to be completed. Rule 7 on time limit provides as follows:

*Mediation proceedings shall take place and be concluded within sixty (60) days from the date of referral to mediation provided that time may be extended for a further period not exceeding ten (10) days by the Mediation Deputy Registrar having regard to the number of parties or complexity of issues or with the written consent of the parties, which consent shall be filed with the Mediation Deputy Registrar.*

This has the implication that parties must submit themselves to the process as required, and in effect, they lose the flexibility and control of the process, which are the key features of mediation as an ADR mechanism.

The limitations of party autonomy are further evident in the conduct of the process. Rule 8, for example, requires that the appointed mediator notifies the parties of the place, date and time of the mediation session, and 'The notice shall also advise parties that the mediation is mandatory.' The notice also bears the following statement: '*YOU MAY BE PENALIZED IF YOU FAIL TO FILE A CASE SUMMARY OR TO ATTEND THE MEDIATION SESSION.*' This is an affront to the principles of mediation. Mediation, as an ADR mechanism, is consensual in nature and the parties ought not to be penalized should they chose not to participate. Furthermore, the process is under the direction of the mediator. Rule 9(3) states that 'The Mediator shall provide guidelines on the process of mediation as appropriate for each referral.'

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<sup>23</sup> Rules 6(2), (3), and (4), Mediation (Pilot Project) Rules 2015.

<sup>24</sup> Rule 6, Mediation (Pilot Project) Rules 2015).

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Where the parties fail to comply with the directions of the mediator or to attend consistently the sessions, the mediator is required by Rule 11(1) to file a certificate of non-compliance with the Mediation Deputy Registrar, who then refers the matter back to court. The court is then empowered by Rule 11(2) to order parties to attend further sessions, to strike out pleadings of the non-complying party unless there was a reasonable excuse, to condemn the non-complying party to pay costs to be assessed by the court, or other orders as the court deems fit. In this way, the parties are being punished for having failed to engage in a process that ought to be consensual.

**a) ADR Mechanisms are Bound to Lose their Salient Features if Administered by the Judiciary**

ADR has key salient features that lead disputants to move away from the formal justice system. These features include the fact that they are primarily informal processes that seek to achieve resolution as opposed to settlement. They are also simple, flexible, quick, cost-effective, emphasise win-win situations for both parties, and foster relationships between parties.<sup>25</sup>

They operate outside the spaces structured and regulated by the state.<sup>26</sup> They are structured by parties in all areas including those which do not have access to the formal system. However, Article 159 of the Constitution has now placed them in the hands of an institution, which is a key player in the formal justice processes. This has the potential to destroy the informal nature of ADR mechanisms, which has always enabled it to reach various persons in the society. ADR mechanisms do not need to be taken over by the state so that they can serve the ends of justice. As observed by Muigua and Kariuki:

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<sup>25</sup> Muigua and Kariuki, 'Alternative Dispute Resolution, Access to Justice and Development Kenya', 3.

<sup>26</sup> Ng'etich R, 'Resolving Community Land Disputes Using Traditional Justice Systems in Kenya' LLB Dissertation, Strathmore University, 2016, 28.

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*'...justice is not found only in official justice forums such as courts. Justice can be experienced also in informal forums such as, homes, villages and workplace. It is thus critical to investigate the impact of Article 159(2) of the Constitution and other statutory provisions of the law in Kenya that seek to formalize some ADR and TDRM processes. Such formalization can be a source of injustice to poor Kenyans, if it will erect barriers to accessing justice through the TDRM.'*<sup>27</sup>

In effect, this eliminates the options available to disputants – the informal processes are pushed out of the dispute resolution landscape, and parties have lesser options to choose from. It also serves to suffocate them with procedural technicalities and legalities, and in the end, disputants will have no real choice to make between the formal and informal processes. Zehr opines that ADR owes *'...its fidelity to intuitive and organic forms of informal justice within any given community, and that its adoption by a State machinery inevitably detracts from that authenticity.'*<sup>28</sup> Party autonomy is negatively affected. In the Kenyan case, this is shown in the fact that mediation has been implemented as a court-annexed process. The court has the power to compel parties to engage in mediation, and a list of mediators is given to them to pick from, and the process has to be completed within set timelines.<sup>29</sup> In effect, mediation has lost its core features and has turned out to be part of the formal justice system.

Another cause for concern is the fact that a tension exists between the Judiciary's role as a public institution and the promotion of the use of ADR mechanisms in disputes. On the one hand, ADR are primarily private affairs as they are

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<sup>27</sup> Muigua and Kariuki, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya', 8.

<sup>28</sup> Zehr H, *Changes lenses: A new focus for crime and justice*, Herald Press, Scottdale, PA, 1990, 97 – 105.

<sup>29</sup> Rules 7 and 8, Mediation (Pilot Project) Rules 2015.

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premised on the principle of party autonomy.<sup>30</sup> This enables parties, as discussed above, to choose venues, the law to govern the process, the persons to resolve the dispute, among other things. On the other hand, the Judiciary is a public institution serving a public function. Therefore, tension arises as the Judiciary, being a public institution, tries to comply with the party autonomy requirements for ADR while at the same time maintaining its identity as a public institution governed by public law.<sup>31</sup> In this tug of war, the Judiciary's role and identity as a public institution prevails. This is because the Judiciary derives its primary mandate from public law and not contract:

*Adjudication uses public resources, and employs not strangers chosen by the parties but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle.<sup>32</sup>*

The Judiciary's mandate to the public, which is captured primarily in the formal system of dispute resolution, is bound to thrive over the responsibility to promote the principle of party autonomy. It is arguable that in the Kenyan case, ADR is recognised in the Constitution, which is an authoritative text, and that such should bind the Judiciary. In response to this, the paper points out that even though the two responsibilities are captured in the Constitution, a

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<sup>30</sup> Cole S, 'Managerial Litigants--The Overlooked Problem of Party Autonomy in Dispute Resolution' 51 *Hastings Law Journal* 1199 (2000), 1201.

<sup>31</sup> Cole, *Managerial Litigants*, 1202.

<sup>32</sup> Fiss O, Comment: Against Settlement, 93 *Yale Law Journal* 1073, 1085 (1984).



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difference emerges in the actual execution of the tasks. The courts are vested with the power to make decision in matters and the parties have the least amount of control. However, in ADR, the principle of party autonomy is a cornerstone and as such requires that parties take charge of the process.

Therefore, there is bound to be conflict where the courts are required to carry out these two responsibilities. Its traditional decisive approach will prevail over ceding of control to disputants. This is already evident in practice. The Judiciary has implemented a court-annexed mediation project, which departs from ordinary mediation as the parties and the mediator are required to act in line with already set rules and timelines.<sup>33</sup>

ADR mechanisms tackle disputes using the resolution approach. However, with the promotion of ADR by the Judiciary, this approach is likely to change to settlement. ADR, on the one hand, identify and address the underlying issues in a dispute.<sup>34</sup> They go 'beyond the positions held by the parties and looking into the underlying values and feelings.'<sup>35</sup> The formal justice system, on the other hand, deals with questions of right and wrong and overlooks the underlying issues.<sup>36</sup> It allocates legal rights and duties in a bid to end the process as quickly as possible.<sup>37</sup>

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<sup>33</sup> Republic of Kenya, *The State of the Judiciary and the administration of justice*, 11.

<sup>34</sup> Burton J and Dukes F, *Conflict: Practices in management, settlement & resolution*, St. Martin's Press, New York, 1990, 83 – 87.

<sup>35</sup> Ng'etich, 'Resolving Community Land Disputes Using Traditional Justice Systems in Kenya' 26.

<sup>36</sup> Burton and Dukes, *Conflict*, 83 – 87.

<sup>37</sup> Spangler B, 'Settlement, resolution, management, and transformation: An explanation of terms' in Guy B and Heidi B (eds.) *Beyond intractability*, Boulder, University of Colorado, 2003.

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The settlement approach will spread to ADR processes administered by the Judiciary. In fact, in the case of mediation, this has already started taking root. In the court-mandated mediation, the idea is to ensure that parties settle the issues quickly through the timelines set by the court. This does not give the process a chance to deal with underlying issues and resolve the matter conclusively.

In the end, parties will therefore not easily find mechanisms which go into the core of the issues at hand. Most of the available mechanisms will examine issues superficially and take the 'allocation of rights approach'. In the real sense, the avenues available will have reduced – negative impact of party autonomy since there are fewer effective options to pick from.

**b) The Challenges Facing the Judiciary are bound to affect the Promotion of ADR Mechanisms**

The Judiciary faces various challenges, which in effect reduces its efficiency. This is shown by the backlogs of cases which have persisted for long.<sup>38</sup> For example, according to the 2016-2017 annual report on the State of the Judiciary and the administration of justice,

*At the end of the FY2016/17, the total case backlog stood at 315,378 cases. Out of these, 83,046 cases were aged 1-2 years; 113,766 cases were aged 2- 5 years; 66,214 cases were 5- 10 years and 52,352 cases were over 10 years in age since the date of filing. The Magistrate Courts and High Court had the highest case backlog at 199,536 cases (63 per cent) and 94,686 cases (30 per cent) respectively.<sup>39</sup>*

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<sup>38</sup> Republic of Kenya, The State of the Judiciary and the administration of justice, 26.

<sup>39</sup> Republic of Kenya, The State of the Judiciary and the administration of justice, 26.

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Therefore, ADR processes placed in the hands of the Judiciary are bound to suffer the same fate. Mediation has been implemented as 'court-mandated' and has seen the introduction of formalities, as discussed above under the Mediation (Pilot Project) Rules. In the end it will just be like litigation and parties will have to abandon it and look for other mechanisms – in the real sense, parties will therefore have lesser options to pick from. Party autonomy is negatively affected.

### **5. Conclusion and the Way Forward**

From the above discussion, it can be concluded that the recognition of alternative dispute resolution mechanisms by the Constitution is a good step in increasing access to justice. However, the move to place the promotion of ADR mechanisms in the hands of the Judiciary is not appropriate. As pointed out above, the nature of the Judiciary as an institution in the formal justice system, its identity as a public institution, and the fact that it is plagued by certain challenges render it inappropriate to promote ADR mechanisms. The drafters of the Constitution sought to enhance access to justice through ADR but placed this worthy cause in the hands of an institution whose nature does not align with the principles of ADR. The Judiciary, as highlighted above, is a player in the formal justice system where it is the norm to enforce the will of the state as opposed to agreements between parties. This negates the principle of party autonomy.

This paper suggests that another institution is placed to administer the promotion of ADR mechanisms so that the Judiciary is left to take charge of the formal justice system. Such an institution ought to embrace the salient features of ADR as discussed above.

In the event that it is not possible to have such an institution, then it is necessary to orient the Judiciary with the principles of ADR, so that the promotion of ADR

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does not become an adventure in distortion of these mechanisms, and therefore limiting the options available to parties in the dispute resolution landscape. In this regard, it is crucial to change the attitude of lawyers and parties towards ADR mechanisms.

**Alternative Dispute Resolution (ADR) At the Workplace:  
The Foundations of Sound Human Capital for the 21<sup>st</sup> Century and  
Beyond**

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

**1. Introduction**

Among the resources employed in wealth production in its diverse range of goods and services, human capital stands out as the most important. All other factors and resources are dependent on its efficiency, adequacy and integrity. It is the one resource that, if ill managed, would send entire enterprises tumbling down. It is human capital that determines the growth and success of institutions. It is the one resource that requires prudence, efficiency and commitment to lend value to others. Indeed, an ailing pool of human capital is the genesis of failed institutions. For this reason, it must be well managed and nurtured to the ends of optimizing productivity, growth and prosperity.

It is true to say that human resource management personnel and other senior managers are entrusted with the most sacred resource. It is for this reason that the workplace should be viewed as the one place at which peace and harmony must reign supreme. Yet, the workplace is often riddled with conflicts and disputes as are all other scenes of human interaction. Why? It is the nature of women and men to hold fast their competing interests in conflict, which explains why conflicts are an integral part of human society. Accordingly, the need for human resource and other senior managers to train and acquire workplace mediation skills cannot be overemphasized.

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## **2. The Nature of Conflicts**

To understand the rightful place of ADR in the labour industry, one must appreciate the appurtenant notions of conflict, effective conflict management and dispute resolution. It is in relation to these notions that the principles of fairness of process and quality of outcomes play a critical role in determining the degree of access to effective systems for conflict management and adjudication of competing claims.

Conflicts and disputes are as old as the human race. They are a common feature of social and legal relations, which are characterised by conflicting interests and competing claims for incompatible needs and entitlements. The terms “conflict” and “dispute” are often used interchangeably. Both terms denote disagreement over incompatible interests. In lexical terms, a conflict has been defined as “a serious disagreement or argument... a prolonged armed struggle...an incompatibility between opinions, principles....”<sup>1</sup>

Arbetman and others accentuate the fact that “conflict is a natural part of everyday life, a possibility in every encounter.”<sup>2</sup> For instance, conflicts among the low-level workforce, between staff and management, between management and unions or employees’ associations, are issues of everyday experience. Because of its inevitability, it is important to consider how best to handle conflicts in our day-to-day life. Understanding the social dynamics and progression of conflicts into full-blown disputes helps us to adopt appropriate mechanisms for conflict management and (ultimately) dispute resolution, whether in judicial proceedings or out of court through alternative dispute resolution mechanisms in which we are presently interested.

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<sup>1</sup> Pearsall (ed) *The Concise Oxford Dictionary* (10th edn Oxford University Press New York 1999) p.299.

<sup>2</sup> LP Arbetman, ET McMahon and EL O’Brien *Street Law: A Course in Practical Law* (5th edn West Publishing Company Minneapolis/St. Paul 1994) p.41.

Simply defined, a conflict is the fruitage of competing claims. Conflicts arise as each individual seeks to defend his or her rights and interests. To address these conflicts, suitable institutional frameworks must be established to ensure effective management of conflicts and the realisation of competing claims and interests. To this end, conflicts have been dealt with in a variety of ways, all of which are intended to generate quality outcomes, ranging from conflict transformation, conflict management and conflict resolution. The question is, to what extent has the labour industry in Kenya embraced tested market mechanisms for effective management and resolution of conflicts at the workplace?

### **3. Understanding ADR**

#### **3.1 The ADR Spectrum**

The ways individuals or groups of individuals manage, process or resolve disputes are, generally speaking, either consensual, adjudicative or legislative in nature. In other cases, though, what is commonly referred to as "hybrid" processes combine features of these approaches. These approaches include negotiation, mediation or conciliation, facilitation, adjudication, arbitration and litigation.

Negotiation is a process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in actual or potential disagreement or conflict. On the other hand, mediation is a process in which an impartial third party helps disputants to resolve a dispute or plan a transaction, but does not have the power to impose a binding solution. The term "conciliation" has often been used interchangeably with "mediation." In Canada, the term "conciliation" generally refers to a process of dispute resolution in which "parties in dispute usually are not present in the same room. The conciliator communicates with each side separately using "shuttle

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diplomacy." The term "mediation," by contrast, is generally used in Canada to describe third-party intervention in which the parties negotiate face to face. The distinction between "mediation" and "conciliation" often breaks down, since in "mediation" separate caucuses are often held with the parties, whereas in "conciliation" some face-to-face meetings may be held.

Facilitation may be described as a process by which a third party helps to coordinate the activities of a group, acts as a process facilitator during meetings, or helps a group prevent or manage tension and move productively toward decisions. The facilitation role can be placed on a continuum from simple group coordination and meeting management to intensive multi-party dispute mediation. The term "adjudication" (including courts, tribunals and binding arbitration), usually applied in case management, is a term that may include decision making by a judge in a court, by an administrative tribunal or quasi-judicial tribunal, a specially appointed commission, or by an arbitrator. An adjudicator determines the outcome of a dispute by making a decision for the parties that is final, binding and enforceable. The parties present their case to the adjudicator (or tribunal, commission or arbitrator), whose role is to weigh the evidence and make a decision that is final, binding and enforceable. Adjudication processes are determinative in nature.

Arbitration differs from courts and quasi-judicial tribunals in a number of respects. For example, most arbitral proceedings are voluntary in the sense that both parties agree to submit the dispute to arbitration, and the parties often agree on the selection of the arbitrator and the procedural rules. Generally, rules of evidence and procedure are more relaxed than the rules of court. Arbitration may also be ordered by a court or be compelled by a statute. In such cases, the arbitrator is usually appointed by a judge or government official. An arbitrator has limited jurisdiction that is strictly determined by the construction of the relevant arbitration agreement.



### **3.2 The Overriding Objectives of ADR**

Alternative dispute resolution mechanisms seek to provide effective platforms for conflict management and resolution of disputes with particular emphasis on

- (a) equality of opportunity and the balancing of powers as between the parties;
- (b) expedition;
- (c) proportionality (i.e., cost-effectiveness);
- (d) party autonomy (in the sense that the process is party-driven);
- (e) fairness of process (which is guaranteed by simplicity of procedures);  
and
- (f) need satisfaction (where all feel that their needs and interests have been addressed and met) in the resolution of competing claims.

### **3.3 The Scope of Workplace Mediation**

The nature of mediation helps us to understand the value and scope of workplace mediation. mediation brings people together to proactively resolve their disputes. It is a confidential, usually voluntary, process of shared decision making in which one or more impartial persons, called mediators, assist people, organizations and communities in conflict to work toward a variety of goals. Mediation is a way to resolve disputes without filing a “formal complaint” or lawsuit. It provides a private forum in which the disputing parties discuss the dispute, feel that they are being heard, gain insight and understanding into the feelings and perspective of the other party. They work together in exploring and developing possible ways towards resolving the dispute.

Workplace mediation is essentially a meeting between two or more parties who are experiencing conflict, with the aim of the meeting to lead discussions to find resolution. The chair of the meeting should be somebody independent to the issues being discussed and preferably independent to the parties in the mediation.

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Workplace Mediation is a confidential, informal and voluntary process whereby an impartial mediator facilitates communication between those in dispute to assist them in developing mutually acceptable agreements to improve their future working relationship. Mediation can be effective in both union and non-union settings and at all levels of the organization.

Workplace mediation is not a fault-finding process designed to determine facts and make findings on exactly what happened and make a ruling on who is right or wrong. Sometimes the parties in a workplace mediation want for someone to be labelled right and the other person to be labelled wrong. If one or more parties is looking for a process that clears their name and labels the other person as wrong or at fault, then a workplace investigation should be conducted rather than a workplace mediation. However, an investigation should only be conducted where there is reasonable grounds to believe that a workplace policy has been breached. Accordingly, the workplace mediator should not try to uncover the truth about actions and behaviours that occurred before, during and after the incidents in issue.

The primary role of the workplace mediator is to help the parties find agreement on the future and not past workplace interactions. His or her role is to guide the parties in identifying those changes in their interactions and behaviours which are necessary to support and help them to work safely, respectfully, professionally, and productively in the future. Notably, workplace mediation is a voluntary process. Parties may choose not to participate. They may submit to the process and withdraw at any time.

### **3.4 The Objective of Workplace Mediation**

The primary goal of workplace mediation is to leave the parties better able to work together. It becomes necessary, therefore, to give management the opportunity to learn about mediation and acquire best practice skills for conflict

prevention, management and resolution. The aim is to ensure that they will be able to, among other things,

- (a) identify workplace conflicts at their different stages, distinguish the stages used in the formal mediation framework, and adapt these for use in their institutions;
- (b) use conflict resolution skills effectively to settle a variety of internal disputes;
- (c) facilitate agreement on complex business issues and influence positive change in their working culture;
- (d) promote conflict prevention and resolution within their organisation's employment framework;
- (e) establish 'internal' mediation schemes and conflict resolution practices; and
- (f) recognise, source and incorporate neutral intervention and external mediation services as appropriate.

### **3.5 Key Players in Workplace Mediation**

Effective workplace mediation and training of personnel in communication and conflict management skills guarantees the effective application of best practices in the context of up-to-date human resource and people management issues. To this end, workplace mediation training or skills development is critical to individuals with strategic or operational management responsibilities in all sectors and professions. Indeed, mediation skills form part of an essential management tool-kit for

- (a) business Directors and those in leadership positions;
- (b) human Resources Directors and senior managers;
- (c) change Directors and senior managers;
- (d) trade Union leaders and officers;

- (e) in-house employment lawyers; and
- (f) professionals dealing with difficult and sensitive people issues.

#### **4. Common Issues for Workplace Mediation**

##### **4.1 Work/Performance-Related Conflicts**

If left unresolved, problems between employees can fester and grow into bigger issues that not only negatively affect the employees who are directly involved, but also impact others around them. Employers who provide mediation as an avenue that employees can use to resolve their disputes in a confidential, impartial and nonjudgmental way serves to empower employees to positively change their workplace relationships and interactions. Others include performance Issues. Employee performance can deteriorate for an array of reasons, including the style of communication, personal interactions, misperceptions, and misunderstanding regarding roles and responsibilities. Mediation offers an alternative, and likely more productive, forum in which to discuss such difficult issues outside of the standard performance review process.

Complaints of harassment are yet another source of workplace conflicts that negatively impact on performance. Applying the mediation process as the first step in dealing with complaints of harassment is very effective, particularly where the complaint is based on a misperception or misunderstanding of what is acceptable workplace behavior. In such cases, mediation serves to open communication between the parties, help clarify what is acceptable workplace behavior, and foster a healthier understanding between co-workers.

Termination of employment is invariably difficult to deal with. Termination affects the employee in question, the employer, and often other employees. Mediation can help the employee feel they have fully shared their feelings and

concerns regarding the termination in a circumstance in which the power lies ultimately with the employer. Mediation can offer an opportunity for a “peaceful parting” and allay employers’ worries of potential litigation. No employer enjoys the prospect of needless litigation over a labour dispute in the Industrial Court.

#### **4.2 Private Issues that Impact on Performance**

In their private life, employees may be involved in disputes that negatively impact on their performance at the workplace. Even though such disputes are not work-related, marital, inheritance, commercial and other disputes of a personal nature, if unresolved, erode an employees’ morale and results in poor performance. For this reason, an employee relations toolkit should provide for advisory services and (possibly) recommendation for referral to trusted ADR practitioners. Such intervention serves to benefit both the employee and his or her employer on account of time saved from costly and time-consuming litigation, not to mention the emotional toll taken by such proceedings on the employee.

#### **5. Who Should Mediate**

The most effective workplace mediator is one who is duly certified on completion of a mediation training through a recognized mediation training program. Certified mediators are trained in the essential skills of communication, impartiality and neutrality, and have a thorough understanding of the mediation process. However, there are options, such as nominating someone internally who is (or is willing to become) a certified mediator. It should be borne in mind, though, that a home-grown mediator stands the risk of being partial or conflicted with respect to the rights and interests of his or her colleagues. Otherwise, there might be no option but to appoint an expert externally.

## **6. The Benefits of Workplace Mediation**

There are innumerable reasons why employers should add mediation to their employee relations toolkit. This is because virtually any difference that arises in the workplace can benefit from mediation if the parties are willing to deal directly with each other where the employer provides the much-needed resources for mediation. Indeed, over time, a workplace in which mediation is the preferred or presumed dispute resolution mechanism is likely to become a workplace in which colleagues and coworkers need less assistance in resolving their differences. Mediation helps them to become natural collaborators. There are certain types of workplace conflicts for which any institution would be well-advised to procure external mediation services.

At a minimum, the benefit of using mediation as a first step in addressing and resolving workplace disputes gives each party better understanding of the issues in contention in a confidential, impartial, non-judgmental and private atmosphere. Mediation offers the parties the opportunity to resolve their dispute expeditiously. It empowers each party by providing them a voice and role in determining the outcome. In cases where mediation does not result in agreement, and the parties resort to court litigation, they will nonetheless have a good understanding of the nature of the dispute and the facts surrounding it.

Mediated disputes that end in agreement have endless benefits. The parties are encouraged to have a positive attitude towards collaborative resolution of workplace disputes in a quick, cost-effective process. In addition, mediation has the long-lasting effect of providing the employees who participate in the process valuable tools for future dispute resolution. At its core, mediation is a confidential and voluntary process in which the parties have an active role in the control and resolution of the dispute. When an agreement is reached, the parties move forward with a sense of completion, ownership of the outcome, and, most importantly, the satisfaction in the feeling that they are winners at

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resolving their problems. This is an especially meaningful experience in the workplace because employees often feel that they do not hold a significant amount of power.

Workplace Mediation offers important benefits to employers and employees alike. It provides creative and mutually satisfactory resolutions. When a dispute is mediated shortly after it arises, the chances of optimal resolution are greater because the parties' differences have not had a chance to fester, the situation is generally more fluid, and the parties have more options open to them. Mediated agreements work better and last longer than authoritatively imposed resolutions in view of the fact that those involved have a stake in the outcome. Moreover, mediation fosters mutual respect by facilitating improved communication. It mends and preserves frayed working relationships despite the pain and anger experienced by the parties. The primary goal of workplace mediation is to leave the parties better able to work together.

## **7. Conclusion**

Without doubt, mediation is an invaluable component of employee relations toolkit. Yet it is least known in developing economies like Kenya. In developed jurisdictions, workplace mediation has taken root with tremendous gains. The question is, how prepared are you to embrace workplace mediation? At the very least, it is important to bear in mind the fact that many disputes arise out of failure by the parties to communicate, understand or consider the needs and interests of the other. Most people fix their attention on the question as to who is right or wrong. Consequently, they become blind to the possibility that both may have a legitimate point of view. The mediator's primary task is to open communication lines between them to appreciate the reasons for the entrenched positions that each has taken. This helps the parties to understand the corresponding views, needs and interests.

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The mediation process offers the opportunity for the mediator to encourage the disputants to look at the dispute through different lenses and ask themselves

- (a) What do they think will work as a practical solution?
- (b) What do they think will be fair?
- (c) What do they think will best honour and promote a good working relationship?

As the parties gain a comprehensive understanding of the situation, their ability to work together toward resolution (and after resolution) increases. The quick and lasting gains of mediation may be summed up as:

**(a) Recognition and Understanding**

When employees feel that they have been heard and have the opportunity to hear and understand the other party's point of view, the opportunity for amicable settlement is heightened.

**(b) Self-Empowerment**

The workplace is usually the kind of environment in which employees feel that they are always being told what to do. Mediation offers employees the opportunity to contribute to the outcome of the mediation process.

**(c) Timeliness and Speed**

Mediation takes place expeditiously and within a short period of time (often just a few hours). In contrast, a formal complaint filed with a regulatory agency or court can take years to resolve.

**(d) Cost Effective**

Mediation is cost effective not only financially, but also in relation to human capital and time. It saves the parties from the emotional distress associated with



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costly, time-consuming and nerve-wrecking litigation. Moreover, the Mediator's fees are usually a fraction of the costs of the legal fees associated with a protracted conflict and litigation.

**(e) Confidential**

Once a lawsuit is filed, it becomes a matter of public record. In contrast, by their very nature and contract, mediations are confidential regardless of whether they take place prior to or after a lawsuit has been filed. In effect, communications exchanged in the mediation are inadmissible in evidence and are confidential.

**(f) Durability of the Mediation Agreement**

Studies have shown that when disputing parties voluntarily reach a mediated agreement, they are more likely to respect and adhere to its terms because they mutually generated the outcomes, which they own as opposed to the decision contained in a judgment imposed on them by a court or regulatory agency.

To read more, go to <http://adrconsultants.law/> or call Dr. K. I. Laibuta on 0722521708 for more information. For Email communication, kindly contact us on [laibuta@adrconsultants.law](mailto:laibuta@adrconsultants.law)

## **International Public Policy in The Context of International Arbitration in Kenya**

*By: Emmanuel Mwangawe Kubo\* & Alvin Gachie\**

### **Abstract**

*This paper discusses the concept of ‘international public policy’, an aspect developed from the first widely-known use of the term led by France. In 2017, the first main court pronouncement referring to international public policy was made at the High Court of Kenya. Therefore, the insufficiency of references of international public policy renders a discussion of the concept from a Kenyan perspective limited. This article thus discusses the issue of international public policy from sources in other jurisdictions and roots the discussion in an evaluation of court pronouncements and literature already available on public policy in general, in the context of arbitration. This paper sets a stage for the possible development of the concept by the courts in Kenya, if the use would be considered in the Kenyan context (as it has been done in other countries), that the concept of international public policy would promote and not limit the aims of international arbitration.*

### List of Abbreviations and Acronyms

ADR	Alternative Dispute Resolution
ILA	International Law Association
OTV	<i>Société Omnium de traitement et de valorisation</i>
UNCITRAL	United Nations Commission on International Trade Law

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## **1. Introduction**

In 1994, the French *Cour de Cassation* (Supreme Court) in *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)*<sup>1</sup> found that an arbitration award rendered and set aside in Switzerland was enforceable in France, and that its enforcement in France was not contrary to international public policy. The court held that while Switzerland was the seat of the arbitration, OTV could avail itself of French rules pertaining to the recognition and enforcement of foreign awards in international arbitration and notably, Article 1502 of the French Code of Civil Procedure. The court found that the award rendered in Switzerland was an international award which was not integrated into the legal order of Switzerland. Therefore, according to the court's reasoning, the award continued to exist on the international sphere even though it had been set aside at a national level. Article 1502 of the French Code of Civil Procedure provides that appeal of a court decision granting recognition or enforcement is only available on five grounds including where the recognition or enforcement is contrary to international public policy.

The concept of international public policy has developed from this first widely-known use of the term led by France. The reasoning that parties should not use the national public policy argument to forestall or avoid enforcement of an arbitration agreement has been mentioned in courts in different parts of the world. In 2017, the first main court pronouncement referring to international public policy was made at the High Court of Kenya. This article discusses the issue of international public policy and explains its relevance to international arbitration. It sets a stage for the possible development of the concept by the courts in Kenya, if the use would be considered in the Kenyan context as it has been done in other countries, that the concept of international public policy would promote and not limit the aims of international arbitration.

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<sup>1</sup> *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* [1994] France, Cour de Cassation 92-15.137, Bulletin 1994 I N° 104 p 79.

## **2. Explaining Public Policy: The Origins**

Arbitration may at first glance be considered to be a strictly commercial relationship, where the dispute resolution procedure would be between private parties and handling issues of a private nature. However, arbitration in areas such as dealings between a State and an investor may address public policy issues such as environmental regulation, protection of public health and safety, and provision of public services, all in which the public at large may have a legitimate interest.<sup>2</sup> On the other hand, the State must balance considerations of public interest with economic interests. In so doing, States should be in a position to engage in legitimate regulation and determination of standards without exercising undue economic pressure on both local and foreign investors.<sup>3</sup> Promotion of international public policy which encompasses a balanced consideration of social, economic, and environmental interests is a precursor for the conduct of alternative dispute resolution that contributes to sustainable development.

The concept of international public policy arises with respect to recognition and enforcement of international arbitral awards.<sup>4</sup> In France, for example, a foreign award is enforceable, or will be recognized, if its existence is proved by the party relying on it, and its enforcement, or recognition, is not manifestly contrary to international public policy.<sup>5</sup> From 1996 to 2003, the International Law Association (ILA) Committee on International Commercial Arbitration

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<sup>2</sup> Aaron Cosbey and others, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements* (International Institute for Sustainable Development 2004) 8.

<sup>3</sup> *Ibid* 15.

<sup>4</sup> Johannes Berning Robertson, *Public Policy as a Ground for the Refusal to Enforce International Commercial Arbitration Awards* (LLM Thesis, North-West University 2011) i <[http://dspace.nwu.ac.za/bitstream/handle/10394/8422/Robertson\\_JB.pdf?sequence=1](http://dspace.nwu.ac.za/bitstream/handle/10394/8422/Robertson_JB.pdf?sequence=1)> accessed 23 May 2018.

<sup>5</sup> Republic of France Code of Civil Procedure - Book IV - Arbitration 1981 s 1498.

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discussed the topic of public policy as a ground for refusing recognition and enforcement of international arbitral awards.<sup>6</sup> The ILA defined international public policy:

*“in the sense given to it in the field of private international law; namely, that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award. It is not to be understood...as referring to a public policy which is common to many States (which is better referred to as ‘transnational public policy’) or to public policy which is part of public international law.”<sup>7</sup>*

On a global level and with respect to arbitration, the international commercial system requires predictability for all parties in different parts of the world to be confident that wherever an award is delivered, no other party can rob the holder of the award of their victory on the basis of local laws. In *Zarubezhstroy v Gibb Africa*,<sup>8</sup> the High Court of Kenya referred to *Gatoil v National Iranian Oil Company*,<sup>9</sup> where the Cour d’Appel de Paris held that Gatoil, a company based in Panama, could not claim after the hearing of the matter, that the National Iranian Oil Company lacked capacity to be party to the arbitration because of a provision in the Constitution of Iran. To allow such an approach would allow a party to rely on international commercial arbitration but later on, once the process has ended, claim that the award is against a national law, thus defeating

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<sup>6</sup> *Pierre Mayer and Audley Sheppard, ‘Final Report of the International Law Association Committee on Public Policy as a Bar to Enforcement of International Arbitral Awards’* (2003) 19 *Arbitration International* 249.

<sup>7</sup> *Ibid* 251.

<sup>8</sup> *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited* [2017] High Court of Kenya Miscellaneous Application 158 of 2016, eKLR.

<sup>9</sup> *Gatoil v National Iranian Oil Company* (Cour d’Appel de Paris).

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the purpose of engaging in the arbitration at all. Public policy of any state is defined to include:<sup>10</sup>

- i. Fundamental principles pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;
- ii. Rules designed to serve the essential political, social or economic interests of the State, these being known as “*lois de police*” or “public policy rules”; and
- iii. The duty of the State to respect its obligations towards other States or international organizations.<sup>11</sup>

International public policy may be considered where the arbitration and the award are international and not domestic. In such an instance, the concept prevents a party from relying on the national law of one jurisdiction to hinder the recognition or enforcement of the award in another jurisdiction. In *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited*,<sup>12</sup> the High Court of Kenya stated that there ‘exists international public policy which prevents an entity, whether private or public, from invoking restrictive provisions of its domestic or national laws in order to prevent *a posteriori* arbitration agreed between the parties.’ When parties agree to enter into arbitration, either through an arbitration clause in a contract or through a separate arbitration agreement, any contest to the applicable rules should take place before or during the hearing. Through this, a party is precluded from presenting such an argument, that the award or the process was contrary to national law, once the award has

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<sup>10</sup> Pierre Mayer and Audley Sheppard (n 6), Recommendation 1(d).

<sup>11</sup> Christoph Liebscher, ‘Arbitration of Antitrust Disputes’ in Emmanuel Gaillard and Domenico di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards - the New York Convention of 1958 in Practice* (Cameron May 2008) 18<[https://www.biicl.org/files/1228\\_nyc-antitrust\\_final\\_6\\_6\\_2006new.pdf](https://www.biicl.org/files/1228_nyc-antitrust_final_6_6_2006new.pdf)> accessed 18 May 2018.

<sup>12</sup> *Zarubezhstroy v Gibb Africa* (n 8).

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been delivered. This is the first major reference to the concept of international public policy made by the courts in Kenya. Therefore, the insufficiency of references of international public policy renders a discussion of the concept from a Kenyan perspective limited.

National courts have an obligation to recognize arbitration agreements, whether the parties decide to refer the matter to arbitration as a result of a contractual or other relationship.<sup>13</sup> The subject matter of the difference has to be capable of settlement by arbitration. However, national courts, while deciding a case involving an arbitration agreement, have an obligation not to refer the parties to arbitration if the court finds that that the arbitration agreement is null and void, inoperative or incapable of being performed.<sup>14</sup> Where the public policy argument is not brought up as a challenge to the arbitrability of the dispute, then it has been seen that a party raises either a substantive or procedural public policy argument to challenge the recognition or enforcement of an arbitral award. The obligation of the national courts, while it also encompasses protecting national interests including the public policy of the country, should be balanced with the obligation to promote Alternative Dispute Resolution (ADR).

### **3. International Public Policy Derives from the Term ‘Public Policy’**

In general, when parties resort to having a dispute between them handled through ADR, the national courts may not intervene. However, the national courts may step in at certain points of the ADR process as provided by law. With regard to arbitration, one of the points along the line of the dispute resolution

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<sup>13</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, Art. II (1).

<sup>14</sup> Ibid, art II (3); UNCITRAL Model Law on International Commercial Arbitration 1985, art 8(1); Arbitration Act 1995 s 6(1)(a); Arbitration Act of the United Kingdom 1996 s 9(4).

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process that the national courts may intervene, is at the point of recognition or enforcement of an arbitration award. In *Joab Henry Onyango Omino v Lalji Meghji Patel & Company Limited*,<sup>15</sup> the Court of Appeal of Kenya stated that once parties to an agreement have chosen to determine their disputes or differences through a domestic forum other than resorting to the ordinary courts of law, that choice should not be brushed aside. However, one of the limitations to this is the widespread concept of public policy, because from the point of view of the State, ADR measures, including arbitration, must be subjected to limitation or control so that they do not produce substantive outcomes that are unacceptable to the state.<sup>16</sup> In connection with this, the term 'public policy' is generally used in relation to 'the overall policy of the state towards alternative methods of conflict resolution' or 'the fundamental norms of states that should not be encroached upon by the ADR system'.<sup>17</sup>

International public policy is derived from the term 'public policy'. Public policy expressly appears in treaty and national law in the context of either setting aside of an arbitral award, or the refusal of recognition or enforcement of a foreign award. The public policy exception to enforcement of an arbitral award was introduced in national law in Kenya and elsewhere as a result of this provision in Article V of the New York Convention, which deals with the reasons for refusal of recognition and enforcement of an arbitral award. It provides that recognition and enforcement of an award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be 'contrary to the public

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<sup>15</sup> *Joab Henry Onyango Omino v Lalji Meghji Patel & Company Limited* [1997] Court of Appeal of Kenya Civil Appeal No 119 of 1997, 1 EA 264.

<sup>16</sup> Simon Roberts and Michael Palmer, 'Dispute Processes: ADR and the Primary Forms of Decision-Making' (2nd edn, Cambridge University Press 2005)

<<http://ebooks.cambridge.org/ref/id/CBO9780511805295>> accessed 22 May 2018.

<sup>17</sup> Farshad Ghodoosi, 'Arbitrating Public Policy: Why the Buck Should Not Stop at National Courts' (2016) 20 Lewis & Clark Law Review 237, 256.



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policy of that country'.<sup>18</sup> The concept of 'public policy' is also relevant in the context of the reasons for setting aside an arbitral award.<sup>19</sup>

The Black's Law Dictionary defines public policy broadly as the principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society.<sup>20</sup> Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is "contrary to public policy".<sup>21</sup> It should also be noted that under the explanatory note by the United Nations Commission on International Trade Law (UNCITRAL) Secretariat concerning the Model Law, an inference has been made that violation of public policy includes serious departures from fundamental notions of procedural justice<sup>22</sup> and non-arbitrability. In addition, the explanatory notes indicate that the grounds relating to public policy may be different in substance from one state to another.<sup>23</sup> However, the UNCITRAL Secretariat has advised that the Explanatory Notes are merely for information purposes only, and they are not an official commentary on the Model Law.<sup>24</sup> Consequently, a more concrete definition of "public policy" would have to be sought from other sources. Sadly, none of the Statutes examined above (the New

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<sup>18</sup> New York Convention (n 13), art V (2); UNCITRAL Model Law on International Commercial Arbitration (n 14), art 36; Arbitration Act (n 14) s 37(1)(b)(ii); Arbitration Act of the United Kingdom (n 14) s 103.

<sup>19</sup> UNCITRAL Model Law on International Commercial Arbitration (n 14), art 34 Arbitration Act (n 14) s 35(2)(b)(ii); Arbitration Act of the United Kingdom (n 14) s 68(2)(g).

<sup>20</sup> Bryan Garner (ed), *Black's Law Dictionary* (9th edn, Thomson West 2009) 1351.

<sup>21</sup> *Ibid.*

<sup>22</sup> United Nations Commission on International Trade Law (UNCITRAL), 'Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006' (UNCITRAL) para 42.

<sup>23</sup> *Ibid* 44.

<sup>24</sup> See footnote to the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law (n 22).

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York Convention, the UNCITRAL Model Law, the English Arbitration Act and the Kenyan Arbitration Act) offer such a definition.

Neither international nor national instruments in Kenya offer a definition of public policy.<sup>25</sup> Similarly, these instruments do not offer a definition nor an explanation of international public policy. Therefore, a look at judicial interpretation may shed light on what ‘public policy’ is and in what scenarios the public policy exception applies.<sup>26</sup> One of the challenges of judicial interpretation of the term ‘public policy’ is that there is no specific standard or criteria that has been supplied by the Judiciary, which creates a disparity that can be used by unscrupulous liable parties to defer or avoid enforcement.<sup>27</sup> As a result, in order to understand the term, it would be useful to consider an amalgamation of the various attempts by the Judiciary to interpret the term.

Various judicial pronouncements define public policy and explain when and how the public policy exception applies especially with regard to challenging the finality and binding nature of arbitral awards. In *Anne Mumbi Hinga v. Victoria Njoki Gathara*,<sup>28</sup> the Court of Appeal of Kenya held that the underlying principle in the Arbitration Act is the recognition of an important public policy in the enforcement of arbitral awards and the principal of finality of arbitral awards. The case of *Christ for all Nations v. Apollo Insurance Co. Ltd*,<sup>29</sup> is likely the *locus classicus* in so far as what constitutes public policy in setting aside an award

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<sup>25</sup> Njoki Mboce, ‘Enforcement of International Arbitration Awards: Public Policy Limitation’ (2015) 3 Alternative Dispute Resolution, Chartered Institute of Arbitration (Kenya Branch) 102, 103.

<sup>26</sup> Ibid 107.

<sup>27</sup> Ibid 108.

<sup>28</sup> *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] Court of Appeal of Kenya at Nairobi Civil Appeal 8 of 2009, eKLR.

<sup>29</sup> *Christ for All Nations v Apollo Insurance Company Limited* [2002] High Court of Kenya Civil Case 499 of 1999, 2 EA 366.

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under Section 35(2)(b)(ii) of the Kenyan Arbitration Act is concerned. In this regard, Justice Aaron Ringera formulated the following requirements:

- i. The award must be inconsistent with the Constitution of Kenya or any other law of Kenya whether written or unwritten; or
- ii. The award must be inimical to the national interest of Kenya, which includes the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya; or
- iii. The award must be contrary to justice and morality, which includes such considerations as whether the award was induced by corruption or fraud, or whether it was grounded on a contract contrary to public morals.

In addition to reiterating the definition of public policy in *Christ for all Nations v. Apollo Insurance Co. Ltd*, the High Court of Kenya in *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited*<sup>30</sup> added the following definition to public policy:

*“...public policy, in my view, generally refers to the set of socio-cultural, legal political and economic values, norms and principles that are deemed so essential that no departure therefrom can be entertained. Public policy acts as a shield for safeguarding the public good, upholding justice and morality and preserving the deep rooted interest of a given society.”*

In *Tanzania National Roads Agency v. Kundan Singh Construction Limited*,<sup>31</sup> the Court of Appeal of Kenya adopted the definition of public policy in *Christ for all*

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<sup>30</sup> *Zarubezhstroy v Gibb Africa* (n 8).

<sup>31</sup> *Tanzania National Roads Agency v Kundan Singh Construction Limited* [2013] High Court of Kenya at Mombasa Miscellaneous Civil Application 171 of 2012, eKLR.

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*Nations v. Apollo Insurance Co. Ltd* in relation to Section 35(2)(b)(ii) of the Kenyan Arbitration Act. In *Glencore Grain Ltd v. TSS Grain Millers Ltd*,<sup>32</sup> the High Court of Kenya held that an arbitral award will be considered to be against public policy if it is immoral or illegal, or if it would violate in a clearly unacceptable manner basic moral principles or values in the Kenyan society. It was also held that the word ‘illegal’ here would hold a wider meaning than just ‘against the law’. It would include contracts or acts that are void. The phrase ‘Against public policy’ would also include contracts or contractual acts or awards which would offend the conceptions of justice in such a manner that enforcement thereof would stand to be offensive.

In *Air East Africa v. Kenya Airports Authority*,<sup>33</sup> the High Court of Kenya held that an arbitration award may be set aside on the ground that the award was outside the terms of reference and therefore contrary to public policy. It was held, *inter alia*, that for an Arbitrator’s Award to be worthy of its name, it must be certain. It must be in a form that can be enforced as a judgment of the Court. Otherwise it would be outside what is contemplated by the reference to arbitration and it would be contrary to public policy and will be set aside. In *Kenya Shell Limited v. Kobil Petroleum Limited*,<sup>34</sup> the Court of Appeal of Kenya considered the issue of public policy in the context of bringing an end to litigation. In that regard, the Court held that as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act, under which the present proceedings were conducted, underscores that policy. As a result, the Court dismissed the appeal.

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<sup>32</sup> *Glencore Grain Limited v TSS Grain Millers Limited* [2002] High Court of Kenya at Mombasa Civil Suit No 388 of 2000, Kenya Law Reports.

<sup>33</sup> *Air East Africa v Kenya Ports Authority* [2001] High Court of Kenya at Nairobi Miscellaneous Application No. 1312 of 2000, eKLR.

<sup>34</sup> *Kenya Shell Limited v Kobil Petroleum Limited* [2006] Court of Appeal of Kenya at Nairobi Civ Appli 57 of 2006, eKLR.

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Some writers in Kenya have made commentary on what public policy entails. According to Margaret L. Moses, public policy is defined differently in different jurisdictions. However, in most, an award could be vacated for violation of public policy if it was not consistent with fundamental notions of justice, honesty and fairness. Thus, corruption, fraud, or lack of integrity in the process could be considered as violation of public policy, requiring the award to be annulled.<sup>35</sup> According to Kyalo Mbobu, it is important to note that the arbitration award is likely to be set aside on grounds of public policy if the claim is time-barred.<sup>36</sup> This implies that time limitation under Statute can be considered as an element of public policy. According to Njoki Mboce, we should use the criminal law of the Enforcement State (of the Award) as the threshold to define public policy. She therefore suggests that both Kenyan as well as international legal instruments should define public policy as:

*“... an issue will be considered to be against public policy and the court shall refuse to enforce such international arbitral award if the issue is one that the court would find to contravene the criminal law of the Enforcement State.”<sup>37</sup>*

Public policy has been described as an indeterminate principle and “an unruly horse, and when you get astride it, you never know where it will carry you”.<sup>38</sup> Because of this indeterminate nature of the term, the judicial interpretation of what constitutes public policy has to be done narrowly. In *Yukos Capital SARL v OJSC Rosneft Oil Co.*,<sup>39</sup> it was held that care must be taken not to expand the

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<sup>35</sup> Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008) 196.

<sup>36</sup> Kyalo Mbobu, *'The Arbitration Agreement'* in Githu Muigai (ed), *'Arbitration Law and Practice in Kenya'* (LawAfrica Publishing Limited 2011) 15.

<sup>37</sup> Njoki Mboce (n 25) 128.

<sup>38</sup> *Richardson v Mellish* [1824] All England Law Reports 229 (Court of Common Pleas, and Other Courts).

<sup>39</sup> *Yukos Capital SARL v OJSC-Rosneft Oil Company* [2012] Court of Appeal of Appeal of

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application of the public policy beyond its true limits. The Court went on to say that these limits demand that, where there is any room for doubt, judicial restraint must be exercised. The view that public policy must be defined narrowly has been said to be in keeping with the New York Convention's pro-enforcement purpose. One of the most cited explanations of the concept comes from the case of *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier*, where the US Second Circuit Court of Appeals, in affirming the enforcement of an arbitral award against an American company, held that:

*"...the Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only when enforcement would violate the forum state's most basic notions of morality and justice".<sup>40</sup>*

An arbitration agreement is ultimately a contract, and therefore is subject to a finding of illegality if it breaches public policy. In *Root Capital Incorporated v Tekangu Farmers' Co-operative Society Ltd & another*,<sup>41</sup> the High Court of Kenya laid out the following principle with regard to illegality of a contract on the basis of public policy:

*"An aspect in the contracts considered illegal is that of being contrary to public policy. Ordinarily, and based on the doctrine of **laissez faire**, when entered into freely and voluntarily, contracts must be held sacred and enforced by courts which, ordinarily, would proceed on the assumption that their duty is to implement the reasonable expectations of the parties... however, because of public*

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England and Wales Civ 855, EWCA.

<sup>40</sup> *Parsons & Whittemore Overseas Co v Societe Generale de L'Industrie du Papier (RAKTA)* [1974] United States Court of Appeals, Second Circuit 508 F.2d 969.

<sup>41</sup> *Root Capital Incorporated v Tekangu Farmers' Co-operative Society Limited & another* [2016] High Court of Kenya at Nyeri Civil Case 11 of 2016, eKLR.

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*welfare considerations, not every contract that has been freely and voluntarily entered into is enforceable...public policy will be served not by enforcing but by denouncing such contracts. The particular aspects of public welfare to which the Courts have paid attention in this regard are the safety of the state, the economic and social well-being of the state and its people as a whole, and the administration of justice. Any contract which injures or which has a direct tendency to injure any one of these public interests is deemed illegal and void."*

Courts will not enforce an arbitration agreement if it is null and void, inoperative or incapable of being performed.<sup>42</sup> As per Root Capital above, a contract can be rendered illegal if it is contrary to public policy.

#### **4. Conclusion**

This paper has discussed the concept of international public policy, an aspect developed from the first widely-known use of the term led by France. The reasoning that parties should not use the national public policy argument to forestall or avoid enforcement of an arbitration agreement has been mentioned in courts in different parts of the world. In 2017, the first main court pronouncement referring to international public policy was made at the High Court of Kenya. This article has discussed the issue of international public policy, and explained its relevance to international arbitration. It sets a stage for the possible development of the concept by the courts in Kenya, if the use would be considered in the Kenyan context (as it has been done in other countries), that the concept of international public policy would promote and not limit the aims of international arbitration. As the first major reference to the concept of international public policy made by the courts in Kenya in 2017, twenty-three

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<sup>42</sup> New York Convention (n 13), art II (3); UNCITRAL Model Law on International Commercial Arbitration (n 14), art 8(1); Arbitration Act of the United Kingdom (n 14); Arbitration Act (n 14).

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years after the concept first emerged in 1994, it remains yet to be seen whether it will be discussed in future national court decisions.



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<[https://www.biicl.org/files/1228\\_nyc-antitrust\\_final\\_6\\_6\\_2006new.pdf](https://www.biicl.org/files/1228_nyc-antitrust_final_6_6_2006new.pdf)>  
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15. *Gatoil v National Iranian Oil Company* (Cour d'Appel de Paris)
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18. *Kenya Shell Limited v Kobil Petroleum Limited* [2006] Court of Appeal of Kenya at Nairobi Civ Appli 57 of 2006, eKLR
19. *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited* [2017] High Court of Kenya Miscellaneous Application 158 of 2016, eKLR
20. *Parsons & Whittemore Overseas Co v Societe Generale de L'Industrie du Papier (RAKTA)* [1974] United States Court of Appeals, Second Circuit 508 F.2d 969
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23. *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* [1994] France, Cour de cassation 92-15.137, Bulletin 1994 I N° 104 p 79
24. *Tanzania National Roads Agency v Kundan Singh Construction Limited* [2013] High Court of Kenya at Mombasa Miscellaneous Civil Application 171 of 2012, eKLR
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26. Arbitration Act 1995
27. Arbitration Act of the United Kingdom 1996

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28. Convention on the Recognition and Enforcement of Foreign Arbitral Awards  
1958
29. Republic of France Code of Civil Procedure - Book IV - Arbitration 1981
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## **Challenges Facing International Commercial Arbitration as A Method of Dispute Settlement in Africa**

*By: Solomon Gatobu M'noti\**

### **Abstract**

*This paper gives an analysis of the problems hindering effective management of international commercial disputes through arbitration. It explores the possibility of having a perfect mechanism under which settlement of these commercial disputes can be achieved.*

*The research also provides some of the remedies that can be employed to these challenges thereby making arbitration the best alternative forum for expeditious resolution of these disputes. Because parties in commercial disputes desire quicker and economical mechanisms for the resolution of their disputes and which mechanisms will not damage their relationship, arbitration has been deemed to be the most appropriate dispute resolution mechanism for such disputes.*

*The research is limited to African and some of the challenges that have been highlighted include having different legal systems, judicial interference, politicization of disputes, political instability, corruption and external influence, lack of professional interaction & recommendations, lack of institutional training capacity, lack of adequate arbitration centers, language and territorial barriers, confidentiality, lack of experience, open bias/low confidence in African arbitrators, control of costs among others.*

### **1. Introduction**

Arbitration is one of the Alternative Dispute Resolution mechanisms that have been regarded as an avenue for resolving disputes.<sup>1</sup> It has been considered as

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one of the most favourable avenues for settlement of disputes arising from cross-border transactions.<sup>2</sup> Arbitration has over time gained popularity and acceptance as the best alternative dispute resolution especially in business community because of its advantages over litigation such as its transnational applicability in international disputes with minimal or no interference by the national courts, thus retaining the parties' business relationship and confidence of realizing justice in the best way achievable.<sup>3</sup>

The key stakeholders in arbitration are the Arbitrators and parties to a contract who have referred their dispute to the arbitration proceedings. The arbitration institutions and the legal framework governing the practice of arbitration also play a significant role in establishing these challenges as they too play a critical role in the practice of arbitration. The efficacy of the practice of arbitration therefore depends on the convenience and success of these stakeholders in arbitration. Some authors have argued that to understand and evaluate the challenges facing arbitration in Africa, we need to look at the challenges the stakeholders have, and also address the question as to whether the challenges facing arbitrators in Africa unique to Africa. Some of these problems facing arbitration in Africa are believed to be Afro-centric while others are universal.<sup>4</sup>

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<sup>1</sup> K. Muigua, "Promoting International Commercial Arbitration in Africa" East Africa International Arbitration Conference. Fairmont the Norfolk, Nairobi; 2014. Available at file:///C:/Users/KARIUKI%20MUIGUA/Downloads/Documents/promoting\_international\_commercial\_arbitration\_in\_africa.pdf (Accessed on 25/03/2018).

<sup>2</sup> See generally, D.J., McLean, "Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration Anniversary Contributions-International Litigation & Arbitration." *University of Pennsylvania Journal of International Law* 30, no. 4 (2009): 1087.

<sup>3</sup> K. Muigua, "Promoting International Commercial Arbitration in Africa" East Africa International Arbitration Conference, Fairmont the Norfolk, Nairobi; 2014.

<sup>4</sup> P. Ngoto, "Challenges Facing Arbitrators in Africa" East Africa International Arbitration

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This paper therefore seeks to explore some of these challenges facing the practice of arbitration regionally bearing in mind the various stakeholders of arbitration and also proposing the various mechanisms that can be employed to enhance its efficient practice. This will take three limbs. The first one will dwell into the challenges facing arbitration institutions in Africa, the second limb will explore the challenges facing the arbitrators, the third one will be the challenges facing the arbitration practice itself.

## **2. The Challenges Facing the Practice of Arbitration in Africa**

Human beings co-exist in a society whereby they have common but different interests that lead to conflicts. For instance, commerce is one of the activities which people engage in leading to disputes which may at times be unavoidable. Because of this, efficient mechanisms for their management are essential. International trade disputes are also as unavoidable. The mechanisms universally used for their management are negotiation, mediation, arbitration and conciliation. These mechanisms work best when a well-resourced, neutral and credible body administers the process.<sup>5</sup>

Therefore, based on an evaluation of existing literature on arbitral institutions across the continent and articles by renowned authors who have highlighted challenges facing International Commercial Arbitration in Africa, the following arise as challenges:

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Conference, The Norfolk Hotel, Nairobi - July 28-29, 2014 Available at [www.cadr.or.ke/.../PNgothoChallengesFacingArbitratorsinAfricaJuly%202014.doc](http://www.cadr.or.ke/.../PNgothoChallengesFacingArbitratorsinAfricaJuly%202014.doc) (Accessed on 25/03/2018).

<sup>5</sup> "Africa ADR – A new African Arbitration Institution" Available at <http://www.lexafrica.com/news-africa-adr-a-new-african-arbitration-institution> (Accessed on 24/03/2018); see also K. Muigua, "Promoting International Commercial Arbitration in Africa" East Africa International Arbitration Conference. Fairmont the Norfolk, Nairobi, 2014, p.3.

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## **2.1 Different Legal Systems**

The legal systems in different countries across Africa vary from civil law, common law, Shari'a law, Roman-Dutch law and hybrid jurisdictions.<sup>6</sup> Due to the different origins of the legal systems, coupled with cultural differences ranging from Francophone, Anglophone and Lusophone backgrounds, arbitration takes diverse forms when the international laws principles are 'imported' into each individual country.<sup>7</sup>

Due to the different legal systems and approaches to arbitration within the countries, an understanding of the host country's laws, rules and procedures would be required for the tribunal and parties to conduct the process efficiently.<sup>8</sup>

Since parties may select arbitration as the dispute resolution mechanism of choice on the basis of its predictability and legal certainty as opposed to the local courts, this challenge may undermine the advantage of this ADR mechanism.<sup>9</sup>

## **2.2 Judicial Interference**

The courts in some countries, by virtue of their national arbitration legislation, are afforded a large opportunity to interfere with the arbitral process. Litigators infuse the arbitration system with the litigation mentality, which slows down

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<sup>6</sup> C. Albanese, "Ring of Diamonds: Africa's Emerging Centres of Arbitration-Africa Law and Business" (Global Legal Group 2015) Available at <http://www.africanlawbusiness.com/news/ring-of-diamonds-africas-emerging-centres-of-arbitration> (Accessed on 24/03/2018).

<sup>7</sup> P. Dlagnekova, "The Need to Harmonize Trade-Related Laws within Countries of the African Union: An Introduction to the problems Posed by Legal Divergence" 15 *Fundamina* 1 (2009) Available at [http://uir.unisa.ac.za/bitstream/handle/10500/3939/funda\\_v15\\_n1\\_a1.pdf?sequence=1&isAllowed=y](http://uir.unisa.ac.za/bitstream/handle/10500/3939/funda_v15_n1_a1.pdf?sequence=1&isAllowed=y) (Accessed on 24/03/2018).

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

<sup>9</sup> *Ibid.*, p. 36, para 1.

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the arbitral process through unnecessary requests for adjournments and interlocutory applications at the national courts, all which serve nothing but to delay the process and increase the associated costs.<sup>10</sup>

The practice of arbitration in Africa may however be an effective dispute resolution mechanism when assisted by the courts. This is because court involvement in arbitration is inescapable in certain situations and at certain levels. For instance, arbitration has no mechanism for the impeachment of its own awards as the arbitral tribunal becomes *functus officio* on making of a final award. Thus, there is no mechanism by which an aggrieved party in arbitration can seek redress for the same unless through the assistance of the court.

Furthermore, arbitral tribunal generally does not have any mechanism for the enforcement of its award unless by the assistance of the domestic courts. There is no independent mechanism for the enforcement of arbitration awards without the involvement of the national court which therefore becomes a subordinate mechanism of resolving disputes. This also undermines the authority of the arbitral tribunals because their enforcement and recognition are subject to the national courts' intervention.<sup>11</sup>

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<sup>10</sup> K. Muigua, "Reawakening Arbitral Institutions for Development of Arbitration in Africa" (May 2015)

<http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf> (Accessed on 26/03/2018).

<sup>11</sup> Dorothy Udeme Ufot, "*The challenges of arbitrating in Africa: The Nigerian experience*", International Law office (December 06 2012) Available at <http://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Nigeria/Dorothy-Ufot-Co/The-challenges-of-arbitrating-in-Africa-the-Nigerian-experience> (Accessed on 23/03/2018).



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Similarly, the arbitration tribunals have no power to grant enforceable interlocutory orders such as injunctions and, in this case, they rely on the courts which in turn lead to much wastage of time and procedural technicalities in pursuing access to justice through this mechanism. Parties to arbitration agreements have used court intervention to delay and frustrate arbitral proceedings whether yet to start or pending. This delays finalization of the matter as well as watering down the perceived advantages of arbitration and ADR in general.<sup>12</sup>

An example in this scenario was seen in *the Arbitration matter between Kanyotta Holdings Limited and Chevron Kenya Limited (CALTEX)*<sup>13</sup> which made its way to the Kenya High Court and Court of Appeal after the award was challenged which was a tactic used to delay the enforcement of the award thereby delaying justice contrary to the advantages of arbitration as an alternative to dispute resolution mechanism.<sup>14</sup>

The courts of Singapore have taken a different stand altogether. This was seen in the case of *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush*,<sup>15</sup> which held that the court had no power to grant an anti-arbitration injunction restraining an arbitrator from proceeding with the arbitration but made clear that it could set aside the award if the circumstances so warranted. African courts should emulate the Singapore High Court in this regard in particular, since undue court intervention can significantly undermine the

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<sup>12</sup> K. Muigua, "Role of The Court Under Arbitration Act 1995: Court Intervention Before, Pending and Arbitration in Kenya," Kenya Law Review (2010), Available at <http://www.kenyalaw.org/klr/index.php?id=824> (Accessed on 25/03/2018).

<sup>13</sup> (2012 eKLR).

<sup>14</sup> Ibid.

<sup>15</sup> [2004] SGHC 26.

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security of contracts especially where arbitration is guaranteed as an alternative dispute resolution mechanism.<sup>16</sup>

The inconsistencies in interpretation of the same law by different judges contributes to legal uncertainty in the arbitration process, where once a matter is submitted to the High Court, parties would have no guarantee that the judges would appropriately apply the law.<sup>17</sup> Parties who have a matter disposed of by the High Court where the judge inaccurately applies the arbitration law, would be forced to abide by an arguably unjust decision.<sup>18</sup>

Arbitration does not run completely parallel to the court system. It needs an efficient and independent judiciary to complement it.<sup>19</sup> In Africa, while there are intelligent, learned and experienced judges with the requisite efficiency of work and independence, in some countries the judges and courts are crippled by inadequate facilities including more specifically, a shortfall in reference materials and training in commercial law and commercial arbitration matters.<sup>20</sup>

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<sup>16</sup> Ibid.

<sup>17</sup> C. Namachanja, *"The Challenges facing Arbitral Institutions in Africa: Meeting the challenges"* CIARbs in Africa Learning from Africa; CIArb Centenary Conference | 15 - 17 July, 2015, Page 21, para 3 Available at <https://www.ciarb.org/docs/default-source/centenarydocs/.../collins-namachanja.pdf> (Accessed on 26/03/2018).

<sup>18</sup> Ibid.

<sup>19</sup> Amazu A Asouzu, *"International Commercial Arbitration and African States: Practice, Participation and Institutional Development"* (Cambridge University Press 2001) 40 [https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&q=zambia,+institutional+arbitration&ots=IeyN8pOE7&sig=itOHSmLVmYKy6V6APybBh\\_vP5V0&redir\\_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false](https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&q=zambia,+institutional+arbitration&ots=IeyN8pOE7&sig=itOHSmLVmYKy6V6APybBh_vP5V0&redir_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false) (Accessed on 25/03/2018).

<sup>20</sup> A. Asouzu, *"International Commercial Arbitration and African States: Practice, Participation and Institutional Development"* (Cambridge University Press 2001) 40 Available at [https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&q=zambia,+institutional+arbitration&ots=IeyN8pOE7&sig=itOHSmLVmYKy6V6APybBh\\_vP5V0&redir\\_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false](https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&q=zambia,+institutional+arbitration&ots=IeyN8pOE7&sig=itOHSmLVmYKy6V6APybBh_vP5V0&redir_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false) (Accessed on 24/03/2018).

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Arbitration and courts are partners in dispensing justice. However, whereas most courts in the developing countries are guilty of delay in arbitration matter, some others are guilty of ignorance. Some judges, with respect, are not knowledgeable and skillful in arbitration process and the resultant effect is that in some cases, awards which are good on their face are often impeached and set aside for reasons which are absolutely doubtful and strange.<sup>21</sup>

### **2.3 Politicization of Disputes**

Political disputes are not arbitrable and therefore it makes it difficult to arbitrate when disputes are politicized. This involves the making of a dispute to become political in nature by bringing in the issue of public interest. Such disputes are ones that relate to infrastructural projects, natural resources and expenditure of public funds as they affect the livelihoods of a large number of people. An example is a matter involving oil and gas such as the Turkana oil saga in Kenya.<sup>22</sup>

In addition, politicization of disputes may arise from the appointment of the members of the arbitral institution by the government. For example, where in Kenya, a good section of the leadership of the Nairobi Centre for Arbitration is appointed by the Government of Kenya, and while the support of the executive is appreciated, its involvement however should be limited in order to ensure that the Centre is independent and trusted by users.<sup>23</sup>

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<sup>21</sup> F. Agbofodoh, *"Hindrances to international commercial arbitration Institution"* Available at [https://www.google.com/search?rlz=1C1CHBD\\_enKE734KE735&q=Agbofodoh+R.+Franklin%E2%80%99s+%E2%80%98Hindrances+to+international+commercial+arbitration+Institutions&spell=1&sa=X&ved=0ahUKEwiw2uvt9InaAhVG0xQKHAKQBPPQBBQgiKAA&biw=1600&bih=794](https://www.google.com/search?rlz=1C1CHBD_enKE734KE735&q=Agbofodoh+R.+Franklin%E2%80%99s+%E2%80%98Hindrances+to+international+commercial+arbitration+Institutions&spell=1&sa=X&ved=0ahUKEwiw2uvt9InaAhVG0xQKHAKQBPPQBBQgiKAA&biw=1600&bih=794) (Accessed on 25/03/2018).

<sup>22</sup> Standard Newspaper, Jan 9<sup>th</sup> 2017, *"Turkana Leaders Vow to Fight For 10% Of Oil Share Benefits"* by Lucas Ngasike and Joan letting.

<sup>23</sup> *Ibid*, (n 15), page 20.

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It can also be caused by the appointment of government officials into an arbitral institution who then bring into the arbitration practice political issues which adversely affect the practice.

### **2.4 Political Instability**

When a country has an unstable political system and civil unrest such that it makes it difficult to ascertain the peace in the country, it becomes difficult to carry out arbitration proceedings especially when the procedural law in that country's laws. It is not however isolated to African countries alone as it mostly affects the developing countries even in other regions outside of Africa.

Most of the African countries do have unfavourable political environments and thus parties to an arbitration dispute find it convenient to appoint arbitrators and the forums for handling their disputes from more politically stable countries on other continents. Parties to large transnational disputes would generally favour arbitral institutions in politically stable countries to carry out the administration of the process, because they offer greater certainty in efficient conduct of proceedings.<sup>24</sup> This is especially so since the disputes involve high value and complex transactions and parties would be intent on completing the arbitration as efficiently, speedily and effectively as possible.<sup>25</sup>

### **2.5 Corruption and External Influence**

Corruption has always existed in different forms and is not determined by politics or geography.<sup>26</sup> Scholars have argued that it exists in rich and poor

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<sup>24</sup> Kwadwo Sarkodie, "International Arbitration in the Sub-Saharan African Context" (Mayer Brown 2014).

<sup>25</sup> Ibid, (n 15), page 15.

<sup>26</sup> E. Nduku and J. Tenamwenye, "Corruption in Africa: A Threat to Justice and Sustainable Peace" Globethics.net Focus 14, ISBN 978-2-88931-016-6 Available at <https://www.amazon.com/Corruption-Africa-Threat-Justice-Sustainable/dp/2889310175> (Accessed on 24/03/2018).

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countries alike, it involves both individual States and international organizations and its costs are borne by the citizens. It affects the proper running of governments, distorts the correct functioning of economic and political institutions and hampers transparency, exploits the human person for selfish interests, renders respect for rules obsolete and is a manifestation of structural sin.<sup>27</sup>

Africa has been referred to as the hub or cradle for corruption and even though there is no evidence backing these claims, the mere perception of this poses a hindrance to the arbitration processes in such states. Where corruption has been identified during procurement, performance or termination, it does not necessarily mean that the arbitrator who gives an award either way is corrupt, especially if there is no evidence given to him about the corrupt practice. Arbitrator's immunity is for actions done in good faith and this immunity does not extend to corrupt and other illegal practices.<sup>28</sup> Corruption among arbitrators, as among judges, is extremely difficult to proof because, like arbitration, corruption is also confidential. The unwillingness of parties to pursue arbitrators for disciplinary action through court, professional associations and appointing authorities does no help.<sup>29</sup>

The parties whom the arbitrators rule against find themselves with a final and binding award and possibly hefty costs of the arbitration proceedings are burdened on them. The fact that arbitral proceedings are confidential and are conducted in privacy does not help and it does not matter since losers will complain even when they lose their cases in open court.<sup>30</sup> Corruption, whether

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid, (n 2), p. 4.

<sup>30</sup> M. Hwang S.C. and K. Lim, "Corruption in Arbitration: Law and Reality" Available at

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in business transactions or among arbitrators thrives in the dark. Yet confidentiality and privacy are perhaps the greatest benefits parties derive from arbitration.<sup>31</sup>

## **2.6 Lack of Professional Interaction and Recommendations**

Arbitration practitioners and advocates need to interact in order to know and appreciate one another. In doing so, they get to learn from one another and discuss various ways that favour their effectiveness of the arbitration in their jurisdictions. They can thereafter apply them thereby making the practice of arbitration more effective. However, this lacks in national boundaries in Africa as they are very restrictive. Thus, Kenyan legal practices have formed alliances with European legal practices but have no linkages with legal practices in fellow African states like Zambia, Ghana or Nigeria. Nigeria has, for example, had a long experience in oil and gas contracts, disputes, arbitration, etc. This should be viewed as a continental resource. The African countries which have just discovered oil have a readily available point of reference yet they do not interact.<sup>32</sup>

In Africa, states are prone to abandon their own legal skills and opt to engage in international arbitrations. This is one of the reasons why African states don't get recommendations or a data base of their local arbitrators.<sup>33</sup> This position

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[http://www.arbitration\\_icca.org/media/4/97929640279647/media013261720320840corruption\\_in\\_arbitration\\_paper\\_draft\\_248.pdf](http://www.arbitration_icca.org/media/4/97929640279647/media013261720320840corruption_in_arbitration_paper_draft_248.pdf) (Accessed on 26/03/2018).

<sup>31</sup> Ibid.

<sup>32</sup> Amazu A Asouzu, "International Commercial Arbitration and African States: Practice, Participation and Institutional Development" (Cambridge University Press 2001) page 40, Available at

[https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&dq=zambia,+institutional+arbitration&ots=IeyN8pOE7&sig=itOHSmLVmYKy6V6APybBh\\_vP5V0&redir\\_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false](https://books.google.co.ke/books?hl=en&lr=&id=g837mlPTXFoC&oi=fnd&pg=PR11&dq=zambia,+institutional+arbitration&ots=IeyN8pOE7&sig=itOHSmLVmYKy6V6APybBh_vP5V0&redir_esc=y#v=onepage&q=zambia%2C%20institutional%20arbitration&f=false) (Accessed on 26/03/2018).

<sup>33</sup> Ibid, (n 26), page 1 (c), paragraph 3.

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ought to be amended and governments should learn to work with their own local arbitrators or contract both parties with an aim of helping or aiding the Local arbitrators gain experience.<sup>34</sup>

### **2.7 Lack of Institutional Training Capacity**

Some institutions in Africa need a greater focus on capacity building to improve the number of, and quality of training for arbitrators, and more funds to facilitate efficient administrative services. If the advocate handling the matter is not apprised of the workings of arbitration, the party's case may be lost. Since the arbitration process is meant to be swift and efficient, counsel needs to know what to do and when.<sup>35</sup> While the arbitral institutions may assist to appoint arbitral tribunals, parties are free to select counsel. With the antagonistic nature of litigation, ill-advised counsel may misconstrue the arbitration process and fail to appreciate the nature of arbitration.<sup>36</sup> While counsel may display antics common in litigation such as unnecessary requests for adjournments and interlocutory applications which may contribute to delay and ineffectiveness of access to justice thereby depriving the parties their rightful rights.<sup>37</sup>

African lawyers must therefore be more involved in arbitration training so as to be familiar with the process and also so that they can avoid unnecessary procedures as done in court. They should attend arbitration conferences, workshops and training sessions across the continent. This focus should not be

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<sup>34</sup> G. Muigai (ed), *“Arbitration Law and Practice in Kenya”* (Law Africa Publishing Ltd, 2015).

<sup>35</sup> Ibid, (n 15), page 22.

<sup>36</sup> C. Namachanja, *“The Challenges facing Arbitral Institutions in Africa,”* presented at the CIARB Centenary Conference, 15-17 July, 2015, p.12. Available at <https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/collins-namachanja.pdf?sfv> (Accessed on 17/06/2018).

<sup>37</sup> C. Namachanja, *“The Challenges facing Arbitral Institutions in Africa,”* presented at the CIARB Centenary Conference, 15-17 July, 2015, p. 12.

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confined to lawyers who intend to be arbitrators, but also to general counsel who should be abreast of the nature of arbitration process.<sup>38</sup>

### **2.8 Lack of Adequate Arbitration Centers**

The main reason why the arbitral institutions are established is to offer administrative support to the arbitral processes.<sup>39</sup> In Africa, there has been sufficient research showing the extent to which arbitral institutions have discharged this role and the tendency of parties to arbitral proceedings to shy away from African institutions may be an indication of failure in this respect.<sup>40</sup> Having well established and recognized institutions is a step ahead to having efficient arbitration processes. This is because each institution comes up with their rules of procedure and practice thereby regulating the practice of arbitration in a professional and easy way. For example, the International Court of Arbitration (ICC) and the Chartered Institute of Arbitrators (CIArb) which are international institutions. Competition is thus intense, as jurisdictions vie to be the preferred forums for international arbitration. African countries cannot afford to be left behind as this race speeds up and should emulate the same.<sup>41</sup> We also need these arbitrations institutions in Africa to coordinate and cooperate rather than competing for recognition and supremacy.<sup>42</sup>

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<sup>38</sup> Ibid p. 29.

<sup>39</sup> See generally, R. Sundra, "Institutional and Ad hoc Arbitrations: Advantages and Disadvantages," *Law Review* (2010): 548. Available at <http://sundrarajoo.com/wp-content/uploads/2016/01/Institutional-and-Ad-hoc-Arbitrations-Advantages-Disadvantages-by-Sundra-Rajoo.pdf>

<sup>40</sup> C. Namachanja, "The Challenges facing Arbitral Institutions in Africa," presented at the CIArb Centenary Conference, 15-17 July, 2015, p. 2, para 2.

<sup>41</sup> Ibid (n 9).

<sup>42</sup> Ibid; See also K. Muigua, "Reawakening Arbitral Institutions for Development of Arbitration in Africa," In *Arbitration Institutions in Africa Conference*. 2015. Available at [http://erepository.uonbi.ac.ke/bitstream/handle/11295/89958/Muigua\\_Reawakening%20arbitral%20institutions%20for%20development%20of%20arbitration.pdf?sequence=1](http://erepository.uonbi.ac.ke/bitstream/handle/11295/89958/Muigua_Reawakening%20arbitral%20institutions%20for%20development%20of%20arbitration.pdf?sequence=1)



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Once we have an increased coordination of the region's arbitration institutions, all parties can effectively work towards instilling public confidence in African institutions as the first choice of oversight bodies for even the most complex of disputes.<sup>43</sup>

## **2.9 Language and Territorial Barriers**

Language is one of the barriers that hinders effective resolution of disputes in Africa because proceeding cannot take place if the parties to the dispute and the arbitrator are not able to effectively communicate. English is the most spoken language in the region and on the continent followed by French but multilingual African professionals are very few.<sup>44</sup>

Language is not necessarily considered to be a barrier in this day and age, with developments in technology and the transition of the world into a global village.<sup>45</sup> However, from a practical perspective, when English-speaking parties engage in a matter that is in a French-speaking country and the arbitral institution only operates in French, it is likely that they would prefer an institution elsewhere.<sup>46</sup> Therefore, both English and French are likely to continue being the default languages of arbitration in Africa for centuries to come, therefore more African states should consider using these languages in their Arbitration causes.<sup>47</sup>

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<sup>43</sup> C. Namachanja, "The Challenges facing Arbitral Institutions in Africa," presented at the CIArb Centenary Conference, 15-17 July, 2015, p. 11.

<sup>44</sup> Ibid, p. 10, para 2.

<sup>45</sup> See generally, D. Morales-Gómez, and M. Melesse. "Utilising information and communication technologies for development: The social dimensions." *Information technology for Development* 8, no. 1 (1998): 3-13.

<sup>46</sup> C. Albanese, "Ring of Diamonds: Africa's Emerging Centres of Arbitration" Africa Law and Business (Global Legal Group 2015) <http://www.africanlawbusiness.com/news/ring-of-diamonds-africas-emerging-centres-of-arbitration> (Accessed on 26/03/2018).

<sup>47</sup> Ibid.

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### **2.10 Confidentiality**

One of the key aspects of arbitration proceedings is that they are confidential as opposed to litigation, where everything is supposed to be done in an open court in a bid to promote transparency in the dispensation of justice.<sup>48</sup> In some countries however, there is no provision for confidentiality in arbitration, and the proceedings may be published unless the parties enter into a separate confidentiality agreement limiting disclosure of their dealings. This puts arbitration in the same league as litigation in terms of disclosure and poses a threat to the development of arbitration as a more favorable course of action.<sup>49</sup>

### **2.11 Lack of Experience**

Effective arbitration process requires the arbitrator to have the required expertise which can only be gained from experience in arbitration proceedings so as to have proficiency in the practice and procedure of arbitration in Africa. It refers to a person's experience as arbitrator and has nothing to do with the

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<sup>48</sup> See generally, F. Dessemontet, "Arbitration and confidentiality," *Am. Rev. Int'l Arb.* 7 (1996): 299-307; A.C. Brown, "Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration," *American University International Law Review* 16, no. 4 (2001): 2; L.E.Trakman, "Confidentiality in international commercial arbitration," *Arbitration International* 18, no. 1 (2014): 1-18.

<sup>49</sup> K. Muigua, "Reawakening Arbitral Institutions for Development of Arbitration in Africa" (May 2015) Available at

<http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf> (Accessed on 26/03/2018); See also L. Camilla, "Norway: Hush! Let's Arbitrate – Discourse and Practice on The Question of Confidentiality in International Commercial Arbitration," 8 April 2014. Available at

<http://www.mondaq.com/x/305634/international+trade+investment/Hush+Lets+Arbitrate+Discourse+And+Practice+On+The+Question+Of+Confidentiality+In+International+Commercial+Arbitration>

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person's age, number of years in the primary profession or years as an advocate in arbitration.<sup>50</sup>

One scholar and profound author in international arbitration<sup>51</sup> argues that the profile for a qualified investment arbitrator must: have knowledge of substantive investment law and international public law; has experience of arbitration proceedings; is impartial and independent; has sufficient time available to conduct the case; is sensitive to economic, social and cultural differences; is capable of dealing with facts and understands that arbitration is a service industry among others.<sup>52</sup> He further states that there lacks a sufficient number of individuals who meet these qualifications.<sup>53</sup>

## **2.12 Open Bias/Low Confidence in African Arbitrators**

One of the features of having arbitration as the preferred dispute resolution mechanism is the parties' right control over the process at their convenience, an aspect referred to as party autonomy.<sup>54</sup> It has generally been observed that people in Africa tend to select non-Africans, where instead of focusing on

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<sup>50</sup> S.L Sempasa, "Obstacle to International Commercial Arbitration in African Countries", *International and Comparative Law Quarterly* 2 (British Institute of International and Comparative Law 1992) 387 – 413. Available at [https://www.google.com/search?q=Samson+L+Sempasa,+\"Obstacle+to+International+Commercial+Arbitration+in+African+Countries\",&rlz=1C1CHBD\\_enKE734KE735&tbm=isch&tbo=u&source=univ&sa=X&ved=0ahUKEwjF4JeH-YvaAhXBbhQKHX4jBZEQsAQIMQ](https://www.google.com/search?q=Samson+L+Sempasa,+\) (Accessed on 26/03/2018).

<sup>51</sup> Albert Jan Van Den Berg, *Qualified Investment Arbitrators? A Comment on Arbitrators in Investment Arbitrations*. Available at [www.hvdb.com/wp-content/uploads/Qualified-Investment-Arbitrators.pdf](http://www.hvdb.com/wp-content/uploads/Qualified-Investment-Arbitrators.pdf) (Accessed on 25/03/2018).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, page 55, para 1.

<sup>54</sup> A.Sklenyete, "International Arbitration: the Doctrine of Separability and Competence-Competence Principle." *The Aarhus School of Business* (2003), p.10. Available at <http://pure.au.dk/portal/files/2372/000126197-126197.pdf>

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development of local home-grown talent, there is the inclination to import arbitrators for their expertise, which begs the question as to whether there is more focus on their nationality than their actual capacity.<sup>55</sup> As stated earlier even our very own African governments typically engage foreign legal firms for representation in international arbitrations. This also shows that the African states don't get recommendations or a data base of their local arbitrators.<sup>56</sup>

African arbitrators therefore lack a global outreach as they are not recognized in international forums and may not get such experience by only being African based arbitrators. This therefore contributes to open bias and in selecting the arbitrators for international disputes which has grown to be generally acceptable in the African continent. This in turn tends to affect arbitrators' confidence in handling international arbitration matters.<sup>57</sup>

It ought to be a challenge to the African institutions to boost the African arbitrators to participate in the international arbitration through nomination of the top practitioners in the regions. Through this, African institutions could increase the chances of home-grown appointment of arbitrators thereby

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<sup>55</sup> P. Benjamin, "A Comparative Study of International Commercial Institutional Arbitration in Europe and in the United States of America" in P Sanders (ed) *Arbitrage International Commercial* 1 (1960). Available at [https://books.google.co.ke/books?id=Jq4GcoOaM7oC&pg=PA351&lpg=PA351&dq=Peter+Benjamin,+\"A+Comparative+Study+of+International+Commercial+Institutional+Arbitration+in+Europe+and+in+the+United+States+of+America\"&source=bl&ots=TL-2rjW210&sig=SdvjxFhhgM3tO9vmCopweN](https://books.google.co.ke/books?id=Jq4GcoOaM7oC&pg=PA351&lpg=PA351&dq=Peter+Benjamin,+\) (Accessed on 26/03/2018).

<sup>56</sup> *Ibid* (n 2), page 1, para 3.

<sup>57</sup> E. Onyema, "Effective Utilization of Arbitrators and Arbitration, Institutions in Africa by Appointors", 4th Arbitration and ADR in Africa Workshop, Empowering Africa in the 21st Century through Arbitration & ADR Conrad Hilton Hotel, Cairo Egypt 29-31 July 2008, Available at [http://eprints.soas.ac.uk/5300/1/Arbitrators\\_and\\_Institutions\\_in\\_Africa.pdf](http://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf) (Accessed on 25/03/2018).

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boosting their confidence in handling international disputes and hence eligible for global appointment.<sup>58</sup>

International appointment and high ranking in the arbitration forums could foster credibility of African arbitrators to the investors who will then appoint them to handle their arbitration matters in the international regime. This will go a long way in enhancing the role of African regional institutions in international arbitration, which would as a result make it easier to penetrate the global institutional arbitration market.<sup>59</sup> It is important to have a database where members of the public have access to a list of able and qualified arbitrators and/or law firms to handle arbitral proceedings. On an international level, there are reviews covering advancements in arbitration. For example, the Global Arbitration Review (GAR) recognizes distinguished arbitrators and arbitration practices.<sup>60</sup>

Therefore, it is very clear that the African governments must take the initiative to play a proactive role in appointing African counsel to represent the state in arbitration proceedings before arbitration fora such as ICSID. In the event that counsel from outside the continent are to be engaged, the governments must support the cultivation of expertise of local counsel through incorporating them in the arbitration teams.<sup>61</sup>

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<sup>58</sup> K. Muigua, "Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya" Available at <http://www.kmco.co.ke/index.php/publications/114-making-east-africa-a-hub-for-international-commercial-arbitration> (Accessed on 26/03/2018).

<sup>59</sup> Ibid (n 15) page 15, para 2.

<sup>60</sup> Global Arbitration Review, Available at <http://globalarbitrationreview.com/> (Accessed on 26/03/2018).

<sup>61</sup> Hogan Lovells, "*Arbitrating in Africa*". Available at

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### **2.13 Lack of Control of Costs**

Costs have recently been regarded as one of the barriers to effective arbitration proceedings as all the delays in such proceedings such as through the court intervention.<sup>62</sup> It has not been clear or there are no clear guidelines on the remuneration of arbitrators and foreigners are not always very sure on what they would have to pay if and when they engage African international arbitrators to arbitrate their commercial disputes. This is because the issue is more often than not left to the particular institutional guidelines, which institution may not be favourable to the parties. For instance, the Kenyan branch of Chartered Institute of Arbitrators has its own rules and guidelines on the remuneration of its arbitrators. However, these are only applicable to those who practice arbitration under the Institute and thus have limited applicability.<sup>63</sup>

### **3. Conclusion**

We can conclude from the above that the challenges facing arbitration are a huge obstacle preventing the effective delivery of justice which is a key component in resolution of disputes both in Kenya as well as in Africa at large. These challenges, once resolved can be a great achievement as it is a great contributor to the promotion of dispute resolution in international commercial disputes.

It can also be inferred that Africa needs to establish and build the capacity of the arbitral institutions which have to be recognized both at the domestic as well as the international level. There have been significant efforts to do so but it has not yet been implemented fully because of the obstacles that need to be addressed with regards to these institutions. This will in turn go a long way in making

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[http://www.hoganlovellsafrica.com/\\_uploads/Publications/Arbitrating\\_in\\_Africa\\_\\_Hogan\\_Lovells\\_March\\_2013.pdf](http://www.hoganlovellsafrica.com/_uploads/Publications/Arbitrating_in_Africa__Hogan_Lovells_March_2013.pdf) (Accessed on 26/03/2018).

<sup>62</sup> See generally, F. David, and N.A. Ali, "Adjudication and Arbitration and The Associated Barriers To Litigation," p.4. Available at <http://www.nzisqs.co.nz/Portals/9/PAQS/Abstracts/10%20-%20d%20finnie.pdf>

<sup>63</sup> CI Arb Arbitration Rules, 2015 Available at <http://www.ciarb.org/guidelines-and-ethics/guidelines/mediation-guidelines> (Accessed on 26/03/2018).

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Africa reach the international standard for commercial disputes both in Africa and the world at large.

Key aspects and issues in international commercial arbitrations that hinder the effective dispute resolution has been critically examined with an intention of promoting effective practice of arbitration within the African region. Africa therefore has the capacity to conduct rigorous and impeccable international commercial arbitration in its own right as a continent. Promoting international commercial arbitration in Africa is imperative as it is achievable. This is the time to showcase Africa as an ideal centre for the settlement of commercial disputes. Once these obstacles are addressed, Africa will be a better hub for the handling of international commercial disputes particularly among investors and businessmen and will definitely enhance the benefits of international commercial arbitration in the developing countries particularly among the businessmen and investors.<sup>64</sup>

#### **4. Recommendations**

Having different legal system or different laws that are not uniform in African countries is one of the challenges that have hindered effective dispute resolution of commercial disputes through arbitration. This is because it has become difficult to enforce arbitration awards in states with different laws and this becomes a challenge to effectiveness of arbitration in such situations. This can however be addressed through using international legal instruments aimed at enhancing recognition and enforcement of arbitral awards such as the New

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<sup>64</sup> G. Chukwudi Nwakoby and Charles Emenogha Aduaka, "Obstacles facing international commercial arbitration - *Journal of Law and Conflict Resolution*" Vol.7(3), page17-20, July,2015 Available at [www.academicjournals.org/journal/JLCR/article-abstract/DBCD59B54216](http://www.academicjournals.org/journal/JLCR/article-abstract/DBCD59B54216) (Accessed on 27/03/2018).

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York Convention<sup>65</sup> and the ICSID Convention<sup>66</sup>, amongst others. If more African states sign up to such instruments and also align their domestic laws on arbitration with international best practices on arbitration, it may help ease this particular challenge.

Judicial interference is also another challenge that has been addressed herein and this can be addressed by having independent institutions dealing with the same. Continuous sensitization of judicial officers on the need to uphold international best practices on arbitration can also ease the problem. Politicization of disputes as a challenge can be addressed by prohibiting various persons from practicing as arbitrators. Political stability in a country is another key issue that needs to be maintained for there to be effective practice of arbitration. States should endeavor to have a stable political atmosphere for efficient resolution of disputes. Corruption is one of the major issues and challenges that affects all spheres such as arbitration. States ought to deal with this issue by coming up with stringent sanctions for acts of corruption so as to curb it.

Another issue that majorly affects the resolution of commercial disputes through arbitration in Africa is the lack of professional interaction with other jurisdictions which have the competence in such practice. It is important that African practitioners interact with other internationally based arbitrators so as to gain more expertise on how to better handle international commercial disputes.

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<sup>65</sup> United Nations *Convention* on the Recognition and Enforcement of Foreign Arbitral Awards (*New York*, 10 June 1958).

<sup>66</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention, 1965). 17 UST 1270, TIAS 6090, 575 UNTS 159.



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Language and territorial barriers is another challenge which can be addressed through having a uniform arbitration language for the African states. Open bias and low confidence in African arbitrators is another challenge which can be handled through more involvement in practice of arbitration proceedings as experience is the best teacher. African arbitration practitioners also need to write more on arbitration so as to boost their confidence before the international *fora* thereby marketing themselves out there.

It is also important to come up with a clear and comprehensive framework in Africa which will provide for both substantive and procedural laws governing the practice of arbitration both domestically as well as internationally.

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## **Security for costs in international arbitrations: A shield against risks of not recovering costs of arbitration by an impecunious claimant or a sword to stifle a claim?**

*By: Hazron Maira\**

### ***Abstract***

*Security for costs is an interim measure that aims to facilitate later enforcement of an arbitral award. Many national arbitral laws and international arbitration institutions have express or implied provisions granting arbitral tribunals jurisdiction to deal with an application for such a measure. This paper discusses the rationale, requirements and criteria for awarding security for costs in international arbitrations and identify the reasons why few arbitral tribunals grant the applications even when circumstances warrant doing so. The paper finds an arbitral tribunal's decision on security for costs is enforceable but not as an award. It examines why performance of the enforcement role lies with the arbitral tribunals and not the courts and the consequences of not complying with an order for security for costs. The decision a tribunal is entitled to take if an order for security might cause injustice to the claimant is also examined.*

### **1.0 Introduction**

The objective of this paper is to establish whether the aim of a party applying for security for costs (*cautio judicatum solvi* in civil law) in an international arbitration is to shield itself from risks of not recovering costs of arbitral proceedings by an impecunious claimant or to stifle the claim and consequently the arbitration.

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Many legal systems and international arbitration institutions recognise as a general principle that arbitral tribunals may issue interim measures in support of arbitration proceedings. In the Note by the Secretariat on the UNCITRAL Working Group II (Arbitration and Conciliation) thirty-sixth session, it's noted that the power of the arbitral tribunal to issue interim measures in support of arbitration arises from the interpretation of the arbitration agreement as an agreement to seek a final and binding resolution of disputes by an impartial third party and this agreement cannot co-exist with the right of either party to alter the subject matter of the dispute in such a way as to destroy or obstruct the arbitral tribunal in making a final and effective award.<sup>1</sup> The tribunal establishes its powers to issue interim measures by examining the terms of the arbitration agreement, the institutional or *ad hoc* arbitration rules the parties had agreed to, and the substantive law of arbitration that either overrides or supplements the parties' agreement.<sup>2</sup>

Broadly, interim measures can be classified into two categories; those aimed at avoiding prejudice, loss or damage and those which are intended to facilitate later enforcement of the award.<sup>3</sup> Included in the measures to facilitate later enforcement of award is security for costs of arbitration. Costs of arbitration include the legal costs of the parties, the arbitrators' fees and expenses, fees and expenses of the arbitral institution (if any) and any other costs (non-legal) of the

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<sup>1</sup> UNCITRAL Working Group II (Arbitration and Conciliation), Thirty-sixth session, Settlement of commercial disputes, Preparation of uniform provisions on interim measures of protection, Note by the Secretariat, UN Doc. A/CN.9/WG.II/WP.119 (30 January 2002), at para 22 (citing: *E-Systems, Inc. v. Islamic Republic of Iran* 2 Iran-U.S. Cl. Trib. Rep. 51, 57 (1983)). Available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V02/509/53/PDF/V0250953.pdf?OpenElement>. [Accessed on 27 Feb 2018]

<sup>2</sup> *Ibid*, para 24.

<sup>3</sup> *Ibid*: See classification details in paras 16 – 18.

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parties.<sup>4</sup> Unless parties have agreed otherwise, the trend in international arbitrations has been to apply the principle “costs follow the event”. In proceedings where the principle of cost-shifting applies, and the tribunal’s decision on costs should reflect the parties’ relative success and failures in the arbitration, a case for guaranteeing payment of a party’s costs in the event of success can be made out if circumstances exist that show the counterparty may not honour a cost order in the event of the failure in the case.<sup>5</sup>

Security for costs can be in various formats; depositing a sum of money with the nominating arbitral institution or provision of a bank guarantee or bond or any other format with similar liquidity as cash. An application for Security for costs should be made at the commencement of arbitral proceedings and is a procedural matter that may be determined by agreement of the parties or, in the absence of an agreement, by the arbitral tribunal in accordance with applicable *lex arbitri* and/or procedural rules.

Reference to the term “international arbitrations” include both commercial and investor-state arbitrations. Both types of arbitrations share similar principles with respect to security for costs but in rare circumstances, there may be minor

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<sup>4</sup> Chartered Institute of Arbitrators (CI Arb), International Arbitration Practice Guideline, Applications for Security for Costs (29 November 2016). Available at: <http://www.ciarb.org/Guideline-and-ethics/Guideline/arbitration-Guideline>. [Accessed on 29 August 2017]

<sup>5</sup> See Thomas H. Webster; Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues, *Arbitration International*, Volume 25, Issue 4, 1 December 2009, pp. 469–514, 473, <https://doi.org/10.1093/arbitration/25.4.469>. [Accessed on 09 April 2018]: - “If the principle that “costs follow the event” is accepted as a starting point for allocating costs, then an even thornier issue of security for costs arises. Awarding costs against an unsuccessful claimant is of little effect if the claimant cannot be forced to pay the costs”.



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differences, and in the discussions that follow, where there are differing principles, the paper discusses them separately.

## **2.0 Which party can request for security for costs?**

A request for security for costs can only be made by the respondent and in the event a respondent makes a counterclaim, then a claimant can also make it.<sup>6</sup> This proposition is based on the following: first, it is the claimant who initiates the proceedings and thus, there is presumption that before doing so, it has taken necessary measures to insulate itself against possible cost awards while the respondent has not; second, it is only the claimant who can commence unmeritorious claims; and third, in the event the claimant succeeds in the claim, the costs award may be an insignificant sum compared to the substantive claim sum in the award, whereas if the claim fails and the respondent is awarded costs, that sum constitutes the entire sum due to it.<sup>7</sup>

## **3.0 Rationale for making security for costs application**

A respondent to an international arbitration commenced by an impecunious claimant stand to lose whether he or she defends the claim or not. In the event of a failure to defend, an adverse award may be issued and may be enforceable under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). If the respondent defends, he or

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<sup>6</sup> See Extract from Procedural Order no. 4 in ICC Case in Geneva (April 2009) Concerning Security for Costs in particular: – when requested by a Counterclaiming Respondent, 28 ASA Bulletin 1/2010, p.70, "The procedural institution of security for costs is for the protection of a respondent party (whether as respondent to a claim or as counter-respondent to a counterclaim).

<sup>7</sup> Noah Rubins, 'In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration'. ARIA Vol. 11 No. 3 (2000)

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she will incur costs and if successful, he or she may never recover costs unless the claimant has given a guaranteed security.<sup>8</sup> Security for costs is designed to address these issues and an ICC Tribunal with its seat in Paris, France, outlined its purpose and said the scope of security for costs is aimed at protecting a party's right of defence against claims (raised by an impecunious party) which may prove to be unfounded at the end of the proceedings, and it would, therefore, be procedurally unfair to force a respondent to defend itself and incur legal costs which eventually could not be recoverable.<sup>9</sup> Safeguarding the integrity of arbitral proceedings has also been identified by arbitral tribunals as another reason for making security for costs requests.<sup>10</sup>

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<sup>8</sup> Pierre A. Karrer and Marcus Desax, Security for Costs in International Arbitration – Why, when, and what if ...: In *Law of International Business and Dispute Settlement in the 21st Century*, Liber Amicorum Karl-Heinz Böckstiegel, Edited by Robert Briner et al. (2002), p. 340/1

<sup>9</sup> Procedural Order of December 2008 in ICC Case 14661 (Extract), Special Supplement 2014: Procedural Decisions in ICC Arbitration.

<sup>10</sup> See Decision on El Salvador's Application for Security for Costs, *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 (20 Sept. 2012), para 45; Procedural Order No. 3, Decision on Respondent's Request for Provisional Measures, *Eskosol S.P.A. In Liquidazione v Italian Republic*, ICSID Case No. ARB/15/50 (12 April 2017), at para 33: - the Tribunal said that what is sought in cases with a party requesting security for costs is an assurance that the pursuit will be *meaningful*, in the sense that there will be assets available at the end of the case against which to enforce any costs award. At issue is concern about an *outcome-related* worry about collection of a cost award and this "concern about collection is sometimes framed as part of a broader *right to effective relief*, considered to be part of the panoply of rights encompassed by the notion of procedural integrity".

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#### **4.0 Jurisdiction of Arbitral Tribunals to deal with requests for security for costs**

Parties to an arbitration are free, subject to mandatory rules of the forum, to expressly grant a tribunal powers to deal with security for costs applications. Likewise, they may exclude the procedure altogether. By default, most national laws and international arbitration institutions rules from common law jurisdictions have express provisions for arbitral tribunals to order security for costs, while national laws and international arbitration institutions rules based in civil law jurisdictions do not expressly provide for making such an order,<sup>11</sup> although the existing provisions have been relied upon to grant security for costs in certain circumstances.<sup>12</sup>

The following samples of national laws and international arbitration institutions rules from both common law and civil law jurisdictions give an oversight of

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<sup>11</sup> This divergence may be attributed to the reasoning that security for costs is an English law doctrine, See Procedural Order No. 10 under UNCITRAL rules (2010), *South American Silver Limited v The Plurinational State of Bolivia*, PCA Case No. 2013-15, (January 11, 2016), para 45: - "Security for costs (*cautio judicatum solvi*) is an instrument of English law that has been seen with certain reservations in arbitration in countries of other legal traditions."; Noah Rubins (*supra* fn. 7), "[S]ome arbitrators from civil-law backgrounds view security bonds as an idiosyncrasy of English law, poorly adapted to use in a multinational proceeding and probably unfamiliar to the participants."

<sup>12</sup> Wendy Miles and Duncan Speller, Security for costs in international arbitration – emerging consensus or continuing difference? *The European Arbitration Review* 2007. Available at:

[https://pittvis.files.wordpress.com/2016/09/security\\_costs\\_internationalarbitration.pdf](https://pittvis.files.wordpress.com/2016/09/security_costs_internationalarbitration.pdf). [Accessed on 18 Sept. 2017]: -The commentators identify German Code of Civil procedure (1998), section 1041 (1) as one exception from civil law jurisdiction that expressly confer authority upon an arbitral tribunal to order security for costs.

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how arbitral tribunals have been granted jurisdiction to deal with applications for security for costs.

**4.1 UNCITRAL Model Law and UNCITRAL Arbitration Rules (as revised in 2010)**

Article 17 of the Model law is on the power of the tribunal to order interim measures, and section (1) provides that “Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.” Section (2)(c) thereof provides that “An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to: Provide a means of preserving assets out of which a subsequent award may be satisfied.” Provision with similar wording is to be found in Article 26 (2)(c) of UNCITRAL Arbitration Rules (as revised in 2010).

Despite having no express provision for security for costs in the Model law, the UNCITRAL Working Group on Arbitration and Conciliation agreed that security for costs was encompassed by the words “*preserving assets out of which a subsequent award may be satisfied.*”<sup>13</sup>

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<sup>13</sup> UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the work of its forty-seventh session, UN Doc. A/CN.9/641 (25 September 2007), para 48. Available at:

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**4.2 Kenyan Arbitration Act 1995 (2009) (Revised Edition 2012 [2010])**

Section 18 (1) (c) provides that “Unless the parties otherwise agree, an arbitral tribunal may, on the application of a party - order a claimant to provide security for costs.”<sup>14</sup>

**4.3 Nairobi Centre for International Arbitration Rules (2015)**

Rule 27 is on interim and conservatory measures and section 2 provides that “The Arbitral Tribunal shall have the power, upon the application of a party, to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party...”

**4.4 England and Wales Arbitration Act 1996**

Section 38 is on general powers exercisable by the tribunal and sub-section (3) provides that “The tribunal may order a claimant to provide security for the costs of the arbitration.”

The inclusion of this provision was also in response to the House of Lords decision in *S.A. Coppee Lavalin NV v Ken-Ren Chemicals and Fertilisers* [1994] 2 WLR 631, where the court by a majority ordered security for costs against an impecunious claimant. The arbitration law at the time provided that the power to order security for costs was for the courts. The proposition that the Court should involve itself in such matters as deciding whether a claimant in an arbitration should provide security for costs received universal condemnation in the context of international arbitrations, and to promote England as a world centre for arbitration, that power had to be discontinued and moved to arbitral

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<sup>14</sup> Although the Kenyan Arbitration Act is based on the UNCITRAL Model Law, it is notable the authors chose to adopt the common law principle of expressly providing for security for costs as opposed to the implied format in the Model Law.

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tribunals.<sup>15</sup> Thus, in Section 44 of 1996 Arbitration Act, the role is not listed among the powers of the court exercisable in support of arbitral proceedings.

**4.5 *London Court of International Arbitration (LCIA) rules (2014)***

Article 25 is on interim and conservatory measures and by Article 25(2), it is provided that *“The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs...”*

**4.6 *Swiss Federal Statute on Private International Law (“PILS”) (1987)***

Article 183(1) provides that *“Unless the parties have otherwise agreed, the arbitral tribunal may, on motion of one party, order provisional or conservatory measures.”*

There is consensus from arbitral tribunals and leading scholars that an arbitral tribunal sitting in Switzerland has power to grant security for costs request pursuant to Article 183(1).<sup>16</sup>

**4.7 *The International Chamber of Commerce (the “ICC”) Rules of Arbitration (2017)***

Article 28 (1) provides that *“Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate.”*

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<sup>15</sup> See Departmental Advisory Committee (DAC) Report 1996 on the English Arbitration Act 1996, Chapter 7 para 193.

<sup>16</sup> See Decision of 17 May 2003 in an International *Ad hoc* Arbitration with its seat in Berne, Switzerland between Mr X. (Claimant) and Mrs Y. (Respondent), 28 ASA Bulletin 1/2010, p.17/18.

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Although express provision with the wording “security for costs” was expressly rejected during the revision process that led to the 1998 version of the ICC Rules<sup>17</sup> (which had the same wording as above), commentators and arbitration tribunals have considered the phrase “*any interim or conservatory measure*” to be broad enough to include powers to order a party to give security for the costs of the other party.<sup>18</sup>

**4.8 International Centre for Settlement of Investment Disputes (ICSID) Convention, Regulations and Rules (2006)**

Article 47 of the ICSID Convention provides that “*Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*”

ICSID Arbitration Rule 39 (1) provides that “*At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*”

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<sup>17</sup> See Extract from Procedural Order in ICC Case in Geneva (*supra* fn. 6), p.66; Noah Rubins (*supra* fn. 7): - “drafters of the new Rules were careful to avoid explicitly naming security for costs among the provisional measures contemplated, “*because they did not wish to encourage the proliferation of such applications, which, apart from being rare, are generally disfavored in ICC arbitrations.*””.

<sup>18</sup> David Altaras, ‘Security for Costs’ (2003) 69(2) Arbitration 2; Procedural Order No. 3 of 4 July 2008 in an ICC Arbitration with its seat in Berne, Switzerland between X. S.A.R.L., Lebanon (Claimant), and Y. AG, Germany (Respondent), 28 ASA Bulletin 1/2010, p. 39 (citing Derains/Schwartz, A Guide to the ICC Rules of Arbitration, 2nd ed., The Hague, p. 297).

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In *RSM Production Corporation v Saint Lucia*,<sup>19</sup> the Tribunal said that although security for Costs is not explicitly provided in ICSID Article 47 or Rule 39,<sup>20</sup> it was notable that a large number of ICSID tribunals have ruled that a measure requesting the lodging of security for costs does, generally, not fall outside an ICSID tribunal's power provided exceptional circumstances exist.<sup>21</sup> The Tribunal agreed that provisions in Article 47 and Rule 39 are phrased broadly and encompass "*any provisional measures*" the Tribunal, after carefully balancing the Parties' interests deems appropriate "*to preserve the respective right of either party*" under the given circumstances.<sup>22</sup> Noting that future or conditional rights such as the potential claim for cost reimbursement qualify as "rights to be preserved", the Tribunal said that the hypothetical element of the right at issue is one of the inherent characteristics of the regime of provisional measures and therefore, the (conditional) right to reimbursement of legal costs qualifies as a right to be protected within the meaning of Article 47 of ICSID Convention and ICSID Arbitration Rule 39 (1).<sup>23</sup>

Once a tribunal establishes it has jurisdiction to hear the request for security for costs, it should then consider whether it has power to order security for costs, taking into account any requirements and/or limitations expressly stipulated in the arbitration agreement, including any arbitration rules and the applicable national law.<sup>24</sup>

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<sup>19</sup> Decision on Saint Lucia's Request for Security for Costs, ICSID Case No. ARB/12/10 (13 August 2014).

<sup>20</sup> *Ibid*, at para 51.

<sup>21</sup> *Ibid*, para 52. At footnote 33 of the Decision, the ICSID tribunals that have ruled that security for costs requests fall within their powers is given.

<sup>22</sup> *Ibid*, para 54.

<sup>23</sup> *Ibid*, paras 72/3.

<sup>24</sup> CIArb Guidelines (*supra* fn. 4).



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A question that relates to both jurisdiction and security for costs would be, whether the arbitral tribunal has power to deal with both issues, if the respondent raises both concurrently. An Arbitration Tribunal with its seat in Switzerland observed that it “is widely recognized that an arbitral tribunal may award costs even if it ultimately determines that it has no jurisdiction over the underlying dispute.” The Tribunal then proceeded to decide it had authority to deal with security for costs application although its jurisdiction to hear the merits of the dispute had been questioned by respondents.<sup>25</sup>

## **5.0 Legal requirements for ordering security for costs**

Legal requirements for ordering security for costs are the requirements that must be met by the party making the request. Therefore, an arbitral tribunal dealing with the application requires the applicant to; (i) put forward its case with reasonable degree of certainty and show that failure to secure the order would deprive it the rights to recover costs in the event the dispute is decided in its favour,<sup>26</sup> and (ii) show there is an immediate danger to its entitlements or rights to a cost claim, and with a reasonable degree of certainty, show that it would suffer irreparable harm if the order for security for costs were not granted immediately.<sup>27</sup>

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<sup>25</sup> Order No. 1 of 19 December 2008 of an Arbitral Tribunal acting under the Swiss Rules of International Arbitration in a matter between Claimants 1-2 and Respondents 1-16, 28 ASA Bulletin 1/2010, p. 53 (citing Julian D.M. Lew et al., *Comparative International Commercial Arbitration* 653 (2003)).

<sup>26</sup> See Procedural Order No. 3 of 4 July 2008 (*supra* fn. 18), p.40; Decision on Saint Lucia’s Request for Security for Costs (*supra* fn. 19), para 58(1).

<sup>27</sup> Bernhard Berger, *Security for Costs: Trends and Developments in Swiss Arbitral Case Law*, 28 ASA Bulletin 1/2010, p.9/10; Decision on Saint Lucia’s Request for Security for Costs (*supra* fn. 19), para 58(2).

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## 6.0 No prejudgment of the merits of the dispute

It is well established that the merits of a dispute cannot be established until the facts of the case and the law are ascertained.<sup>28</sup> Applications for security for costs, as already stated elsewhere, is a procedural matter that is made at early stages of the proceedings before any award has been made. Therefore, the tribunal should not allow a party making an application for security for costs based on allegations on the outcome of the case, as that would amount to prejudgment of the merits of the dispute, for example, making an allegation that the claimant's case is without merits, and will lead to unnecessary costs and expenses.

When considering a request for security for costs, what the tribunal should have regard to is the claimant's and the respondent's prospects of success without prejudging the outcome of the dispute, whether in the jurisdictional phase or in the merits phase.<sup>29</sup> A Dutch Tribunal succinctly made this point when it stated that "[a]t this preliminary stage of the proceedings, the Tribunal is neither required nor prepared to make detailed findings on the numerous factual issues that separate the parties. The Tribunal's task is instead more limited:... to identify the broad areas in which [the moving party] has, or has not, made out

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<sup>28</sup> See *Vinava Shipping Co. Ltd v. Finelvet AG ("The Chrysalis")* [1983] 1 Lloyd's Rep. 503, 507; Procedural Order No. 2, *Emilio Agustín Maffezini v Kingdom of Spain* ICSID Case No. ARB/97/7 (28 Oct. 1999), para 20.

<sup>29</sup> Order No. 1 of 19 December 2008 (*supra* fn. 25), p.54; CI Arb Guidelines (*supra* fn. 4), p. 6: - At footnote 15, the Guidelines refers to ICC Case 6632 (unpublished) where both parties to an arbitration agreement applied for an order for security for costs and the tribunal declined the application, stating: "The arbitral tribunal considers that, in the present stage of its information, it cannot, without pre-judging the issues relating to the merits of the case, determine whether the contract was validly terminated or not and whether the property was legally or illegally seized by the respondent."

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a *prima facie* claim for relief.”<sup>30</sup> Likewise, Julian Lew explicitly says that in dealing with a request for an interim measure, an arbitral tribunal must refrain from pre-judging the merits of the case and it will generally refuse to grant such a measure, where the request essentially covers what it is asked to resolve in the substantive arbitration.<sup>31</sup>

## **7.0 Balancing exercise by a Tribunal assessing security for costs application**

A tribunal dealing with an application for security for costs in international arbitrations must weigh the injustice of an impecunious claimant being prevented from pursuing its claim in arbitration by an order for security for costs, against the injustice to the respondent in the event no security for costs is ordered, and after the conclusion of the proceedings, the respondent succeeds and is unable to recover the costs incurred in defending the claim.<sup>32</sup>

Without going into the merits of the dispute, the factors an arbitral tribunal would consider in the balancing exercise include whether the claim is genuine and has reasonable prospect of succeeding, for example, if the claim relates to compensations for unilateral acts or omissions of the respondent, the tribunal

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<sup>30</sup> Interim Award in NAI Case No. 1694 (1996), 23 Y.B. COM. ARB. 97 (1998), at 105. (cited in Noah Rubins (*supra* fn. 7) and CIArb Guidelines (*supra* fn. 4) at fn. 17).

<sup>31</sup> Julian D.M. Lew, Commentary on Interim and Conservatory Measures in ICC Arbitration Cases, ICC International Court of Arbitration Bulletin Vol. 11 No. 1 (2000), at para 30.

<sup>32</sup> International Council for Commercial Arbitration (ICCA) – Queen Mary University London (QMUL) Task Force on Third Party Funding in International Arbitration, Subcommittee on Security for costs and costs, Draft Report (Nov. 2015) p. 12. Available at:[http://www.arbitration-icca.org/media/6/09700416080661/tpf\\_taskforce\\_security\\_for\\_costs\\_and\\_costs\\_draft\\_report\\_november\\_2015.pdf](http://www.arbitration-icca.org/media/6/09700416080661/tpf_taskforce_security_for_costs_and_costs_draft_report_november_2015.pdf). [Accessed on 29 August 2017]; Procedural Order No. 3 of 4 July 2008 (*supra* fn. 18), p. 41.

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would check whether there is any form of admission by respondent the claimant may be owed money in case statements, correspondence, open offers, sums involved etc.

## 8.0 Criteria for granting security for costs

National laws and international arbitration institutions Rules do not have stipulations of the circumstances upon which arbitral tribunals may grant requests for security for costs, and the existing guidelines have been developed through case laws, scholarly writings, commentaries and international best practice.<sup>33</sup>

The grant or refusal of an order for security for costs in international arbitrations must depend upon all the circumstances of each case.<sup>34</sup> However, there is consensus from arbitral tribunals and commentators that an order for security should be granted only under “exceptional circumstances”.<sup>35</sup> In international commercial arbitrations, exceptional circumstances has been described as where there is “a clear and present danger that a future cost award would not be enforceable, e.g. because of a party’s insolvency as proven by the applicant.”<sup>36</sup> In investment

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<sup>33</sup> See Procedural Order No. 3 of 4 July 2008 (*supra* fn. 18), p.40; Order No. 1 of 19 December 2008 (*supra* fn. 25), p. 54; CIArb Guideline (*supra* fn. 4).

<sup>34</sup> *Bank Mellat v. Helliniki Techniki* [1984] QB 291, 303.

<sup>35</sup> See Order No. 1 of 19 December 2008 (*supra* fn. 25), p.53 for authorities under Swiss Rules and PILS; CIArb Guidelines (*supra* fn. 4): - the authors observe that in relation to tribunals operating under ICC Rules, they “appear to apply a rather restrictive approach”; Decision on Saint Lucia’s Request for Security for Costs (*supra* fn. 19), p. 18 and fn. 53 for authorities from ICSID tribunals; Nadia Darwazeh & Adrien Leleu, Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding. (2016) 33 J. Int. Arb. 2, at p.140.

<sup>36</sup> Extract from Procedural Order no. 4 in ICC Case in Geneva (April 2009) (*supra* fn. 6), at p. 63.

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arbitrations, the threshold for exceptional circumstance is higher than in commercial cases, and as stated by one ICSID Arbitration Tribunal; “*the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced*”,<sup>37</sup> and that may cause an irreparable harm if the measure is not granted.<sup>38</sup>

Parties making security for costs applications often encounter challenges due to the limitations imposed by these descriptions but in some cases, exceptional circumstances have been established and requests granted with the following stipulations having been developed as the guiding factors.

### **8.1 *Insolvency of the claimant.***

In international commercial arbitration, a mere allegation that the claimant cannot satisfy an adverse cost award because it is insolvent or almost insolvent is not sufficient to warrant granting a request for security for costs.<sup>39</sup> Likewise, opening of bankruptcy proceedings would also not be sufficient grounds as long as the estate of the bankrupt party has enough assets that can finance the arbitral proceedings and to honour possible future costs awards.<sup>40</sup> Reduction in the assets of an arbitral claimant than at the time of concluding the arbitration agreement is also an insufficient ground for granting security for costs especially

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<sup>37</sup> Decision on El Salvador’s Application for Security for Costs (*supra* fn. 10), para 45.

<sup>38</sup> Procedural Order No. 10 under UNCITRAL rules (2010) (*supra* fn. 11), para 68; Decision on Preliminary Issues, *Libananco Holdings Co. Limited v Republic of Turkey* ICSID Case NO. ARB/06/8 (23 June 2008), at para 57.

<sup>39</sup> Decision of Arbitral Tribunal, Geneva Chamber of Commerce and Industry (CCI) (25 September 1997), 19 ASA Bulletin 745 (2001): - “In the particular circumstances of this case, the shareholders of A have decided to go into liquidation. In the view of the Tribunal, it is a commercial risk that has to be borne by Defendant. It has neither been alleged nor proved that this decision was made in circumstances amounting to bad faith”.

<sup>40</sup> Procedural Order No. 3 of 4 July 2008 (*supra* fn. 18), p. 41/42.

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if there is no evidence the reduction was deliberately carried out in anticipation of arbitration.<sup>41</sup> A respondent would also be unsuccessful in getting security for costs orders if at the time of concluding an arbitration agreement the claimant was already insolvent, or was a mere shell, or was, and still is, a resident of a country that is not a signatory of the New York Convention. This is premised on the basis that by entering into an agreement with such a party, the respondent party assumed the risk of not being able to collect an award eventually rendered in its favour.<sup>42</sup>

An exceptional circumstance that could result in security for costs being granted in international commercial arbitration would be if there is a fundamental change in the circumstances of the claimant between the conclusion of the arbitration agreement and the arbitral proceedings,<sup>43</sup> and that change would make it difficult to enforce a future cost award. Two examples of such circumstances have been cited in arbitral cases, first, manifest insolvency at the time of initiating the arbitral proceedings despite having been in good standing

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<sup>41</sup> Order No. 1 of 19 December 2008 (*supra* fn. 25), p.54.

<sup>42</sup> Pierre A. Karrer *et al*, (*supra* fn. 8), p. 346; See for example ICC Case No. 7047, Albert Jan van den Berg (ed), Yearbook Commercial Arbitration, vol. XIX (Kluwer Law International 1994): - the respondents who were from Yugoslavia made an application for security for costs on the basis that the claimant was incorporated in Panama as a shell company with no assets. The respondents also argued that there was “no bilateral convention of securing costs of arbitral procedures between Panama and Yugoslavia” and as a result, they were at risk of being unable to recover their costs. The tribunal rejected the application for security for costs stating that the reasons cited by the respondents in support of their application were already known to them before signing the contract. (cited in CI Arb Guidelines (*supra* fn. 4) at footnote 19 and Procedural Order of January 2006 in ICC Case 12732 (Extract), Special Supplement 2014: Procedural Decisions in ICC Arbitration).

<sup>43</sup> Pierre A. Karrer *et al*, (*supra* fn. 8), p. 350-352.

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at the commencement of the contract,<sup>44</sup> and second, if a claimant went through bankruptcy proceedings, which were suspended due to lack of assets, in which case, the respondent's interest in security for costs should prevail over the claimant's interest in unimpeded access to arbitral justice.<sup>45</sup> However, the request for security for costs could be unsuccessful if the claimant can prove that its financial predicaments are due to deliberate acts or omissions of the respondent<sup>46</sup> and *prima facie* this appears to be true.<sup>47</sup>

In investment arbitrations, "lack of assets, the impossibility to show available economic resources, or the existence of economic risk or difficulties that affect the finances of a company are not *per se* reasons or justifications sufficient to warrant security for costs."<sup>48</sup> In ICSID arbitrations, this principle is based on two propositions; first, it is not unusual in ICSID proceedings to find a Claimant that is a corporate investment vehicle, with few assets, that was created or adapted specially for the purpose of the investments, and second, it is not a requirement of the ICSID dispute resolution system that an investor's claim should only be heard upon establishment of its sufficient financial standing capable of paying a possible costs award.<sup>49</sup>

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<sup>44</sup> Procedural Order No. 3 of 4 July 2008 (*supra* fn. 18), p. 40/41.

<sup>45</sup> Zurich Chamber of Commerce (ZCC) Arbitration Proceedings No. 415, Fourth Order of 20 November 2001, published in ASA Bulletin 2002, 467 (471).

<sup>46</sup> Procedural Order No. 3 of 4 July 2008 (*supra* fn. 18), p. 41.

<sup>47</sup> Pierre A. Karrer *et al.*, (*supra* fn. 8), p. 348.

<sup>48</sup> Procedural Order No. 10 under UNCITRAL rules (2010) (*supra* fn. 11), para 63.

<sup>49</sup> Decision on Respondent's application for Security for Costs, *Rachel S. Grynberg et. al v Government of Grenada* ICSID Case No. ARB/10/6 (14 October 2010), para 5.19.

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**8.2 Is the claimant being funded by a third party who may not be subject to a cost order?**

International arbitrations especially those that relate to investments can be expensive,<sup>50</sup> and a recent development in that area of dispute resolution is the involvement of third party funders. Third party funders have no interest in the substantive issues in dispute and their intention is to invest in the proceedings and then make a profit upon settlement of the dispute.<sup>51</sup> In rare circumstances, there may be exceptional cases where third party funding may not be for profits (and may be qualified as donations), for example, in *Philip Morris Brands Sàrl et al v. Oriental Republic of Uruguay* ICSID Case No. ARB/10/7, the Bloomberg Foundation and its 'Campaign for Tobacco-Free Kids' programme decided to assist the State of Uruguay in the arbitration proceedings that concerned certain measures adopted by the Government in relation to the packaging of tobacco products.<sup>52</sup> As a result of this funding alternative, access to justice is made possible or is increased for a party to an arbitration agreement with a dispute that could result in proceedings that would otherwise be too expensive.<sup>53</sup>

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<sup>50</sup> See for example: Jeffery P. Commission, How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years, Kluwer Arbitration Blog (Feb. 2016): - "The average claimant costs in the 55 ICSID arbitrations concluded between FY2011 and FY2015 (where claimant costs data was available) was US\$5,619,261.74... In 56 ICSID arbitrations concluded between FY2011 and FY2015 where respondent costs data was available, average respondent costs were US\$4,954,461.27." Available at:

<http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/>. [Accessed on 01 March 2018].

<sup>51</sup> De Brabandere, Eric and Lepeltak, Julia Veronika, Third Party Funding in International Investment Arbitration (June 5, 2012). Grotius Centre Working Paper No. 2012/1, <http://dx.doi.org/10.2139/ssrn.2078358>. [Accessed on 20 Sept. 2017].

<sup>52</sup> *Ibid.*

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



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Defining third party funding is said to be difficult because economic interests in a party or a dispute can come in many shapes and sizes, funders may create “special purpose vehicles” to facilitate funding agreements, conditions for recovery may vary significantly, etc. Consequently, definition of third party funding or third-party funders may vary depending on the purpose for which the definitions are used.<sup>54</sup> A definition the author finds to be consistent with the objective of this paper is included in the Report of the International Council for Commercial Arbitration-Queen Mary Task Force on Third-Party Funding in International Arbitration that provides as follows;

“the term “third-party funder” may be understood generally to refer to an entity that has no interest in the underlying merits of a dispute but provides funding or resources for the purpose of financing the legal costs and expenses of an international arbitration.”<sup>55</sup>

The existence of the third-party funder alone does not evidence claimant’s insolvency or the impossibility to pay costs of arbitration and it’s possible for a claimant to obtain financing for other reasons.<sup>56</sup> However, it is possible a

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<sup>54</sup> William Park & Catherine A. Rogers, *Third-Party Funding in International Arbitration: The ICCA Queen-Mary Task Force*, 2015 Austrian Yearbook on International Arbitration 113 (2015). Available at: [http://scholarship.law.bu.edu/faculty\\_scholarship/16](http://scholarship.law.bu.edu/faculty_scholarship/16). [Accessed on 22 Sept. 2017].

<sup>55</sup> International Council for Commercial Arbitration, Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, The ICCA Reports no. 4 (April 2018), at fn.1. Available at: [http://www.arbitration-icca.org/media/10/40280243154551/icca\\_reports\\_4\\_tpf\\_final\\_for\\_print\\_5\\_april.pdf](http://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf). [Accessed on 23 April 2018].

<sup>56</sup> Procedural Order No. 10 under UNCITRAL rules (2010) (*supra* fn. 11), para 76; See De Brabandere, Eric *et al* (*supra* fn. 51): - “investors may be unwilling to use their own resources to finance the lengthy and costly proceedings, instead preferring to invest in new opportunities, ...[and] the inherent uncertainty in effectively obtaining the

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claimant may resort to third party funding because it may not be in a position to finance the arbitral proceedings. In the event this is the case, one of the issues that arise from this funding alternative is the possibility of the respondent questioning whether the claimant would be in a position to honour an arbitral award with an order for costs against it. Consequently, the respondent may want to address the risks of not recovering its costs in the event of the claimant's failure in arbitration by applying for security for costs at the commencement of the proceedings.<sup>57</sup>

The willingness of a third-party funder to finance an impecunious claimant but may not be willing to fund any adverse cost awards against it has been a subject of scholarly writings and commentaries, and there is consensus from scholars, arbitrators and commentators that it is as a compelling ground for granting security for costs in international arbitrations.<sup>58</sup> A twist from such a situation is

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requested compensation through the proceedings may warrant a transfer of the risk of the proceedings to a third party".

<sup>57</sup> Miriam K Harwood *et al*, Third-Party Funding: Security for costs and other key issues: In *The Investment Treaty Arbitration Review*, (1st edition, April 2016), Edited by Barton Legum.

<sup>58</sup> See Gary Born, *International Commercial Arbitration*, Wolters Kluwers (2<sup>nd</sup> Edition, 2014), p. 2496, "Where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong *prima facie* case for security for costs exists"; J.E. Kalicki; "Security for Costs in International Arbitration", *Transnational Dispute Management*, Vol. 3, No. 5 (2006), "A twist on this scenario is where the claimant's arbitration fees and expenses are being covered by a related entity or individual who stands to gain if the claimant wins, but would not be liable to meet any award of costs that might be made against the claimant if it lost. This scenario has been called "arbitral hit and run", and described by arbitrators and commentators alike as particularly compelling grounds for security for costs"; Noah Rubins (*supra* fn. 7), "The danger of abuse by [claimants] becomes greater when the complaining party is an empty shell, either by accident or design, its arbitral ... costs covered by an unrelated but wealthy third party. This is particularly true in arbitral

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once it becomes certain the third party funding agreement includes a provision that the funder would not undertake to finance any adverse costs related to the arbitration and the respondent applies for security for costs, the burden of proof of impecuniosity shifts from the respondent to the claimant.<sup>59</sup>

In international commercial arbitration, an ICC Arbitration Tribunal with its seat in Berne, Switzerland granted a security for costs application against a claimant that was in good standing at the time of concluding the arbitration agreement, but at the time of commencing the proceedings, it had continuous business inactivity, with evidence to show a manifest over-indebtedness and had practically no liquid cash. The Tribunal justified its decision to grant security for costs and in part reasoned by saying that “if a party has become manifestly insolvent and therefore is likely relying on funds from third parties in order to finance its own costs of the arbitration, the right to have access to arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party’s reasonable costs to be

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proceedings, where ...outside parties cannot be impleaded if they have signed no arbitration agreement with the [respondent]. With no way to “pierce the veil” between shell companies and their benefactors, claimants are perversely incentivized to deplete or hide assets and find temporary outside funding to avoid costs awards afterwards.”

<sup>59</sup> *Luis Garcia Armas v. Venezuela and Manuel Garcia Armas et al. v. Venezuela* (ICSID AF Case No. ARB(AF)/16/1) Procedural Order (7 July 2017) administered by ICSID’s Additional Facility Rules; PCA Case No. 2016-08, administered by the Permanent Court of Arbitration, (Both with the seat in The Hague, The Netherlands), (cited in Report of the ICCA-Queen Mary Task Force on Third-Party Funding, (*supra* fn. 55), at p.179-180). In these parallel cases that related to the same investment dispute, the third-party funding agreement included a provision that the funder did not undertake to finance any adverse costs related to the arbitration. Following this disclosure, the respondent applied for security for costs and before making a decision, the tribunal asked the claimants to provide reliable evidence of their solvency, including asset valuations and jurisdictions where those assets were located, in order to assess the enforceability of any future adverse costs order.

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incurred. If those third parties are not willing to provide such security, it would be finally up to the insolvent party's creditors to decide how to proceed with the claim in dispute".<sup>60</sup>

In another ICC case where an application for security for costs was granted, a third-party funder agreement with claimant had been disclosed and the tribunal found fundamental change of circumstances in the claimant that justified granting security for costs because the terms of the agreement did not cover adverse costs and the third party funder was empowered to terminate the agreement at any time, entirely at its discretion.<sup>61</sup> As one commentator observed, the exclusion in the third-party funding agreement of the payment of arbitration costs in case of failure places the respondent against a claimant who has the means to move forward his arbitration without taking any risk regarding its outcome because of his impecuniosity, and this undesirable situation justifies granting security for costs.<sup>62</sup>

A Tribunal in another ICC Arbitration noted that in the case of *Ken-Ren Chemicals and Fertilizers Ltd (In Liquidation in Kenya)* [1994] 2 All E.R. 449, [1994] 2 WLR 631, exceptional circumstances were found to have been present because at the time of the arbitration, the claimant, *Ken-Ren*, was insolvent. Its share of the advance on costs, which had to be made to the ICC so that the arbitration could proceed, was paid by a majority shareholder, which stood to gain if *Ken-*

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<sup>60</sup> Procedural Order No. 3 of 4 July 2008 (*supra* fn. 18), p. 42.

<sup>61</sup> *X v. Y and Z*, ICC Case, Procedural Order dated 3 August 2012. (cited in ICCA – QMUL Subcommittee on Security for costs and costs, Draft Report (*supra* fn. 32), p. 14; and in Miriam K Harwood *et al*, (*supra* fn. 57), p. 105/106).

<sup>62</sup> Philippe Pinsolle, 'Third Party Funding and Security for Costs', 2 *Cahiers de L'Arbitrage* 399 (2013). (cited in Miriam K Harwood *et al*, (*supra* fn. 57), at fn. 30).

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*Ren* won the arbitration but would not have been liable to meet any award of costs which would have been made against *Ken-Ren* if it lost.<sup>63</sup>

In investment arbitrations, the existence of a funder is an element to take into account, but mere recourse to third-party funding by a claimant that has become impecunious cannot readily be characterized as carrying an element of abuse, and cannot of itself be taken as a reason for tribunals to award security for costs.<sup>64</sup> A Permanent Court of Arbitration Tribunal with its seat in the Netherlands in part reasoned its decision in rejecting an application for security for costs and said that “[i]f the existence of these third-parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims.”<sup>65</sup>

In *RSM Production Corporation v Saint Lucia* case, the only ICSID arbitration case where a request for security for costs was granted, the Tribunal weighted up the Respondent’s interest with Claimant’s right to access justice and came to the conclusion that it would be unjustified to burden Respondent with the risk emanating from the uncertainty as to whether or not the unknown third party

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<sup>63</sup> Procedural Order of December 2007 in ICC Case 14993 (Extract), Special Supplement 2014: Procedural Decisions in ICC Arbitration, at footnote 3 (citing Redfern/Hunter, Law and Practice of International Commercial Arbitration, 357).

<sup>64</sup> ICCA – QMUL Subcommittee on Security for costs and costs, Draft Report (*supra* fn. 32), p. 4; Procedural Order No. 3 – Decision on Requests for Provisional Measures, *EuroGas Inc. & Belmont Resources Inc. v. Slovak Republic* ICSID Case No. ARB/14/14 (23 June 2015), para 123 - “financial difficulties and third party-funding...do not necessarily constitute *per se* exceptional circumstances justifying that the respondent be granted an order of security for costs.”

<sup>65</sup> Procedural Order No. 10 under UNCITRAL rules (2010) (*supra* fn. 11), para 77.

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would be willing to comply with a potential costs award in the Respondent's favour.<sup>66</sup> The Tribunal distinguished the *RSM Production Corporation* case with other ICSID arbitrations in which the request for security for costs was in every case denied, and observed the circumstances brought forward in other proceedings occurred in this case cumulatively. Those circumstances were the proven history in other ICSID and non-ICSID proceedings where the Claimant did not comply with cost orders and awards due to its inability or unwillingness, including admission that it did not have sufficient financial resources and was funded by an unknown third party, which the Tribunal saw reason to believe, might not comply with a possible cost award rendered in favour of Respondent.<sup>67</sup> The Tribunal after carefully balancing the interest of the parties found the circumstances constituted "sufficient grounds and exceptional circumstances as required by ICSID jurisprudence for ordering Claimant to provide security for costs".<sup>68</sup>

### **8.3 *Bad faith manoeuvres***

If a claimant takes deliberate steps with the objective of ensuring that the other party, in case of a final award in its favour, would be deprived of recovering the costs of the arbitration, this can be construed as an act of bad faith, and security for costs can be granted. The following situations have been cited as manoeuvres considered to be contrary to good faith in international arbitration cases;

- 1) Where the claimant, an offshore company acquired a claim in dispute by way of assignment with no apparent compensation and without showing cause for such assignment, and with the assignment dated and signed two

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<sup>66</sup> Decision on Saint Lucia's Request for Security for Costs (*supra* fn. 19), para 83.

<sup>67</sup> *Ibid*, para 86.

<sup>68</sup> *Ibid*, para 87.

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weeks before filing a request for arbitration, the arbitral tribunal said that it “cannot but assume that at least one of the reasons for such assignment was to prevent Respondents from recovering their cost claim in case the dispute should be decided against Claimant,” and granted security for costs request.<sup>69</sup>

In a not very dissimilar situation, where a Claimant which at some stage during the proceedings was in the process of dissolution but later undertook a corporate “reinstatement” using a successor in interest with the sole purpose of prosecuting certain outstanding claims, including against the Respondent, an ICC Arbitration Tribunal with its seat in London, England found that (i) Respondent was involved in an arbitration against a party other than the party it initially agreed to arbitrate disputes with, and (ii) the existence and status of the Claimant, against whom any cost order would have to be enforced, was an issue, and under such circumstances the Arbitrator was persuaded that the provision of some form of security for costs was appropriate.<sup>70</sup>

- 2) When “a party takes certain steps in order to divest itself from its assets so as to be just an empty shell in case it loses the arbitration.” Another instance referred by the Tribunal that made this pronouncement is when a company that is just a shell, for example, *Ken-Ren Chemicals and Fertilizers Ltd (In Liquidation in Kenya)* (See [1994] 2 All E.R. 449, [1994] 2 WLR 631), launches

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<sup>69</sup> Order No. 6 of 25 July 2003 in the dispute between X. SA, Panama v A., B., C. & D (Original in German), 28 ASA Bulletin 1/2010, p.28-37.

<sup>70</sup> Procedural Order of November 2006 in ICC Case 14020 (Extract), Special Supplement 2014: Procedural Decisions in ICC Arbitration.

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an arbitration and if it won, it would cash the award, but pay nothing if it lost.<sup>71</sup>

- 3) In situations where the claimant moves its residence to a State where the execution of arbitral awards is not warranted, or when the suspicion cannot be averted that the claimant only moved its residence in order to extricate itself from liability for a future award of cost if it lost.<sup>72</sup>

#### **8.4 Security for costs where there is a counterclaim**

In *Hitachi Shipbuilding & Engineering Co Ltd v. Viafiel Compania Naviera SA*,<sup>73</sup> Donaldson LJ said that the existence of a counterclaim gave jurisdiction to order security for costs against the respondent to an arbitration.<sup>74</sup> Ackner LJ formulated the overall question as, "are the respondents in the position of the [claimant]?"<sup>75</sup>

It is necessary, when considering an application for security for costs on a counterclaim, to decide whether the counterclaim is a separate claim, or merely the substantive defence to the claim brought by the claimant.<sup>76</sup> With respect to a separate claim, an order can be granted giving security for the claimants' costs in respect of counterclaim if an impecunious respondent makes a counterclaim which is more than a mere formulation of its defence,<sup>77</sup> or the counterclaim

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<sup>71</sup> See Decision of Arbitral Tribunal, Geneva CCI (*supra* fn. 39).

<sup>72</sup> Procedural Order of December 2007 in ICC Case 14993 (*supra* fn. 63).

<sup>73</sup> [1981] 2 Lloyd's Rep 498.

<sup>74</sup> *Ibid*, at 508.

<sup>75</sup> *Ibid*, at 510.

<sup>76</sup> *Newman (t/a "Newman Associates) v Wenden Properties Ltd* [2007] EWHC 336 (TCC), para 10.

<sup>77</sup> *CT Bowring v Corsi* [1995] 1 BCLC 148 at 153: CI Arb Guidelines (*supra* fn. 4), p. 5.



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involve additional costs beyond that of the claim.<sup>78</sup> On the other hand, as Michael O'Reilly puts it, if "the counterclaim is of significant magnitude and the facts which found the claim are substantially the same as those which found the counterclaim, an order for security against the claimant is inappropriate if the respondent is intent on pursuing the counterclaim."<sup>79</sup>

Where a counterclaim is a mere substantive defence relied on with the objective of reducing or extinguishing the claim by the claimant, an order for security for costs should not be granted,<sup>80</sup> because such an order might stifle that defence.<sup>81</sup> Such an approach is consistent with the general rule that security may not be ordered against a respondent.<sup>82</sup>

## **9.0 Consequences of a failure to comply with an order for security for costs**

An arbitral tribunal can normally enforce its own procedural order for security for costs without requiring the assistance of any national court with the standard sanction for a party's failure to comply with an order for security for costs being termination of the arbitral proceedings<sup>83</sup> with prejudice. The consequence of this

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<sup>78</sup> *Hitachi Shipbuilding v. Viafiel* (*supra* fn. 73), at p. 508; Procedural Order of December 2007 in ICC Case 14661 (Extract), Special Supplement 2014: Procedural Decisions in ICC Arbitration.

<sup>79</sup> Michael O'Reilly, *Orders for Security for Costs: From the Arbitrator's Perspective*, (1995) 61(4) *Arbitration*, p.250; Principle adopted by Tribunal in ICC Case in Geneva (April 2009) (*supra* fn. 6), at p.70, when refusing a request for security for costs by a counterclaiming respondent.

<sup>80</sup> *Hutchison Telephone (UK) Ltd v. Ultimate Response Ltd* [1993] BCLC 307, 316.

<sup>81</sup> CIArb Guidelines (*supra* fn. 4), p. 5.

<sup>82</sup> *Hutchison v Ultimate Response* (*supra* fn. 80).

<sup>83</sup> See Extract from Procedural Order no. 4 in ICC Case in Geneva (April 2009) (*supra* fn. 6), p. 67; English Arbitration Act 1996 Section 41(6): - "If a claimant fails to comply with

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form of termination is the decision would have *res judicata* effects. This may seem harsh, but the alternative would be unfair to the party requesting security for costs because dismissing the claim without prejudice would be permitting the claimant to proceed to a hearing on the merits, as though the tribunal's security for costs decision did not exist.<sup>84</sup> An order for payment of damages or a negative inference of the non-compliance at the end of the arbitral proceedings are not practically suited to preserve respondent's asserted right to claim reimbursement of costs.<sup>85</sup>

With no award on the merits of the dispute issued by the time a respondent makes a request for security for costs, the claimants' failure to comply with the tribunal's orders on the security is deemed to be a failure to comply with their basic obligations and to orderly prosecute their claims. The claimants are therefore perceived as the unsuccessful party of the proceedings. Consequently, in making a decision on costs incurred as a result of the claimants' decision to commence the arbitration and their subsequent refusal to pursue their claims in an efficient manner in accordance with the applicable arbitration rules, the arbitral tribunal exercises its discretion depending on the circumstances of the case, and in accordance with the rules governing the proceedings and the terms

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a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim".

<sup>84</sup> See Pierre A. Karrer *et al.*, (*supra* fn. 8), p. 351/2; Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings, *RSM Production Corporation v. Saint Lucia* ICSID Case No. ARB/12/10 (8 April 2015), para 47; DAC Report 1996, (*supra* fn. 15), Chapter 7 para 198: - It is stated that if an arbitrator stayed proceedings, the arbitration would come to a halt without there necessarily being an award which could be challenged (e.g. if a party seeks to continue the proceedings). The disadvantage of this course is if the proceedings are dormant but alive, years later they could be revived by the provision of security.

<sup>85</sup> Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings (*supra* fn. 84), para 53.

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of the arbitration agreement, may order the claimant to pay the cost of the proceedings or part of it.<sup>86</sup>

#### **10.00 When an order for security for costs might result in oppression**

Where an order for security for costs against the claimant might result in oppression, in that the claimant would be forced to abandon a claim which has a reasonable prospect of success, the tribunal is entitled to refuse to make that order, notwithstanding that the claimant, if unsuccessful, would be unable to pay the respondent's costs.<sup>87</sup> In *Pacific Maritime (Asia) Ltd. v Holystone Overseas Ltd.*,<sup>88</sup> in an application for an order to increase the amount of security for costs that had already been granted, the Judge put this point as follows;

“In the somewhat unusual circumstances of this case I do not propose to order the provision of further security, essentially because I take the view that there is a markedly greater risk of injustice if I require it than if I refuse it. [Claimant] has a well arguable claim to a sizeable amount... [and] will probably be unable to put up anything like the amount sought by way of security so that the likely effect of requiring further security is to stifle the claim”.<sup>89</sup>

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<sup>86</sup> Order for the Termination of the Proceedings and Award on Costs by a NAFTA Tribunal acting under the UNCITRAL Arbitration Rules, *Melvin J. Howard v The Government of Canada* PCA Case No. 2009-21, (02 August 2010), paras 75 – 82.

<sup>87</sup> *Aquilla Design (GRB) Products Ltd. -v- Cornhill Insurance plc* [1988] BCLC, 134 (Court of Appeal).

<sup>88</sup> [2007] EWHC 2319 (Comm), at para 74.

<sup>89</sup> Same principle applies in investment arbitrations - see Award, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* ICSID Case No. ARB/07/24 (18 June 2010), para 17: - The Tribunal ruled on the Respondent's request for provisional measures in Procedural Order No. 3 issued on June 24, 2009, upon ICSID's receipt of the Claimant's advance payment shortly before the Hearing, stating “that there was a serious risk that an order

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Before the tribunal refuses to order security on the grounds that it would unfairly stifle a valid claim, it must be satisfied that, in all circumstances, it is probable that the claim would be stifled,<sup>90</sup> and the claimant to show that, apart from the question of whether its own means are sufficient to meet an order for the security, there will be no prospect of funds being available and forthcoming from any outside source,<sup>91</sup> for example, from shareholders, stakeholders or associated companies.<sup>92</sup>

## **11.00 Conclusion**

In international arbitrations, an application for security for costs may be granted only in exceptional circumstances, with satisfying criteria being higher in investment arbitrations than in commercial cases. If an impecunious claimant's unconditional access to justice could result in the respondent not recovering its costs of arbitration in the event of a failure of the claim and costs are awarded to the winning party, the tribunal undertakes a balancing exercise of both situations and imposes a condition by granting the respondent a request for security for costs. The principle is equally applicable in the event a respondent submits a counterclaim, in which case it takes the position of a claimant with respect to counterclaim.

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for security for costs would stifle the Claimant's claims ..."; Decision on El Salvador's Application for Security for Costs (*supra* fn. 10), para 52: - The Tribunal had concerns that granting the Respondent's request of security for costs "might seriously affect the Applicant's right to seek annulment of the award".

<sup>90</sup> *Keary Developments v Tarmac Construction* [1995] 3 All ER 534, 540.

<sup>91</sup> *Kufaan Publishing Ltd. v Al-Warrack Bookshop Ltd.*, 1<sup>st</sup> March 2000, Court of Appeal (unreported).

<sup>92</sup> *Kazakhstan Kagazy Plc v Zhunus (Rev 1)* [2015] EWHC 996 (Comm), at para 226.

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The purpose of granting security for costs requests is to provide a form of protection to the respondent's rights of defence and ensure that if it successfully defends itself in the arbitration, it would recover its costs. If the arbitral tribunal is satisfied the claim has a reasonable chance of success and in the event of granting security for costs application, the claimant may not raise the security requested, the tribunal should exercise its discretion and refuse to grant security for costs notwithstanding the claimant's impecuniosity may not permit it to honour a cost award if the claim fails. This is premised on the proposition that the sanction for failing to raise security for costs is termination of the arbitration and an impecunious claimant with a well arguable claim should never be denied access to arbitral justice by permitting the respondent to use a security for costs application to stifle the claim and consequently the proceedings.

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## **Mediation as A Tool of Conflict Management in Kenya: Challenges and Opportunities**

*By: James Ndungu Njuguna\**

### **Abstract**

*Mediation is one of the Alternative Dispute Resolution mechanisms that have been practiced for a long time and among the most preferred modes of conflict management. This can be attributed to the fact that mediation can resolve various disputes of varying nature and the outcome is based on mutual consensus. In Kenya, mediation has become an effective method of resolving political, family, commercial and civil disputes, among others. It is deemed to be a suitable mechanism because of its distinct attributes like voluntariness, cost effectiveness, informality, less time consuming, focusing on the interest and not the rights, allowing for creative solutions and enhancing party autonomy.*

*However, despite having all these features, mediation faces a myriad of challenges which undermine its efficacy. Of major concern is the fact that mediation is non-binding. Further mediation can lead to endless proceedings where parties fail to agree. It is in light of the foregoing that this paper seeks to discuss the challenges facing mediation as a conflict management mechanism in Kenya and advocates for reforms so as to enhance the practice and outcome of the process.*

### **1. Introduction**

Mediation refers to a voluntary conflict resolution process in which a third party known as a mediator assists parties to a conflict to reach tangible and mutually acceptable agreements.<sup>1</sup> In mediation, the mediator does not make a decision on

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behalf of the parties but facilitates the process and assists the disputants to reach a consensus.

Mediation has been in practice for a long time and has been seen to be efficient because of the long lasting solutions parties agree on based on mutual consensus and without any coercion. Mediation has been heralded due to its ability to help parties to a conflict to restore, redefine and transform their interactions and attitudes towards each other with the ultimate goal of reconciliation and enhancing peaceful relationships.<sup>2</sup>

Notably, at the international level, Alternative Dispute Resolution (ADR) mechanisms are recognized as viable means of dispute management. The *Charter to the United Nations* is one such treaty that recognizes the important role of ADR mechanisms in management of interstate disputes and it provides that the parties to any dispute should first seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement and other peaceful means of their own choice.<sup>3</sup> They are seen as viable means of promoting peace in and among states.

With the promulgation of the Constitution of Kenya 2010, mediation as a form of ADR was given Constitutional recognition. The Constitution requires courts and tribunals while exercising judicial authority to be guided by a number of principles which include promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.<sup>4</sup> However, the traditional dispute resolution

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<sup>1</sup> Moore, C.W, *The mediation process: Practical strategies for resolving conflict*, (John Wiley & Sons, 2014), p. 1.

<sup>2</sup> *Ibid.*

<sup>3</sup> United Nations, *Charter of the United Nations*, 24<sup>th</sup> October 1945, Article 33.

<sup>4</sup> Constitution of Kenya 2010, Article 159 (2) (c), (Government Printer, Nairobi, 2010).

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mechanisms should not be used in a way that contravenes the Bill of Rights, is repugnant or results in outcomes that are repugnant to justice and morality, or is inconsistent with the Constitution or any written law.<sup>5</sup>

Mediation is meant to be a voluntary, informal, consensual, confidential, flexible, cost-effective, speedier and non-binding conflict management process. It can be said that mediation is an aspect of the general structure and process of negotiation, since it is considered as negotiation with the help of a third party called a mediator where the negotiators have hit a deadlock.<sup>6</sup> It owes its widespread application in the management of conflicts and disputes in the contemporary world to these attributes that have made it possible to resolve disputes of a varied nature which have resulted in potentially binding and long lasting settlements between disputants.<sup>7</sup>

## **2. Accessing Justice through Mediation in Kenya**

Justice is considered among the basic rights which everyone should access and it is a fundamentally important element of stability and Rule of Law.<sup>8</sup> Equal access to justice is a right based on human rights obligations and it is to be guaranteed for all including the people living in poverty. Access to justice means people are capable of claiming their rights or seek a remedy against exploitation.<sup>9</sup>

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<sup>5</sup> Ibid, Article 159 (3).

<sup>6</sup> Mwangiru, M., *Conflict in Africa; Theory, Processes and Institutions of Management*, (Centre for Conflict Research, Nairobi, 2006), pp. 115-116.

<sup>7</sup> Muigua, K., *“Resolving Conflicts Through Mediation in Kenya”*, (2<sup>nd</sup> Ed., Glenwood Publishers Ltd, 2017), p. 4.

<sup>8</sup> See generally, Muigua, K. & Kariuki, F., ‘ADR, Access to Justice and Development in Kenya,’ *Strathmore Law Journal*, Vol. 1, No. 1, June 2015.

<sup>9</sup> Muhanda, P., *“The Advocate: Access to Justice”*, The LSK Magazine | Volume 1, Issue 6 | March - June, 2016, p. 24.

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Access to justice can and should be enhanced by both access to the courts as well as through Alternative Dispute Resolution mechanisms or forums for reaching consensual outcomes outside the courts.<sup>10</sup> It is also generally accepted that popular notions of access to justice are focused on empowering individuals to exercise their legal rights in the civil justice system.<sup>11</sup>

The meaning of the word justice can vary between countries and cultures. However, the idea of justice is common to all and generally depicts notions of fairness, accountability and equity. Access to justice is a broad concept, encompassing people's effective access to the formal and informal systems, procedures, information and locations used in the administration of justice.<sup>12</sup>

People who feel wronged or mistreated in some way usually turn to justice systems including in relation to civil, administrative and criminal law for redress.<sup>13</sup>

The barriers can be encountered in relation to a country's normative framework or national laws, or be faced in terms of a country's institutional framework for justice, which includes law enforcement and court systems.<sup>14</sup> With regard to the latter, barriers and impediments are often complex, involving combined forms of inaccessibility as well as other forms of discrimination. The implications of such barriers are significant, as lack of access to justice can compound the

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<sup>10</sup> Aina, K., "Court Annexed Mediation: Successes, Challenges and Possibilities", Lessons from Africa Session (Nigeria) Available at <http://www.conflictdynamics.co.za/files/217/mediation--lessons-from-Nigeria--Mandela-Institute-Presentation.pdf> (Accessed on 20/05/2018).

<sup>11</sup> Ibid.

<sup>12</sup> United Nations, "Access to Justice for Persons with Disabilities: Toolkit on Disability for Africa", Module 8.

<sup>13</sup> Ibid.

<sup>14</sup> Haley, J., "Mediation and Access to Justice in Africa: Perspectives from Ghana", Harvard Negotiation Law Review, Vol. 21, 59, Fall 2015, page 59.



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disadvantages faced by different groups of persons in the society. Equally, justice delayed is justice denied, so timely access to justice is important.<sup>15</sup>

The right of access to justice in Kenya is constitutional and it gives the mandate to the State to ensure that this right is accessible to every person without due regard to procedural technicalities, and, if any fee is required, it should be reasonable and should not impede access to justice.<sup>16</sup>

The Constitution of Kenya also provides that every person has the right to institute court proceedings claiming that a right and fundamental freedom in the Bill of Rights has been denied, violated, infringed or is threatened.<sup>17</sup> There is the provision that every person is equal before the law and has the right to equal protection and equal benefit of the law.<sup>18</sup> In an effort to implement these provisions of access to justice, the State through Article 48 has implemented various measures to ensure that justice is brought closer to the people.

The State is in the process of promoting the use of Alternative Dispute Resolution mechanisms through various ways such as introduction of Court Annexed Mediation which is mediation under the supervision of the courts. This has led to reduction of court cases and quick dispensation of justice to the people of Kenya. Highlighting this point, the World Bank reports that mediation has reduced the time it takes to resolve a dispute in Kenya from 24 months to 66 days.<sup>19</sup> The practice of mediation has become effective because of its flexibility

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<sup>15</sup> Ibid.

<sup>16</sup> The Constitution of Kenya, 2010, op cit pg 4, Article 48.

<sup>17</sup> Ibid, Article 22 (1).

<sup>18</sup> Ibid, Article 27.

<sup>19</sup> The World Bank, 'Court Annexed Mediation Offers Alternative To Delayed Justice for Kenyans.' Available at,

<http://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans>

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and versatility in handling a variety of disputes. It would be necessary to point out that mediation can be used in conflict management as well as in dispute prevention. An example of this would be in facilitating the process of contract negotiation. Mediation can be used in many areas to resolve disputes. The areas include workplace disputes, commercial disputes, family disputes, public disputes that evolve around environmental or land-use, school conflicts, violence prevention among many other areas.<sup>20</sup>

One reason why disputants would choose mediation as a means of resolving their disputes is the fact that mediation increases the control which parties have in the resolution of disputes unlike in litigation. Parties appoint a mediator and decide on the rules and procedures to govern the process. This is unlike litigation where parties obtain a settlement but control resides with a judge. As a result, mediation is likely to produce a result that is mutually agreeable to the parties as they both participate and have control of the decision-making process. Further, the cost payable to a Mediator is incomparable to that one would pay an Advocate in litigation as the mediation process generally takes much less time than moving a case through the standard legal channels. In

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Accessed on 28/05/2018

<sup>20</sup> Nyaribo, J. and Ouma, E., "Keeping disputes out of Court...Mediation gaining ground in Kenya" Available at <http://mman.co.ke/content/keeping-disputes-out-court%E2%80%A6mediation-gaining-ground-kenya> (Accessed on 22/05/2018); See also Edelman, L.B., Erlanger, H.S. and Lande, J., "Internal dispute resolution: The transformation of civil rights in the workplace" *Law and Society Review*, 1993, pp.497-534; Hensler, D.R., "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System," *Penn St. L. Rev.*, 108, 2003, pp.165-1295; Lipsky, D.B. and Seeber, R.L., "In Search of Control: The Corporate Embrace of ADR," *University of Pennsylvania Journal of Business Law*, Vol. 1, No.1, 1998, p.133; Crowfoot, J.E. and Wondolleck, J.M., *Environmental Disputes: Community Involvement in Conflict Resolution*, (Island Press, 1990); cf. Lerman, L.G., "Mediation of Wife Abuse Cases-The Adverse Impact of Informal Dispute Resolution on Women," *Harvard Women's Law Journal*, Vol.7, No. 1, 1984, pp.57-113.

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addition, mediation is private and confidential and only limited to the parties unlike court hearings which are public in nature. No one but the parties and the Mediator know what has happened. This creates confidence in the process. Lastly, in mediation, there is an element of mutuality in that the parties to a mediation process are typically ready to work mutually towards a resolution.<sup>21</sup>

Therefore, it is important to address the barriers hindering the effective dispensation of justice through mediation both in and out of Kenya so that we can pave way for a better future for the practice of mediation.

### **3. Challenges Facing Mediation in Kenya**

Mediation has become a popular means for resolving disputes for a variety of reasons. A primary reason is because mediation works and more often than not produces a resolution or begins a dialogue that results in a resolution.<sup>22</sup> It has

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<sup>21</sup> Ibid; See also Faridkian, S. and Bahar, M.M., "The Definition of Mediation with an Emphasis on Family Mediation," *Social Research Quarterly*, Vol. 6, No. 4, Winter 2014. available at

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1018.1381&rep=rep1&type=pdf> ; See also Goodman, A., "Specialist mediation advocates," *Counsel*, February, 2016, available at

<https://www.counselmagazine.co.uk/articles/specialist-mediation-advocates>

<sup>22</sup> Resolution of conflicts is believed to give rise to an outcome based on mutual problem-sharing in which the conflicting parties cooperate in order to get an outcome that is enduring, non-coercive, mutually satisfying, addresses the root cause of the conflict and rejects power-based outcomes. For difference between settlement and resolution, see Muigua, K., *Resolving Conflicts through Mediation in Kenya*, (2<sup>nd</sup> Ed., Glenwood Publishers, 2017), Chapter six, pp. 66-76; See Cloke, K., *The Culture of Mediation: Settlement vs. Resolution*, The Conflict Resolution Information Source, Version IV, December 2005; See also Mwagiru, M., *Conflict in Africa: Theory, Processes and Institutions of Management* (Nairobi: Centre for Conflict Research, 2006), p. 42; See also Bercovitch, J., *Mediation Success or Failure: A Search for the Elusive Criteria*, Cardozo Journal of Conflict Resolution, Vol.7.289, p.296; See also Bloomfield, D., *Towards*

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been regarded as the most effective conflict management mechanism in Kenya and its widespread practice is because of its attributes and flexibility which favour the parties to the dispute. However, the process is affected by a number of challenges which have hindered the effectiveness of the mediation process.<sup>23</sup>

### **3.1 Inadequate Information on Mediation as A Form of Conflict Management**

To begin with, there is limited information among most Kenyans on mediation as a mechanism for conflict management. This can be clearly seen from the fact that most Kenyans resort to litigation whenever a dispute arises as it is the most recognized mechanism for settlement of disputes. The Judiciary in its annual report has noted that there were 533,350 pending cases at the end of the Financial Year 2016/2017 an increase of 7% from 499,341 pending cases at the close of the Financial Year 2015/2016.<sup>24</sup> This high number of cases in the judiciary is a pointer to the fact that most Kenyans lack adequate information on alternative forms for conflict management, which include mediation. This limits the right of access to justice as a result of the ensuing backlog of cases. Access to information is an essential element of access to justice since it enables citizens to make informed decisions on the course of actions to take in case of infringement of their rights and fundamental freedoms. This is highlighted by Article 35 of the Constitution that enshrines the right to access information held by the state or any person necessary for the protection of any right or

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*Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland*, Journal of Peace Research, vol. 32 no. 2 May 1995, pp. 151-164).

<sup>23</sup> FennP.,," Introduction to *Civil and Commercial Mediation*" (Chartered Institute of Arbitrators, London, 2002), Available at <http://www.adrgroup.co.uk/DisputeResolution/civil-and-commercial-mediation> Accessed on 23/05/2018).

<sup>24</sup> The Judiciary, 'State of the Judiciary and the Administration of Justice' Annual Report 2016-2017, Available at <https://www.judiciary.go.ke/.../state-of-the-judiciary-and-the-administration-of-justice-> Accessed on 31/05/2018

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fundamental freedom. For the country to fully reap the benefits of mediation and other Alternative Dispute Resolution mechanisms, it is essential for citizens to be aware of such mechanisms, the processes involved and their benefits over the adversarial nature of litigation.

Further, there is limited public information and awareness on the existence of Court Annexed Mediation largely owing to the young nature of the project. It is therefore the role of professionals such lawyers who are better placed to understand Court Annexed Mediation to educate the public about this novel concept.<sup>25</sup>

It is very important that the Kenyan citizen gets to know and access the available conflict management processes such as mediation and the other mechanisms so that they can have diverse means by which they can seek remedy for the violation of their rights. Mediation has come to the aid of such persons as it is readily available even in the communities. The reason for this assertion is because mediation is a flexible conflict management process which can be conducted anywhere so long as the parties to the dispute appoint a neutral third party such as elders, to assist them in resolution of their disputes.<sup>26</sup>

The State is also obligated to make known to the public on the various ways they can access justice in Kenya pursuant to Article 48 of the Constitution of Kenya 2010. The Article states that the State shall ensure access to justice for all

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<sup>25</sup> Joy Kubai Namachi, *“Court Annexed Mediation: Dawn of a New Era in the Kenya Judicial System”* LawQuery Blog, Available at <https://www.lawquery.co.ke/our-blog/court-annexed-mediation-dawn-of-a-new-era-in-the-kenyan-judicial-system> (Accessed on 22/05/2018).

<sup>26</sup> R. Dawson, *“5 Basic Principles for Better Negotiation Skills”*, Available at <http://www.creonline.com/principles-for-better-negotiation-skills.html> (Accessed on 23/05/2018).

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persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.<sup>27</sup>

### **3.2 Non-Binding Nature of Mediation**

The non-binding nature of mediation presents another challenge with regard to its efficacy. It is a voluntary process that depends on the good will of the parties to a dispute for its acceptance.<sup>28</sup> This poses the danger of non-compliance with settlements with the consequence that disputes may remain unresolved even after the mediation process. There is need to guarantee the enforceability of the mediated agreement to ensure that mediation competes meaningfully with the formal and binding dispute settlement mechanisms such as courts and arbitral tribunals.<sup>29</sup> The introduction of court annexed mediation seeks to cure this problem since the settlement arrived at through mediation can be enforced as a court order. This urges disputants to prefer court annexed mediation over the traditional form of mediation in order to create certainty in the outcome of the process. It has also been argued that the enforcement of a mediation settlement should not be left to the goodwill of the parties. Rather, it should be conferred on a public authority while at the same time being delinked from the requirements of form or process.<sup>30</sup>

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<sup>27</sup> Ibid (n 11).

<sup>28</sup> Muigua, K., 'Resolving Conflicts Through Mediation In Kenya' 2<sup>nd</sup> Ed., 2017, op cit., p. 4

<sup>29</sup> Ibid.

<sup>30</sup> Bettina, K. & Zach, E., "Taking the Best from Mediation Regulations: The EC Mediation Directive and the Austrian Mediation Act" (Arbitration International, 2007) page 686. Available at

[https://hl=en&as\\_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9CTaking+the+Best+From+Mediation+Regulation%22&btnG=](https://hl=en&as_sdt=0%2C5&q=Knotlz+B.+%26+Zach+E.%2C+%E2%80%9CTaking+the+Best+From+Mediation+Regulation%22&btnG=) (Accessed on 21/05/2018).

### **3.3 Adversarial Aspects of Mediation**

The seemingly limited understanding of the nature and purpose of mediation by professionals especially lawyers has also hampered the success of mediation in the country. The professionals have ended up transferring their adversarial skills from the courtroom to the mediation room. Consequently, mediation is now facing similar challenges to those of litigation which parties sought to avoid when they resorted to it. Advocates costs and adjournments which occasion delay in conclusion of disputes are increasingly becoming part and parcel of mediation. In addition, taking adversarial skills to the mediation process based on arguments and desire to win undermines the nature of mediation which aims at restoring relationships based on consensus that creates a win-win situation. This challenge may end up leading to ineffectiveness of the mediation process.<sup>31</sup>

The problems of adversarial litigation imported lawyers into the mediation process is also evident from the fact that in some court cases, parties litigate for many years without any exchange of communication about an out of court settlement. Many lawyers avoid settlement initiatives to dispel any suggestion of weakness. This becomes a challenge when such a matter is referred to resolution through a mediation process. Hence, a skilled mediator is required so as to facilitate good communication about settlement in cases where the parties are reluctant to do so, on their own.<sup>32</sup> Settlements can occur, sometimes rather easily if the parties communicate earlier and more openly.

Differences between an advocate and the client can create barriers to resolution of a dispute. In many mediation processes, parties are unprepared to make realistic assessments because advocates have overstated the likelihood of success at the outset of the dispute or failed to communicate with the client on

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<sup>31</sup> Ibid.

<sup>32</sup> K. Muigua, *“Alternative Dispute Resolution and Access to Justice in Kenya”* (Glenwood Publishers Limited, 2015) ISBN 978-9966-046-07-9, page 31.

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an adequate basis. Mediators are in a good position to determine and deal with any disconnect between an advocate and a client.

### **3.4 Lack of an Effective National Regulatory Framework on Mediation**

It can also be argued that the lack of an effective national regulatory framework that controls the practice and process of mediation such as an Act of Parliament hinders the success of mediation. The only regulatory frameworks that exist in mediation are different sets of rules of procedure formulated by various institutions such as the Judiciary, the Nairobi Centre for International Arbitration and the Chartered Institute of Arbitrators which only make provision on how to conduct mediations administered in the particular institution. These rules include the Mediation (Pilot Project) Rules, 2015<sup>33</sup> which govern Court-Annexed Mediation and the Nairobi Centre for International Arbitration (Mediation) Rules, 2015 which govern mediations conducted in that Centre. Such a fragmented approach creates problems such as lack of uniformity and certainty in mediation. The enactment of an Act of Parliament to govern mediation would contribute widely to its efficacy due to the ensuing certainty as to its nature, process and decisions.

It is observed that Court Annexed Mediation faces a myriad of challenges affecting the mediation process. First, mediation is a voluntary and consensual process of resolution of disputes. However, Court Annexed Mediation ousts this basic attribute because the parties' choice is limited to appointment of a mediator whereby the Mediation Deputy Registrar nominates three mediators from among whom the parties will choose one. There is a likelihood of a challenge arising regarding the sustainability of the project in future due to funding problems. Furthermore, there is a likelihood that if more cases go the mediation way in court without an accompanying increase in the court's

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<sup>33</sup> *Mediation (Pilot Project) Rules, 2015*, Legal Notice No. 197 of 2015, *Kenya Gazette Supplement No. 170*, 9<sup>th</sup> October, 2015, (Government Printer, Nairobi, 2015).



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capacity to handle the matters. If the two are not well handled, especially now that there has been roll out of the project to the rest of the country, Court-Annexed Mediation may be weighed down by the procedural processes such as initial screening of files and filing the settlement arrived at in the mediation proceedings which may occasion delay and costs on the disputants. Because the process is court-annexed, settlements are formally registered and get the force of a court order. Despite the fact that this is the way to go for sustainable settlements in disputes resolved through the process, failure to ensure that delays do not arise and the processes remain affordable to the majority may defeat the underlying values and principles of mediation which include cost effectiveness and timeliness, amongst others.<sup>34</sup>

#### **4. Recommendations on the Way Forward**

##### **4.1 Creating Awareness on Mediation and other Alternative Dispute Resolution Mechanisms**

Disputes are bound to occur in any given society due to competing interests between individuals, groups and organizations in such societies. The manner in which the disputes are handled determine the overall well-being and co-existence in the society. In the Kenyan context, statistics have shown that many disputes are settled through the court process.<sup>35</sup> However, as seen in the foregoing discussion, litigation has many demerits and may not be the right tool for most disputes especially where there is need to preserve underlying relationships. Kenyans should thus be encouraged to embrace mediation as an alternative to litigation due to its inherent benefits. It is the role of professionals

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<sup>34</sup> Shantam, K., "Promoting Alternative Dispute Resolution to Reduce Backlog Cases and Enhance Access to Justice of the Poor and Disadvantaged People Through Organizing Settlement Fairs in Nepal", (Asia-Pacific Rights and Justice Initiative, July 2003).

<sup>35</sup> The Judiciary, 'State of the Judiciary and the Administration of Justice' Annual Report 2016-2017, Available at <https://www.judiciary.go.ke/.../state-of-the-judiciary-and-the-administration-of-justice-> Accessed on 31/05/2018

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especially advocates, upon being approached by parties to a dispute to encourage them to resolve their disputes through mediation rather than immediately instituting court proceedings. Further, the Judiciary should refer more disputes to mediation especially those which relate to the family unit so as to preserve relationships and ensure harmonious co-existence in the society.

#### **4.3 Streamlining Court-Annexed Mediation to Enhance Party-Autonomy and Voluntariness**

Court-Annexed Mediation has been criticized as going against the cardinal principles of mediation which are voluntariness and party autonomy. It has been observed that court ordered mediation interferes with the voluntary nature of the process.<sup>36</sup> However, Court-Annexed Mediation guarantees the enforceability of settlements since they are adopted and enforced in the same manner as a court order.<sup>37</sup> Hence, the process should be streamlined to enhance party autonomy and voluntariness. Parties' control of the process should be seen on aspects such as referring the dispute to mediation, selection of the mediator(s) and the negotiation process. Court's involvement should only come in at the final stage of the enforcing of the settlement.

#### **4.3 Institutionalization of Mediation**

Institutions such as the Nairobi Centre for International Commercial Arbitration (NCIA), the Chartered Institute of Arbitrators, Kenya Branch (CIArb (K)) and the Mediation Training Institute (I) East Africa, amongst others, present great opportunities that can be explored for the success of mediation in Kenya. The NCIA and the CIArb (K) have their own mediation rules and list of accredited mediators. The existence of the institutional rules and database of mediators

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<sup>36</sup> 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>  
Accessed on 05/06/2018

<sup>37</sup> Civil Procedure Act, Cap 21, S 59 (B) (4)

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creates certainty in the procedure and outcome of the mediation process. Further, the Mediation Training Institute (I) East Africa offers great opportunities such as the training and certification of mediators. These efforts should be appreciated and supported. Disputants ought to be persuaded to seek their services. Mediators should thus be encouraged to undertake such courses so as to sharpen their skills and ensure competence during the process.

#### **4.4 Consolidation of Mediation Rules and Regulations into an Act of Parliament.**

The approach towards mediation in Kenya is currently a fragmented one with no clear and definite rules governing the process unlike arbitration which is governed by the Arbitration Act, No. 4 of 1995. Mediation in Kenya can be classified as institutional mediation (conducted by institutions such as the NCIA and CIArb (K)), informal mediation and court annexed mediation. Each category is governed by its own rules and procedures. While this might not in any pose a risk on the success of mediation conducted under any of these categories, there is need to create certainty as to the overall principles, rules and procedure governing the mediation process regardless of the institutional rules governing the process, that is, minimal or general guidelines on the same. This creates the need for enactment of a Mediation Act to address the challenges posed by the fragmented approach. Mediation conducted under any of the categories will thus be governed by the Act and parties will have a definite recourse where such mediation deviates from the objectives, rules and procedures as stipulated under the Act.

#### **5. Conclusion**

Despite the challenges highlighted above, mediation still remains an effective mechanism for conflict management due to its inherent benefits. It is confidential, cost-effective, flexible and easily accessible to parties in the conflict. Sustainability of settlements reached under mediation is high and almost guaranteed because settlements are owned by the parties.

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Mediation and other alternative dispute resolution mechanisms are meant to reduce backlog of cases in court. This will in turn improve the efficiency in courts and the case clearing rate. It is therefore important to deal with the challenges that affect the just resolution of disputes using mediation so as to make the process more effective and efficient. Concerted efforts from different stakeholders in implementing the suggested recommendations can go a long way in enhancing the practice of mediation in Kenya, as a tool for access to justice for all.

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**(Re) Configuring 'Alternative Dispute Resolution' As 'Appropriate Dispute Resolution': Some Wayside Reflections**

*By: David Ngira\**

**1. Introduction**

Recent scholarship on justice seems to be shifting towards the study of alternative dispute resolution systems (ADR). Although the discourse on alternative dispute resolution systems is fairly new, ADR as a dispute resolution system predates judicial systems.<sup>1</sup> For instance, the traditional dispute resolution mechanisms, that are still the main forms of dispute resolution in Kenya, predate the current court system whose origin in Kenya can only be traced to colonization.<sup>2</sup> Even in Western Europe, such systems dominated dispute resolution, at least upto the onset of urbanization and industrialization. The discourse on alternative dispute resolution systems has been characterised by two misconceptions that this paper will seek to unpack; Mischaracterization of ADR as alternative, and the failure by its supporters and critics to give it a jurisprudential foundation. In the absence of a jurisprudential foundation and proper characterization, ADR has been mistaken to be an ad hoc and secondary means of resolving conflict whenever parties find the courts to be inappropriate, expensive, cumbersome or unable to arrive at a proper outcome in a legal dispute.<sup>3</sup> However, as will be demonstrated in later sections of this paper, what is christened as ADR is actually the normal and mainstream response to disputes .In fact in some instances, courts resort to ADR when they realize that

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<sup>1</sup> M Kariuki 'Effective Justice for Kenyans: is ADR Really Alternative?' (2015) 2 (1) Law Society of Kenya Journal, 49-62.

<sup>2</sup> F Kariuki 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' (2015) 3(2) Journal of Alternative Dispute Resolution 30-47.

<sup>3</sup> See Kariuki above note 1 p 61.



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the dispute at hand has underlying socio-cultural and psychological factors that are outside the domain of law.<sup>4</sup> For conceptual clarity, this study excludes all court sanctioned forms of ADR such as court annexed mediation and arbitration. To this end it is anchored upon informal forms of ADR such as mediation, conciliation negotiation and traditional justice systems.

## **2. What is ADR?**

According to Robert Mnookin, alternative dispute resolution (ADR) refers to a set of practices and techniques aimed at permitting the resolution of legal disputes outside the courts.<sup>5</sup> ADR is therefore a collective term for mediation, negotiation, arbitration, conciliation, reconciliation and traditional dispute resolution mechanisms.

The Law Reform Commission of Ireland defines mediation as a facilitative, consensual and confidential process, in which parties to the dispute select a neutral and independent third party to assist them in reaching a mutually acceptable negotiated agreement.<sup>6</sup> Conciliation is fairly similar to mediation except that in conciliation, the third party only gives proposal and recommendations on settlement of the dispute.<sup>7</sup> Negotiation is basically a process through which two parties to a dispute directly engage each other in

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<sup>4</sup> See generally W Brazil 'Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns' (1989) 14 (3) Ohio State Journal on Dispute Resolution 715-811 p 750.

<sup>5</sup> M, Robert Alternative Dispute Resolution (March 1998). Center for Law, Economics, and Business, Harvard Law School, Discussion Paper No. 232. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.319.4741&rep=rep1&type=pdf>

<sup>6</sup> See Irish Law Reform Commission, '*Alternative Dispute Resolution: Mediation and Conciliation*' (Ireland Law Reform Commission, 2010) 17 accessed from [http://www.lawreform.ie/\\_fileupload/reports/r98adr.pdf](http://www.lawreform.ie/_fileupload/reports/r98adr.pdf) on 21/02/2017.

<sup>7</sup> Ibid.

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resolving the conflict.<sup>8</sup> There is usually no third party involved. Arbitration is the process through which parties willingly submit to a non-state third party (arbitrator) who is selected either by or for the parties.<sup>9</sup> The third party often gives the disputants an opportunity to present their case and makes a binding decision based on the existing laws regulating arbitration in the state. Arbitrators are usually trained and often work within the laws on arbitration.<sup>10</sup> Traditional dispute resolution systems refer to community-based justice systems that operate outside the domain of the state.<sup>11</sup> They majorly utilize customary law and are presided over by councils of elders or chiefs. This form of dispute resolution is quite popular in Africa and Asia where traditional structures of societies are still strong as well as among indigenous communities in Australia, New Zealand, Canada and the United States.

Although they largely operate outside the state justice systems, anecdotal evidence from Ghana, South Africa, Malawi and Nigeria indicate that these institutions are sometimes formally recognised or even constituted by state law.<sup>12</sup> At the same time, studies point out that the traditional dispute resolution systems are the primary point of dispute resolution and complement the state dispute resolution organs which are not only unpopular with local communities but are often unreachable, expensive or too complicated for the grassroots

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<sup>8</sup> See Y Shamir, 'Alternative Dispute Resolution Approaches and their Application. Potential Conflict to Cooperation Potential' (UNESCO,2003) 6 Accessed from <http://unesdoc.unesco.org/images/0013/001332/133287e.pdf> on 27/1/2017.

<sup>9</sup> M Hiroshi, 'The Relationship between Arbitration and Court Litigation in the United States' (1989) 39(4) Hokkaido University Law Review 1223-1230.

<sup>10</sup> See for instance, Arbitration Act, 1995.

<sup>11</sup> A Pop, 'Traditional Approaches in Alternative Dispute Resolution: A Brief overview' (2014) 7 Conflict Studies Quarterly pp. 34-48 p 36.

<sup>12</sup> J Ubink and B Van Rooij, 'Towards Customary Legal Empowerment: An introduction' in U Janine and T McInerney (eds) *Customary Justice: Perspectives on Legal Empowerment.* (IDLO 2011).

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communities.<sup>13</sup> Because of their European origin (which accounts for their adversarial nature and win-lose approach in dispute resolution), state courts are often unpopular with rural communities that are more acquainted and comfortable with restorative justice systems such traditional dispute resolution mechanism.<sup>14</sup>

### **3. Justice and Punishment in The Court System: Where is the Victim?**

#### **3.1 The Concept of Justice**

The definition of justice has largely eluded philosophers for centuries. There is neither an agreement on the best way of achieving justice nor on what exactly constitutes justice. On one hand, there are scholars like Mill who see justice as impartiality in dispute resolution.<sup>15</sup> Accordingly, Mill argues that justice can only be said to have occurred when a dispute is determined purely based on the evidence presented before the dispute resolver. Thinkers like Emanuel Kant see justice as the punishment of offenders in line with retribution principles, while Rawls, Dworkin, and Plato consider justice to be fair distribution of good and services in society, liberty and equality.<sup>16</sup> Justice is also seen as a quality of a

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<sup>13</sup> T Chopra, 'Building Informal Justice in Northern Kenya (Legal Resource Foundation, 2008) pp 33,36

<[http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Chopra\\_Building\\_Informal\\_Justice\\_in\\_Northern\\_Kenya.pdf](http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Chopra_Building_Informal_Justice_in_Northern_Kenya.pdf) >

<sup>14</sup> Ibid.

<sup>15</sup> Mill cited in J Troy 'Impartiality', *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.), URL =

<<https://plato.stanford.edu/archives/spr2017/entries/impartiality/>>. Accessed on 12/7/2017

<sup>16</sup> see L Mark and S Michael 'Justice as a Virtue', *The Stanford Encyclopedia of Philosophy* (Spring 2016 Edition), E Zalta (ed.), URL =

<<https://plato.stanford.edu/archives/spr2016/entries/justice-virtue/> accessed on 12/5/2017.

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legal system and as a personal attribute.<sup>17</sup> Other scholars have also observed that justice can be said to have occurred when a dispute is decided purely based on the law.<sup>18</sup>

Although the above (and other scholars) have a varied conception of justice, there is at least a partial agreement that justice involves equity, equality, fairness, dignity and impartiality. These principles, that also anchor human rights are considered to be both a feature of a just society, just individual and just legal systems.

### **3.2 Victims, Punishment and the Subject of Justice.**

Let us consider the example of a chicken thief. Individual A, who has 20 chicken steals chicken from individual B, slaughters it and eats it for dinner. Upon investigations, A is arrested and arraigned in court for theft. He pleads guilty of the offence and is sentenced to 10 years in prison for the theft.

In the eyes of retributionists, justice is considered to have been done to B because A has suffered punishment for the offence committed. The underlying principle here is that punishment is justified not because of its positive outcome but simply due to the fact that a crime has been committed.<sup>19</sup> Now let us assume that there was no law that barred A from stealing Bs chicken, what would be the justification for punishing A? To this, criminal law scholars like Dana Shahrām would point out that based on the principles of *nulla poena sine lege* and *nullum crimen sine lege*, a person can only be punished for violating a law; in other

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> See B Gerard 'Retribution: The Central Aim of Punishment (2003) 27(1) Harvard Journal of Law & Public Policy pp 19-32.

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words an action is not punishable unless it violates a law.<sup>20</sup> Other scholars like Luis Chiesa would argue that punishment is not justified on account of law, but rather by the very fact that the action of the offender caused harm on the victim.<sup>21</sup> Mill would agree and point out that the only action for which man should be punished is harm to a second party.<sup>22</sup> Joel Feinberg would point out that A should be punished not only because his action harmed B, but also because it offended the society.<sup>23</sup> In other words, dispossessing a member of society of his property is an action that offends the whole society which then responds to the offence by punishing A. Patrick Devlin would argue that all immoral acts must be punished and because theft is an immoral act it must be punished while sociologists like Durkheim would point out that punishment is important in establishing and re-emphasising the social boundaries of human conduct.<sup>24</sup> Within this context, an offender is punished to communicate to the society the limits of their action. Levanon and Tadros would point out that by stealing his chicken, A violated Bs personhood and gained a social advantage over him.<sup>25</sup> To restore balance between the two, A must suffer punishment. Advocates of deterrence will point out that punishing A for the offence will

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<sup>20</sup> D Shahram, Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing (2009) 99(4) *Journal of Criminal Law and Criminology*, 859-928.

<sup>21</sup> See L. Chiesa 'Taking victims seriously: A Dworkinian Theory of Punishment' (2007) 76 *Revista Juridica* PP 117-128 p 123.

<sup>22</sup> J.S.Mill cited in R Arneson 'Mill versus Paternalism (1980) 90 *Ethics*, No 4 pp 470-489.

<sup>23</sup> F Joel 'Offense to Others: The Moral Limits of the Criminal Law' (OUP 1988) P 11.

<sup>24</sup> S Steven 'Punishment and Social Organization: A Study of Durkheim's Theory of Penal Evolution' (1975) 9(4) *Law & Society Review* 613-637 See also Devlin cited in Stanton-Ife, John, 'The Limits of Law', *The Stanford Encyclopaedia of Philosophy* (Winter 2016 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2016/entries/law-limits/>>.

<sup>25</sup> L Levanon Personhood, Equality and possible justification for criminal punishment (2014) 27 (2) *Canadian Journal of Law and Jurisprudence* pp 439-472.

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deter other would be criminals.<sup>26</sup> Criminal lawyers will even point out that the punishment meted on A is important as it will prevent A from future crime, incapacitate him or rehabilitate him.<sup>27</sup> Philosophers will be quick to point out that imprisoning A is restitutionary as it will be a form of relief unto B.<sup>28</sup>

Three weaknesses are inherent in all these justifications for imprisonment. Firstly, whereas they highlight the value of punishment, they do not explain the exact quality or quantity of punishment that is necessary to achieve the perceived purpose. For instance, how many years should A spend in prison before B can feel relieved? What length of imprisonment is enough to pass a message to the society that theft is wrong? How long should A stay in prison to restore equality? The answer to these questions is one: That the correct imprisonment period cannot be determined through a logical process because in the absence of a standardised scale of measurement, punishments are generally arbitrary.<sup>29</sup> The prison sentence is arrived at not through any scientific or rational methodology but simply through an argumentative process devoid of any scientific reference.<sup>30</sup> In some instances, the ultimate decision over the legal punishment is arrived at through voting by members of parliament during the law making process. This arbitrary decision is then legitimised through the court process.

The second concern is the place of the victim in the process of punishment. As pointed above, theories of punishment usually focus on the benefit that punishment has for the society but completely ignore the interest of the most

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<sup>26</sup> H Adam and K Erin 'Punishment', The Stanford Encyclopaedia of Philosophy (Fall 2015 Edition), E Zalta (ed.), URL = <https://plato.stanford.edu/archives/fall2015/entries/punishment/>.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> For such an argument see Luis Chiesa above n 21 pp 119-120.

<sup>30</sup> Ibid.

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aggrieved party; the victim in the process. Consequently, very little research has been dedicated to the role of the victim in the process of punishment or implication of punishment on the victim of a crime.<sup>31</sup> As will be highlighted in later sections, the relocation of the victim to the periphery of the justice system in court not only increases his victimhood but generally instrumentalises him into a tool that is only useful in achieving the society's deterrence efforts. In principle, it is a form of secondary injustice on the victim.

The third concern has to do with the subject matter of justice in court. Responses to this concern are just as varied as the differences in the conception of justice. Scholars like Mathew Sues have pointed out that because the state prosecutes a criminal on behalf of the society and in line with state law and the doctrine of *ius puniendi*, justice for the state (and for the society) occurs when the case is determined based on the law and the suspect is imprisoned or suffers damage.<sup>32</sup> This approach is however problematic at least in view of a recent cases from the Kenyan High court; *Republic vs Mohamed Mohamed*.<sup>33</sup> In this particular case, Mohamed was accused of murder. However, as the case progressed, Mohammed's family met the victim's family and agreed to resolve the matter in line with the customs of the Somali community. Mohamed's family paid a number of camels and underwent cleansing ceremonies after which the matter was considered resolved. Mohamed's lawyer then notified the court of the development and requested that the case be dropped because it had been resolved through the *Maslah*, Somali council of elders. He specifically referenced article 159 of the Kenyan constitution which encourages the state to promote the

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<sup>31</sup> A Andrew 'Punishment and Compensation: Victims, Offenders and the State' (1986)6 (1) Oxford Journal of Legal Studies PP 86–122,

<sup>32</sup>M Sues, 'Punishment in the State of Nature: John Locke and Criminal Punishment in the United States of America' (2015) 7 Washington University Jurisprudence Review pp 367-397. P 379

<sup>33</sup> Republic Vs Mohamed Mohamed (2013) e KLR

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use of traditional dispute resolution mechanisms. The Director of Public Prosecution originally objected but eventually had to give in after all the witnesses fled to Somalia. This is because according to the witnesses, the matter had been resolved through *Maslah* and continuing to pursue it in court would go against the agreement between the two families. Eventually the case was terminated and Mohamed was released.

This case (and at least two other similar cases)<sup>34</sup>, raises the question of whether the state's conception of justice is in any way consistent with that of the overall society. As demonstrated above, the society may see justice as restoration of past relationships between the families of the victim and the offender while the state often considers justice as upholding the law at all costs.<sup>35</sup> Similarly, attempts by Kenyan government to address cattle rustling by arresting and prosecuting cattle rustlers has faced resistance and apathy from pastoralists communities in Kenya because the state's conception of justice is largely different from that of the community.<sup>36</sup> Thus, whereas the state sees justice as prosecution of cattle rustlers, victims of cattle rustling often see the return of their stolen cattle or compensation as the ultimate justice.<sup>37</sup> Because the state has largely ignored this dimension, its programmes towards ending cattle rustling in Kenya, such as prosecuting suspected rustlers, have largely been futile as communities that feel dispossessed of their cattle often resort to revenge missions to recover them instead of waiting for legal response from the state which in their view, doesn't

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<sup>34</sup> See Republic v Bernard Kiptoo Langat & 2 others [2014] eKLR; See also Republic v Leraas Lenchura [2012] e KLR.

<sup>35</sup> See for instance Republic v Abdulahi Noor Mohamed (alias Arab) [2016] eKLR where an attempt by a murder suspect to seek acquittal on the basis that he had reconciled with the victim's family was rejected.

<sup>36</sup> C Tanja 'Justice Versus Peace in Northern Kenya' (November 1, 2009) World Bank Justice and Development Working Paper Series No. 2/2009, 11-12 available at SSRN: <http://ssrn.com/abstract=1713439>

<sup>37</sup> Ibid.



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cure the injustice meted against them.<sup>38</sup> To them, justice is only considered to have been done when animals are returned and not necessarily when the perpetrator is prosecuted. However, such a possibility is only realistic in ADR Processes such as traditional dispute resolution and not through the courts.

Other scholars like Luis have argued that the victim of an injustice needs to be central to the dispute resolution process.<sup>39</sup> He has criticised the adversarial system for robbing the victim of his victimhood by reducing him into a witness and purporting to prosecute the offender on his behalf.<sup>40</sup> The victim is minimised and made into a small sub-section of a broader legal project whose outcome is already predetermined by existing laws. The fact that human rights law, especially the right to fair trial has developed in a way that largely protects the interests of the offender at the expense of the victim and the lack of a clear scale of establishing the weight attached to the victim's input only serves to worsen his unequal status in a court dispute.<sup>41</sup> Luis argues that justice can only be said to be done when the victim controls or actively participates the dispute resolution systems.<sup>42</sup> Accordingly, he dismisses the punishment of offenders in victimless crimes or in crimes where the victim consented. Other scholars have pointed out that the dispute resolution process should be therapeutic and should enable the victim to emotionally express his or her sentiments regarding the offender, the punishment and or any suitable relief.<sup>43</sup> The assumption that punishing the offender is restitutionary is largely incorrect because in many jurisdictions including Kenya, the victim is neither given an opportunity to

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<sup>38</sup> Ibid.

<sup>39</sup> See Chiesa above n 21 p 126.

<sup>40</sup> Ibid.

<sup>41</sup> A Nash 'Victims by Definition', (2008) 85 Washington University Law Review pp 1419 -1461.

<sup>42</sup> Luis above n 21 p 125.

<sup>43</sup> S Daicoff 'Law as a Healing Profession: The "Comprehensive Law Movement' (2015) 6 (1) Pepperdine Dispute Resolution Law Journal, pp 1-62 p 5.

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determine the fate of the offender nor propose a workable solution that would restore his or her status to the pre conflict level.<sup>44</sup> For instance in A-B instance highlighted above, B may be more concerned with recovering his chicken than in having A go to prison. However, such a sentiment will be considered to be legally irrelevant in an adversarial court system. This is because the victim is not expected to show sympathy to the offender; instead he is expected to objectively narrate the chronology of events, a reality that is often expected (at least by the prosecutor), to sway the bench towards successful prosecution and imprisonment of the offender.<sup>45</sup>

### **3.3 ADR and the Victim**

Unlike the adversarial systems, ADR usually place the victim at the centre of the dispute resolution. The direction that the dispute resolution process takes often depends on the interest of the victim and his express sentiments.<sup>46</sup> Because ADR takes the victim more seriously, they are better suited to correct injustices that are meted on the victim because they (correctly) consider the victim and not the state or society as the subject of justice.<sup>47</sup> Indeed, justice can only be said to be done not only when the victim of an injustice is actively involved in pursuit of justice but also when he or she believes that justice is done.<sup>48</sup> This can only be done by having him or her dictate or consent to the fate of the perpetrator. At the same time, since justice involves correcting an injustice, returning the victim

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<sup>44</sup> R Kool and G Verhage 'The (Political) Pursuit of Victim Voice: (Comparative) Observations on the Dutch Draft on the Adviesrecht' (2014) 10 (4) Utrecht Law Review Volume pp 86-98.

<sup>45</sup> J Roberts 'Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole' (2009)38 (1) Crime and Justice pp 347-412.

<sup>46</sup> M Menkel 'Restorative Justice: What Is It and Does It Work?' (2007) 3 Annual Review of Law Social Sciences 10.1-10.27.

<sup>47</sup> Ibid at 10.10.

<sup>48</sup> For such an argument see M Fernandez 'Restorative Justice, Forgiveness and Reparation for the Victims' (2014) 4 (3) Oñati Socio-Legal Series pp 390-403 p 394.

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to his or her pre-conflict status should be the aim of the justice process. Arguably, in our A-B case scenario above, justice can only be done when B gets back his or her chicken (unless it is B's express view that A should go to prison for stealing his or her chicken). Moreover, scholars have observed that the interest of parties in any dispute is never catered for simply by winning the case. Rather, parties are usually more interested in dispute resolution processes that appreciate their perspectives, respect them and shield them from the negative impacts of the acrimonious dispute resolution process.<sup>49</sup> Such concerns are better addressed through ADR processes.

Let us consider another scenario. C and D are married. However, their marriage has had problems because D is a drunkard. C, a staunch Christian, doesn't like her husband's drinking habits but doesn't want a divorce or separation. She has approached the church, relatives and community elders for help but all her attempts have failed. What legal options are available to C?

Many legal jurisdictions do not consider such possibilities. To this end, marriage laws only provide for separation and divorce and do not embrace disputes like the one highlighted above.<sup>50</sup> As argued by Manzano and Meadow, disputes in which the parties still value their relationships in the post conflict set up are better addressed through ADR processes.<sup>51</sup>

#### **4. ADR Mechanisms as the True Avenues of Justice**

Methods of dispute resolutions such as negotiations, mediation and traditional dispute resolution mechanisms which are considered by mainstream legal scholarship as 'alternative' are usually the very first mechanisms of handling

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<sup>49</sup> Daicoff above n 43 p 18.

<sup>50</sup> J Murphy and J Singer 'Moving Family Dispute Resolution from the Court System to the Community' (2016) 75 Maryland Law Review Endnotes pp 9-14.

<sup>51</sup> Meadow supra note 46 10.10-10.11, Manzano above n 48 p 399

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any disputes.<sup>52</sup> A lot of times, parties only resort to the courts after the failure of the non-legal dispute resolution systems. Thus, although they are considered as alternative, and in principle secondary justice systems, they are not only the most accessible but also the most preferred dispute resolution systems.<sup>53</sup> Moreover, by putting the victim of injustice at the centre of the justice process, ADR mechanisms are considered to be generally more therapeutic and therefore suitable for sustainable conflict resolution.<sup>54</sup> In fact, scholars like Menkel Meadow, Shamir Yona and Kariuki Muigua have argued that ADR is actually 'Appropriate Dispute Resolution Mechanism and not alternative Dispute Resolution Mechanism.'<sup>55</sup> This position is based on the assumption that ADR addresses the root cause of the conflict and goes beyond the superficial legal approach embraced by the courts. Other scholars note that because courts are largely adversarial and are characterised by competition between the parties, they simply aggravate the conflict.<sup>56</sup> The end of a dispute in court often marks either the beginning of a new one in real life or the aggravation of an existing one.<sup>57</sup> This is because courts are not oriented towards promoting harmony. Rather they are more focused on enforcing the law which often results into a win –lose situation. The assumption that law (or a legal process) result into justice and harmony has long been dispensed with by legal philosophers.<sup>58</sup>

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<sup>52</sup> Y Shamir 'Alternative Dispute Resolution Approaches and Their Application. Potential Conflict to Cooperation Potential' (UNESCO,2003) 6 Accessed from <http://unesdoc.unesco.org/images/0013/001332/133287e.pdf>

<sup>53</sup> Ibid

<sup>54</sup> See E Hanan 'Decriminalizing Violence: A Critique of Restorative Justice and Proposal for Diversionary Mediation' (2016) 46 (1) New Mexico Law Review, 123 – 167 p 140.

<sup>55</sup> Shamir n 52 above p 2, M Carrie 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38 (1) William. & Mary Law Review, 5-44, p 37, see also Muigua n 1 at 50.

<sup>56</sup> See S Jana, 'Dispute Resolution and the Post-Divorce Family: Implications of a Paradigm Shift' (2009) 47(3) Family Court Review 363-370.

<sup>57</sup> Ibid.

<sup>58</sup> See for instance Meadow above n 55.

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Jurists like Bhagwati, the former Chief Justice of India, have even pointed out that in some circumstances, the application of law in dispute resolution sometimes results into an injustice.<sup>59</sup> To this end, Bhagwati and other advocates of judicial activism have urged judges to look outside the law if its application in a specific case would result into an injustice to the parties.<sup>60</sup> However, this paper does not consider law to be completely irrelevant in ADR processes. Instead, it considers law to be a mechanism for rights claims in ADR and as a yardstick for measuring ADR outcomes.

Scholars like Murphy and Singer have pointed out that the legal system is unsuitable for resolving family disputes because of its restrictiveness.<sup>61</sup> Although family disputes are varied and manifest differently in each and every family, the law generally provides limited options for the parties in family disputes. For instance, the assumption in family law is that family disputes would concern divorce, separation, succession, matrimonial property or children matters. Accordingly, family law only limits parties to remedies and reliefs that are contained in the relevant statutes and case law.<sup>62</sup> However, as observed in Cs case above, family disputes are intersectional and go beyond the limit of the law. The assumption in law, that disputing couples simply want divorce or separation is both factually and normatively wrong.<sup>63</sup> The array of

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<sup>59</sup> P Bhagwati 'Judicial Activism in India' accessed from [https://media.law.wisc.edu/m/4mdd4/gargoyle\\_17\\_1\\_3.pdf](https://media.law.wisc.edu/m/4mdd4/gargoyle_17_1_3.pdf) on 8/7/2017.

<sup>60</sup> Ibid, see also S Arpita 'Judicial Activism in India: A Necessary Evil' (July 8, 2008). Available at SSRN: <https://ssrn.com/abstract=1156979> or <http://dx.doi.org/10.2139/ssrn.1156979>

<sup>61</sup> Murphy above n 50 at 10.

<sup>62</sup> I'm alert to the concern raised by legal realists that judges need to look beyond the letter of the law in resolving disputes and to Ronald Dworkin's assertion that law contains both legal rules and principles. However, these matters are subject to an ongoing intellectual discourse which is outside the scope of this paper.

<sup>63</sup> J Lande 'The Revolution in Family Law' (2012) 24 Dispute Resolution Journal of the American Academy of Matrimonial Lawyers 411-449.

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family disputes is so wide and divorce is not only an uncomfortable option for most couples but is generally considered too radical for most family disputes which are not discreet legal events but are simply temporary emotional occurrences that require a more restorative and intersectional dispute resolution systems.<sup>64</sup> In fact, studies have shown that even in cases of domestic violence, couples are more interested in cessation of violence rather than in divorce.<sup>65</sup> This explains why disputants often seek the help of 'non- legal' dispute resolution system before resorting to court.

The Court is, therefore, not a main option but an alternative option that parties only look for after the failure of all other dispute resolution mechanisms.<sup>66</sup> In other instance, such as in the UK, family mediation is compulsory before moving to court over a family dispute.<sup>67</sup> This is usually done through certified mediation institutions. Kenya is currently piloting a similar program where courts would send parties to a mediator and only intervene upon the failure of the mediator to resolve the family dispute.<sup>68</sup> However, unlike the UK where family law supports mediations before court proceedings, the Kenyan family law system is quite ambivalent on the matter. For instance, the Marriage Act

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<sup>64</sup> See Singer above n 56 p 365.

<sup>65</sup> Collaborative Centre for Gender and Development, 'Reducing Vulnerability to Sexual and Gender Based Violence in Kenya' (2015) p 39, accessed from <http://ccgdcentre.org/index.php/publications/reports> accessed on 25/7/2017. See also J Gilmore 'Whither Restrictiveness?: Restorative Justice and the Challenge of Intimate Violence in Aboriginal Communities. (2014) 56 (4) Canadian Journal of Criminology and Criminal Justice, pp. 417-446.

<sup>66</sup> FIDA Kenya, 'Informal Justice Systems in Kenya: A Study of Communities in Coast Province (2013) 10, accessed from <http://fidakenya.org/wp-content/uploads/2013/08/Traditional-Justicefinal.pdf> on 12/1/2017.

<sup>67</sup> See Family Law Act 1996, section 13.

<sup>68</sup> Judiciary, 'Court Annexed Mediation' accessed from <http://kenyalaw.org/kenyalawblog/wp-content/uploads/2016/04/Court-Annexed-Mediation-at-the-Judiciary-of-Kenya..pdf>

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requires parties to a traditional marriage or Christian marriage to attempt traditional dispute resolution and mediation respectively before going to court for dissolution of the marriage.<sup>69</sup> However, the Act is silent on the role of ADR in civil marriages.

Family law should, in view of emerging socio-legal research, increase the value attached to the voices of the parties. It should move away from the current system of pre-set legal conditions and outcomes to a system in which couples participate more actively in working out the suitable solution to their family problem.<sup>70</sup> This will not only encourage parties who are suffering in silence for fear of the radical court options but also limit the potential psychological damage that often results from a litigated family dispute.<sup>71</sup> As has been opined by Narayan, the adversarial nature of the court system often makes reconciliation impossible in the post conflict scenario and actually aggravates the family conflicts.<sup>72</sup> Moving forward, states should embrace and strengthen ADR in dispute resolution generally and in family disputes specifically.

One country that has made strides in this direction is the United States where collaborative law is increasingly replacing litigation in family disputes.<sup>73</sup> By

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<sup>69</sup> See Sections 64 and 68 of the Marriage Act, No. 4 of 2014, Laws of Kenya.

<sup>70</sup> M Jane and R Robert, 'Domestic Violence and Mediation: Responding to the Challenge of Crafting Effective Screens' (2005) 39(1) Family Law Quarterly PP 53-85.

<sup>71</sup> See H Difonzo 'Dispute Resolution to Peace-making: A Review of Collaborative Divorce Handbook: Helping Families without Going to Court by Forrest S. Mosten' (2010) 44(1) Family Law Quarterly, 95, 98.

<sup>72</sup> N Neeati 'Mediation as an Effective Tool of Alternative Dispute Resolution System in Matrimonial Disputes (Feb 20, 2013). Available at SSRN: <https://ssrn.com/abstract=2226567>

<sup>73</sup> M Julie 'The Emerging Phenomenon of Collaborative Family Law: A Qualitative Study of Collaborative Family Law Cases' (Research Report Presented to the Department of Justice Canada, 2005), vii available on [http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005\\_1/pdf/2005\\_1.pdf](http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf)

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definition, collaborative law refers to a contractual commitment between a lawyer and a client not to resort to litigation in resolving the client's problem and to negotiate with respondents with the intention of coming up with a non-litigated outcome.<sup>74</sup> If the parties fail to agree, the client is at liberty to proceed to court but the general practice is that the advocate who attempted the collaborative law option should not be the one proceeding with the court option.<sup>75</sup> As a form of ADR, collaborative law has not only succeeded in decongesting family courts in the US but has also enabled parties to focus on the main issues in the dispute without the legal restrictions of the court system.<sup>76</sup> This has not only led to a more amicable resolutions of family disputes but has also resulted into the protection of the best interest of the parties and their children especially in the post-divorce arrangement, which more often than not requires co-parenting.<sup>77</sup> As noted by Parkinson, co-parenting can only be successful upon the full cooperation of both spouses, a reality that is best achieved through the less acrimonious collaborative law.<sup>78</sup>

### **5. ADR as Appropriate Dispute Resolution Mechanism and Not Alternative Dispute Resolution Mechanism**

To understand the problem with 'ADR' as a concept, one must first start by appreciating the nature of a dispute and the definition of 'Alternative'.

'Alternative' according to the Oxford dictionary means; substitute, another, unconventional, complementary or marginal. The implication of all these words is that what is labelled as alternative is only secondary to a mainstream system. Accordingly, alternative dispute resolution mechanisms are usually considered

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> P Tesler, Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts, (2008) 7(1) Journal of Dispute Resolution pp 83-130.

<sup>77</sup> P Patrick 'Family Law and the Indissolubility of Parenthood' (2006) (40) 2 Family Law Quarterly 237-280.

<sup>78</sup> Ibid p 240.



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to be secondary to the court system.<sup>79</sup> A dispute occurs when two or more parties disagree.<sup>80</sup> When this happens, parties either resort to fighting or seek a different way of resolving the conflict. The most common (and often the first) ways of doing this is through negotiation between themselves.<sup>81</sup> Upon the collapse of negotiations, they would often seek the intervention of a third party such as a mediator or a conciliator.<sup>82</sup> It is upon the collapse of the mediation or conciliation process that court option is often sought. The court process therefore comes after negotiation, conciliation and mediation which are erroneously labelled as the 'alternative' but are indeed the first and mainstream dispute resolution mechanism. Even in instances where parties directly move to court after the collapse of negotiations, courts are increasingly urging them to explore mediation or conciliation options and only return to court upon collapse of the same.<sup>83</sup>

Anecdotal evidence indicates that in many instances especially in family and commercial disputes courts often refer the parties for mediation and eventually legitimize the outcomes of the mediation or arbitration processes by converting the agreed action points into court orders.<sup>84</sup> The orders, therefore, assume the identity of a court order and lose their identity as outcomes of consensual ADR processes. At the same time, it is noteworthy that court cases are only a very tiny fraction of disputes in any society.<sup>85</sup> There are thousands, if not millions of cases which although similar in magnitude (or even more intense than the few in

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<sup>79</sup> Muigua above n 1 at 50.

<sup>80</sup> Oxford dictionary.

<sup>81</sup> Shamir above n 8 at 6.

<sup>82</sup> V Jaya, 'Alternate Dispute Resolution Mechanisms' in S Singh 'Towards Legal Literacy: An Introduction to Law in India' (Oxford University Press, 2007) pp. 205-212.

<sup>83</sup> S Thomas, 'ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution' (2004). 1 (3) Journal of Empirical Legal Studies, 843-912.

<sup>84</sup> Ibid at 849.

<sup>85</sup> Ibid at 847.

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court), are addressed by 'alternative dispute resolution systems'. Courts are essentially secondary or even tertiary levels of dispute resolution. In fact, evidence illustrate that in the aftermath of the court process, which often address the superficial elements of the disputes, restorative processes (christened as ADR) are triggered to conclusively dispose off the dispute and resolve both the pre-conflict factors behind the disputes as well as the challenges that may have emerged out of the adversarial and competitive court process.<sup>86</sup> Contrary to conventional understanding, ADR is neither alternative nor complementary to court system as noted by Kariuki Muigua.<sup>87</sup> It is the mainstream dispute resolution system because it is usually the first point of reference in any dispute. Because emerging jurisprudence is moving towards court preference for ADR at the expense of a formal system, Meadow Menkel rightly points out that ADR is indeed the appropriate dispute resolution system that should be strengthened, not as an alternative avenue of justice but as the mainstream and preferred justice system. For conceptual consistency, the court system, which is considered to be the mainstream dispute resolution mechanism should be the alternative dispute resolution mechanism.

## **6. Conclusion and Recommendations**

Globally, there has been a movement towards non-adversarial forms of justice. This is based upon the belated realization that adversarial forms of justice are not only expensive but also time consuming and unsustainable.<sup>88</sup> In North America, there has been the proliferation of collaborative law, a contractual commitment between lawyer and client not to resort to litigation in resolving the client's problem and to negotiate with respondents with the intention of

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<sup>86</sup> Meadow above n 55 pp 6-8.

<sup>87</sup> See generally Kariuki above n 1.

<sup>88</sup> C Meadow-Menkel, 'The Trouble with the Adversary System in a Postmodern, Multicultural World' (1996) 38 (1) William. & Mary Law Review, 5.

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coming up with a non-litigated outcome.<sup>89</sup> In Europe, the movement has majorly focused on formalizing mediation through the establishment of professional bodies to train and supervise mediators.<sup>90</sup>

In Kenya, the movement has been multifaceted. On the one hand, there have been attempts by courts to mainstream ADR within the adversarial justice stem, by for instance, encouraging parties in civil disputes to embrace ADR.<sup>91</sup> This movement has also been characterised by more formal procedures such as Court Annexed Mediation and the establishment of Mediation Accreditation Committee to accredit certified mediators.<sup>92</sup> Similarly, there have been attempts to strengthen traditional justice systems in line with article 159 of the constitution. However, unlike the other initiatives that are judiciary- driven, strengthening (and popularizing) traditional justice has largely been the work of NGOs such as KELIN (Kenya Legal and Ethical Issues Network), (Federation of Women Lawyers (FIDA) and to a small extent, watchdog agencies such as the National Gender and Equality Commission and the Kenya National Commission on Human Rights.<sup>93</sup>

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<sup>89</sup> M Julie, 'The Emerging Phenomenon of Collaborative Family Law: A Qualitative Study of Collaborative Family Law Cases' (Research Report Presented to the Department of Justice Canada, 2005), vii available on [http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005\\_1/pdf/2005\\_1.pdf](http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2005_1/pdf/2005_1.pdf)

<sup>90</sup> Ibid.

<sup>91</sup> The Judiciary, 'Sustaining Judiciary Transformation-A Service Delivery Agenda' (2016)<[http://www.judiciary.go.ke/portal/assets/filemanager\\_uploads/Policy%20Documents/STRATEGIC%20BLUEPRINT.pdf](http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Policy%20Documents/STRATEGIC%20BLUEPRINT.pdf) > accessed on 23.4.2018.

<sup>92</sup> These are however not the focus of this paper.

<sup>93</sup> See Kenya Legal and Ethical Issues Network, 'Accessing Justice and Protecting the Rights of the Vulnerable through Cultural Structures: A Tool on Working with Elders in Communities' (2010) 1 accessed from <http://kelinkenya.org/wp-content/uploads/2010/10/Working-with-Cultural-Structures-A4FINAL.pdf> on 2/5/2018; FIDA Kenya, 'Informal Justice Systems in Kenya: A Study of Communities in Coast Province' (2013) 10, accessed from <http://fidakenya.org/wp->

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Re-institutionalizing ADR into the social infrastructure of society requires a collaborative effort between all the players in the justice system. In line with the spirit of the Kenya Constitution and that of statutes such as the Community Land Act that encourage the use of ADR (specifically traditional dispute resolution ) in conflict management, the executive, judiciary and legislature, watchdog agencies such as Gender and Equality Commission , Kenya National Commission on Human Rights and the office of the Ombudsman, civil society organizations and labour movements should launch joint initiatives together to promote the use of ADR, not as Alternative Justice but as the Appropriate justice system. As a first step, such efforts can focus on traditional justice systems which already have roots within the Kenyan society.

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content/uploads/2013/08/Traditional-Justicefinal.pdf. See also KNHCR, 'Annual Report for the 2009 – 2010 Financial Year (2010)' 45 accessed from <<http://www.knchr.org/Portals/0/AnnualReports/2009-2010%20ANNUAL%20REPORT%20OF%20THE%20KNCHR.pdf?ver=2013-02-20-234013-820> accessed on 2/5/2018.

*Book Review: Resolving Conflicts through Mediation in Kenya:  
Endoo Dorcas*

**Book Review: Resolving Conflicts through Mediation in Kenya**

*By: Endoo Dorcas\**

**Author:** Dr. Kariuki Muigua

**Publisher:** Glenwood Publishers Limited

**Edition:** 2nd Edition, 2017

**ISBN:** 978-9966-046-01-7

Alternative Dispute Resolution (ADR) seems like the next big thing for conflict management professionals in Kenya, especially with the formal recognition of ADR mechanisms such as arbitration, mediation, conciliation and adjudication, amongst others. Can mediation be administered by anyone, with or without any special skills? Is mediation and ADR in general a panacea for conflict management in Kenya? How effective is mediation compared to the other ADR mechanisms? Is ADR and mediation in that natter, applicable to all and/or any dispute? These are some key questions that this book attempts to address and, with great details and precision, the author has achieved this. The book offers a balanced analysis of mediation, discussing both pros and cons of mediation in an objective manner.

The first edition of this book was published at a time when there was hardly any substantive local literature or laws on mediation or other ADR mechanisms in Kenya, and its entry into the market was thus a welcome move. This book

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outlines thus aptly the development of the practice of mediation as an ADR mechanism in Kenya.

The book not only enabled many mediation practitioners, ordinary readers and students of mediation and Alternative Dispute Resolution (ADR) to appreciate the main aspects of mediation but also how mediation relates to other ADR mechanisms. This edition was inspired by the need to take into account the developments that have occurred as a result of the implementation of the current Constitution of Kenya 2010 especially in the access to justice sector such as the implementation of the Court Annexed Mediation Program in the Commercial and Family divisions of the High Court of Kenya. The edition builds on the earlier edition but also contains additional materials on the practical application of mediation in various sectors as well as the requisite skills that may be necessary for a mediator to carry out a successful mediation.

While the book is lacking in details on the particular institutions that offer mediation services in Kenya, the shortfall is compensated for by inclusion of a chapter on the general guidelines for carrying out a mediation process, which is good enough especially for practitioners who may not be or may not wish to align themselves with a particular institution when carrying mediation. Notably, the author appreciates the fact that mediation is a flexible process without any particular hard and fast rules on how it should be conducted and therefore offers general guidelines on some of the most important aspects of the process and the various roles of played by the parties.

This edition, which is an easy yet detailed read for lawyers and non-lawyers interested in mediation, cannot have come a better time considering that more people are not only embracing mediation and the other ADR mechanisms but are also taking up courses on the same to acquire more skills. This book is

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therefore be a must have for all both new and experienced mediators and any other person interested in the process.

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ISBN 978-9966-046-14-7



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