

**ROLE OF ARBITRATION IN
PROMOTION OF ACCESS TO
JUSTICE AS MANDATED BY
ARTICLE 48 OF THE CONSTITUTION
OF KENYA**

**MTULA FREDRICK ODHIAMBO
ADM No. 072272**

**A DISSERTATION SUBMITTED IN
THE PARTIAL FULFILLMENT OF
THE REQUIREMENTS OF THE
AWARD OF THE DEGREE OF
BACHELOR OF LAWS (L.L.B) OF
STRATHMORE UNIVERSITY**

**STRATHMORE LAW SCHOOL
JANUARY 2016**



**ROLE OF ARBITRATION IN PROMOTION OF ACCESS OF JUSTICE AS
MANDATED BY ARTICLE 48 OF THE CONSTITUTION OF KENYA**

**A RESEARCH PAPER SUBMITTED IN PARTIAL FULFILLMENT OF THE
BACHELOR OF LAWS DEGREE**

STUDENT'S NAME:

Fredrick Odhiambo Mtula

STUDENT'S REGISTRATION NUMBER:

072272

SIGNATURE OF STUDENT:



DATE:

06/05/2016

STRATHMORE UNIVERSITY LAW SCHOOL

NAME OF SUPERVISOR:

Linet Muthoni

SIGNATURE OF SUPERVISOR:




TABLE OF CONTENTS

CHAPTER ONE: INTRODUCTION

1.1. Background and purpose.....5
1.2. Introduction to arbitration.....6
1.3. Research focus.....7
1.4. Aims and Objectives of the research.....8
1.5. Research design And Methodology.....8

CHAPTER TWO: THE THEORETICAL FRAMEWORK ACCESS TO JUSTICE THROUGH ARBITRATION

2.1 Literature Review.....9
2.2 Management of disputes and arbitration edification.....9
2.3 Justice as Fairness and the Utilitarian Approach.....10
2.4. Social choice theory of justice.....11
2.5 Access to justice through arbitration.....12
2.6 Conformity of the Arbitration process with the Constitution.....12
2.6.1. Access to Justice as per Article 48 of the Constitution.....13
2.7 Natural Justice.....14
2.7.1. Fairness.....14
2.7.2. Equity.....16

CHAPTER THREE: THE LEGAL AND CONTEXTUAL FRAMEWORK FOR ARBITRATION IN KENYA

3.1 Introduction.....18

3.2. Law and Regulation of Arbitration in Kenya.....	18
3.3. Role of the Court in Arbitration Process.....	20
3.3.1. Statutory power of court to intervene in the arbitration process.....	21

CHAPTER FOUR: REVIEW AND ANALISYS.

4. Challenges.....	23
4.1 Training of Arbitrators.....	23
4.2 Code of Ethics.....	23
4.3 Societal Acceptance.....	24
4.4 Institutional capacity.....	24
4.5 The changing face of arbitration.....	24
4.6 Prospects	25

CHAPTER FIVE: CONCLUSION.....27

BIBLIOGRAPHY

Abstract.

The dissertation concludes with reflections on the future of arbitration in Kenya, and the need for modification and harmonization of arbitration laws for peaceful resolution of disputes and serious conflicts within the Kenyan Jurisdiction.

This paper explores the possibility of efficiently accessing justice through arbitration. Access to justice is now well entrenched in the current constitution of Kenya 2010 (hereinafter the 2010 constitution) as one of its fundamental pillars. Access to justice by majority of citizenry has been hampered by many unfavorable factors which are inter alia, high filing fees, bureaucracy, complex procedures, illiteracy, distance from the courts and lack of legal knowhow. Arbitration is used to refer to the management of disputes without resorting to litigation. Arbitration has the potential to ensure access to justice for the Kenyan people. This potential should be exploited. Arbitration bears certain attributes that can be tapped and lead to justice and fairness. These attributes include party autonomy, flexibility of the process, non-complex procedures and low cost. This paper argues that arbitration can be used in managing disputes effectively since it moves closer to the people, flexible, expeditious, fosters relationships, voluntary and cost-effective and thus facilitates access to justice by a larger part of the population. This paper starts with a brief background and then proceeds to examine the effect of Article 159 of the Constitution, implementation of arbitration, the challenges and opportunities and ends with a short conclusion.

CHAPTER ONE: INTRODUCTION

1.1 Background and purpose

In a world where both personal and social conflicts arise quite regularly, dispute resolution is crucial within society now more than ever. Kenya has moved from an era where the sort of disputes, to be handled were limited, given a low levels of education or unawareness of the individuals rights, to an era of constitutionally guaranteed rights¹. This coupled with the apparent demise of the idea of good faith, has led to the bringing forth of suits based on pure malice and sheer opportunism or are simply of such a low magnitude that they can be dealt with out of court.² “Frivolous lawsuits are booming in this country. U.S. has more costs of litigation per person than any other industrialized nation in the world, and it is crippling our economy”, Jack Kingston³. The spark that ignited this litigation explosion was not these two factors solely, but a coming together’ of several factors such as economy, societal development⁴ to mention a few.

Kenya in this paper is used as the primary reference point. The first of these factors that has led to this judicial backlog, is the recent state of the judiciary, government and the constitution. Kenya recently promulgated a new constitution in 2010⁵. This new constitution firmly protects the rights and liberties of the people. Few countries have modified their constitution to adapt to changing times thus Kenya can be viewed objectively to among the counties with a more advance arbitration law⁶ measured against other African Jurisdictions i.e. Zimbabwe.

The growth of litigation within the Kenyan legal system, is evidenced by the large Backlog of cases and unheard matters within the judiciary⁷. There are well over 200,000⁸ cases pending in the

¹ Chapter 4 of the Constitution of Kenya 2010

² *Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya* By Kariuki Muigua available at <http://www.kmco.co.ke/attachments/article/113/Heralding%20a%20New%20Dawn,%20Access%20to%20Justice%20PAPER.pdf> accessed on 11/12/2015

³ Jack Kingston behind the Offshore Veil.

⁴ *The Litigation Explosion and the Trial Lawyer’s Changing Role*
By David K. Watkiss

⁵ The constitution of Kenya Adopted August 2010

⁶ Articles 159(1). Constitution 2010, Arbitration Act (1995) Act No. 4 of 1995 Cap 49 Laws of Kenya

⁷ State of the Judiciary Reports pg. 22 available at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/SOJAR%20REPORT%202013%20%202014-min.pdf Accessed on 15/01.2016

⁸ State of the Judiciary Reports pg. 26 available at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/SOJAR%20REPORT%202013%20%202014-min.pdf Accessed on 15/01.2016.

principal High Court in Nairobi; cases can take up to 10 years to reach conclusion⁹. The backlog within the judicial system however may at first glance point towards a litigation explosion, but this problem is deeper than excessive litigation. This has occurred as a result of a judiciary that is ineffective in dealing with its case load and is mired by corruption and abuse of power. The judiciary is however under reform¹⁰ to curb these issues by promoting Alternative dispute resolution mechanisms e.g. through court mandated Arbitration and Mediation.¹¹

Kenyan universities release a large number of Law graduates students into the job market, 328 alone in 2015 fewer of whom proceed to the Kenya school of law to qualify as advocates¹². The ratio of lawyers to population stands at 7500 to 40 million¹³. This is because the number of lawyers who practice in the system is shockingly low given the state of the judiciary and prospects of more lucrative returns in other fields. Most law graduates endeavor into academia or like fields. This imbalance of the client to advocate ratio, has largely resulted in a low rate of access to justice for majority of the Kenyan population. Thus debates on arbitration as a cheaper effective and more viable form of Alternative dispute resolution (ADR) are on the rise¹⁴

ADR refers to all dispute resolution mechanisms or variations¹⁵ of such mechanisms that are ordinarily unavailable within court system¹⁶ and are voluntarily opted for by parties to a dispute or contracted for in contemplation of future disputes.¹⁷ ADR under the Kenyan constitution section 159(2) includes but is not limited to Arbitration, Mediation, Conciliation and Traditional forms of Dispute resolution.

⁹ The Climate of Arbitration and ADR in Kenya Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003 Speaker: Brenda Brainch.

Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003

Speaker: Brenda Brainch

¹⁰ <http://www.icj-kenya.org/index.php/about-us/success-stories/271-judicial-reform>

¹¹ Arbitration Law and Practice in Kenya edited by Muigai, Gith

¹² <http://law-school.uonbi.ac.ke/node/1678>

¹³ [www.abajournal.com/News/Is Legal Profession Shakeout Long Overdue?](http://www.abajournal.com/News/Is_Legal_Profession_Shakeout_Long_Overdue?)

¹⁴ "Settling disputes through Arbitration in Kenya", Luanda Publishers 2012 Dr Kariuki Muigua

¹⁵ <http://www.oxforddictionaries.com/definition/english/variation>

¹⁶ The 2010 Kenyan constitution under article 159(2) now acknowledge and provide for ADR methods.

¹⁷ This Definition is crucial as it suggests ADR methods are merely a derivation or precursor to Litigation as it were and not a completely autonomous means of dispute resolution from the court system.

1.2 Introduction to arbitration

Arbitration is a consensual form of dispute resolution exercised by individuals. The Arbitrators are appointed by the parties involved in the dispute and vested with the power to adjudicate the dispute in the place of formal litigation rendering a decision that is binding upon the parties and with an effect similar to a judgment issued by a court of law. In Kenya, arbitration is the best developed form of ADR. With constitutional backing and promotion within various sections of the constitution and statute¹⁸

However arbitration is mired with many of the same problems that repel people from the Litigation process¹⁹. These problems include costs involved. Many Kenyan advocates have hopped on the arbitration band wagon and acquired certifications and qualifications in arbitration²⁰. This has meant that competition has risen within the arbitration market and thus advocates demand similar if not higher fees for the arbitral services some far in excess of actual litigation. Another problem is that arbitration as a process is not as accessible to the average civilian and thus is less effective than litigation to that regard²¹.

1.3 Research focus

There is a clear need for a viable form of ADR to tackle some of the problem of lack of access to justice. With the focus on arbitration, this research project probes arbitration from its theoretical foundations and assesses its complex relation to litigation in facilitating increased access to justice. This will endeavor to answer the question whether arbitration simply an alternative to litigation for the rich? With this in mind, the main beneficiaries of this research are the population that seek increased access to justice and further education on arbitration, the judicial system that is likely to benefit from an eased case load and increased jurisprudence upon which to rely on. Finally legal practitioners who i.e. lawyers who may fully realize the viability of Arbitration as a field to be ventured into and developed.

¹⁸ Art. 189(4), Constitution of Kenya 2010 which provides that National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

¹⁹ This premise forms the basis for the proposed dissertation.

²⁰ This is evidenced by the newly proposed Arbitration Center run by the Law society of Kenya that was alleged to cost Ksh 800 million. This was met with a fierce legal battle that currently lies in the Court Of Appeal of Kenya.

²¹ Kariuki Muigua and Kariuki Francis, 'ADR, Access to Justice and Development in Kenya' (Strathmore Annual Law Conference, Nairobi, July 2014)

1.4 Aims and objectives of the research

The overarching aim of this dissertation is to evaluate the accessibility and effectiveness of Arbitration as an Alternative to litigation in improving access to justice.

The primary objective for this dissertation is therefore to examine the theoretical basis for arbitration and its key proponents, and to illuminate the complex relations between litigation forums and arbitration, with a view to enhance access to justice. A second objective is to investigate the application of the arbitration in filled court cases. To create the link between observation, theory and knowledge about Arbitration, the third objective entails conception of a value construct, which is to establish whether arbitration can increase access to justice. From these objectives, the following research questions arise:

1. What are the theoretical grounding and attributes of the arbitration model in Kenya, and is its application as an ADR method, and does it indeed have theoretical and practical bona fides?
2. Can arbitration in fact be used to ease the overflowing case load of the formal dispute resolution systems?
3. When applied, tested and observed, does arbitration meet the requirements for good ADR method within the Kenyan context? These requirements include expediency, affordability and delivery of justice²². How can it be improved, given the test results, and what recommendations flow from these insights to improve the effectiveness of Arbitration when applied in practice?

1.5. Research design and methodology

Primary sources for this paper will include literature the 2010 Kenyan Constitution and statute on arbitration within the Kenyan context that will further be expounded upon and contrasted with other literature of significance to this paper from other jurisdictions. This will provide a clear analysis of the arbitration process and its ability to contribute to the access to Justice. Secondary sources will include scholarly journals, statute and case law.

²² H. Kelsen , General Theory of standards , Manzsche publishing and bookshop , Vienna 1979 , Wien, 1979

CHAPTER TWO: THE THEORETICAL FRAMEWORK ACCESS TO JUSTICE THROUGH ARBITRATION

2.1 Literature review

According to Jeffrey W. Stempel²³, despite the law's promise of a remedy for every right, the ability of aggrieved parties to access the courts, and the law, has long been constrained as a practical matter. Guided by Jeffrey W. Stempel's philosophy, this literature review assesses the theoretical conception of justice by Amartya Sen and John Rawls. This is done to assess Arbitration as a means to enhancing said justice and access to it.

2.2 Management of disputes and arbitration edification.

Inefficiencies in the court system leads to a variety of adverse effects. Arbitration cannot however be considered as an alternative, viable means of dispute resolution without taking into account levels of knowledge and control over Arbitral processes – after all, Arbitration is — private consensual process where parties in dispute agree to present their grievances to a third party for settlement²⁴. In response to the progress and popularity of Arbitration, Brenda Brainch²⁵ too warns institutions to refine its tools for understanding Arbitration. From a common wealth lawyer comes the sigh that it would be far more useful for Arbitration to be market driven to improve the access to justice.

Indeed, the drive towards arbitration cannot be overstated, given the verdict by Paul Ngotho²⁶ that Litigation does not comprehensively dispose of all new cases filled in an expedient manner and further hinders access to justice through corruption etc. In fact, Dr. Kariuki Muigua reports arbitration development as one of the more viable solution to these externalities of the judicial system. This scenario is confirmed by Brenda Brainch, who cites the average time for case disposition in courts as 10 years. PK Mbote and M Akech²⁷ further suggest that given the vast

²³ Stempel's J W, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*

²⁴ Kariuki Muigua *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises*

²⁵ Brenda Brainch *The Climate of Arbitration and ADR in Kenya Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003*

²⁶ *Access to justice through ADR, the bastard provision in Kenya's arbitration Act*

²⁷ *Justice Sector and the Rule of Law PK Mbote, M Akech – 2011.*

number of law students graduating, it is vital to assess whether arbitration is a viable alternative for dispute resolution to meet the demands of this vast population.

2.3. Justice as Fairness and the Institutional Approach.

In order to view Arbitration as a means to improve access to justice in Kenya, one must better understand the concept of justice itself. John Rawls has arguably written the seminal piece on justice from a Western perspective. He theorized a vision of the world where all actors having been rendered equal – determine the principles of the institutions governing their social relations. This theoretical stand is derived from a Utilitarian standpoint that society should aspire to achieve the greatest good for the greatest number of people. Rawls proposition that justice predicated on fairness is key as, if Arbitration is indeed to improve access to justice and be a viable alternative to litigation, it must be equally accessible to all. Rawls’ institution-focused theory of justice essentially led to a key principle that each person has the right to the same liberties as those received by others²⁸. This theory is key as it underpins the premise that accessibility is key if Arbitration is to indeed be a viable alternative to dispute resolution. This is because lack of access to a legal mechanism by the majority renders it redundant. This theoretical backing will not be analyzed on a universal context, but at a regional level as Arbitration in this paper is to remedy problems within the Kenyan and the African context. More attuned to this discussion, Rawls theorizes that a just economic and legal system would take into account the agreement of those within a society that intends to elect a Leviathan.

“Fairness” is a Key principle akin to justice itself that should be considered in evaluating a Just arbitration infrastructure. Fairness is among the key aspects of natural justice and Rawls places this at the forefront of determination of a just political system and in this case an arbitration regime in resolving the fundamental flaws outlined as the research objectives and questions in this paper Rawls identifies the basic structure of a society as the primary subject of justice and identifies justice as the first virtue of social institutions. He considers justice a matter of the organization and internal or tribal divisions within society. Rawls theorizes as to whether man given the free choice (independent) to determine the society they live in and choose to be governed by would affect the laws they chose to prevail.

²⁸ Amartya Sen, *The Idea of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2009)

After asserting that the main characteristics of justice is fairness and the theoretical superiority of this approach to utilitarianism. Rawls identifies two principles: First, that every person ideally should have equal rights to the most liberties in line with other people having and actualizing the same liberties; and secondly, that inequalities should be arranged so that they would be to everyone's advantage and arranged so that no one person would be blocked from enjoying any liberty. Rawls derives from these two principles an egalitarian conception of justice that would allow more attention to be given to those born with fewer assets and into less favorable social or communal positions. Arbitration to this extent should be purely considered as a law. This idea that a "Just" and fair law that promotes these propositions as enunciated by Rawls can seldom result in adverse effects. From a Utilitarian standpoint of the greatest good for the greatest number of people, this paper proceeds with this theoretical standing..

There are however criticisms to this approach to defining justice. One of the main critics that presents himself is Nozick²⁹ who points out that resources are produced by people and that people have rights to the things they produce. Thus, trying to improve the condition of the poor through redistribution and re-imagination of laws is unjust because they some people work too hard for others to deprive them of the goods and opportunities they have created through time and effort. However in Rawls contemplation of justice he opines that Legal justice is generally considered a matter of appropriate responses to actions.

2.4. Social choice theory of justice

In his idea of justice, Amartya Sen does not necessarily offer a concrete definition of justice, but rather a way of considering how an effective pursuit of justice might happen. Sen's focus is on the behavior of people in societies. This is much like the basis of this paper as it seeks to analyses the disputes within the Kenyan context, how people chose to solve them and if these disputes are arbitrable. Sen underlines the importance of the "comparative approach:"³⁰ by suggesting the comparison of different communities facing similar challenges and understanding the mechanisms that provide them with more just outcomes. Rawls's identifies territorially-situated agents from wider and more global impartiality, he argues that real impartial assessment requires sensitivity to

²⁹ *Anarchy, State, and Utopia* (1974) Nozick

³⁰ Amartya Sen, *The Idea of Justice* page (105).

those governed by laws; objectivity therefore requires taking note of different cultures and viewpoints from other jurisdictions.

2.5 Access to justice through arbitration.

Arbitration is a creature that “arises from contracts” between parties. Despite this limited definition, Carlston³¹ goes further to define arbitration as “a chameleon word, assuming varying significance as the social setting in which it takes place varies”. This suggests arbitration should not only be viewed in the context of written contracts and must consider individuals “sentient anatomical structure”, and as parties to the universal social contract theory as envisaged more famously by Thomas Hobbs, John Lock and Jean-Jacques Rousseau. With this basis it is then possible to evaluate its position broadly in Kenya and later evaluate the ability of arbitration to ease the judicial case backlog. (Improved Access to Justice).

2.6 Conformity of the Arbitration process with the Constitution.

The Constitution, under article 2, is the supreme law of the Republic and binds all persons and State organs at all levels of government. This is clearly demonstrated in *Albert Ruturi & Others vs A.G & The Central Bank of Kenya*³² which stated that any law inconsistent with the Constitution shall be deemed void. Arbitration is to adjudicate and not to create rights (Kenneth S. Carlson). This means Arbitration should be consistent with preserving rights already etched in the constitution for instance the right of access to Justice³³, and article 50 which guarantees the right to a fair hearing.

Arbitration as a means of dispute resolution derives its force of law from “the will and consent of the parties of the parties”³⁴. This is as per the UNCITRAL model law which has been incorporated into the Act. These are pre-dispute arbitration clauses. The Contracts in the Kenyan jurisdiction of an international commercial nature customarily include an arbitration clause allowed for by virtue

³¹ Kenneth s Carlston “Law and contemporary problems volume 17 autumn, 1952 number 4 theory of the Arbitration process

³² High Court at Nairobi, Miscellaneous Civil Application No. 905 of 2001

³³ Article 48 Constitution of Kenya 2010

³⁴ *Reily v. Russell*, 34 Mo. 524, 528 (1864).

of article 159(2) of the constitution charged with guiding the Arbitral process and other forms of ADR including Mediation.

2.6.1 Access to Justice as per Article 48 of the Constitution.

In considering the aspects that would render Arbitration a viable alternative to litigation, one of the more crucial aspects that needs to be assessed is the Money factor. A major hindrance too access to justice if the financial capabilities of the parties involves. This is not only true for the various forms of ADR but is applicable to the Judicial Process as well. This proves such a factor that in contemplating the Constitution and the need for effective access to justice, drafters seemed it important to include Article 48 that states that it is the States' responsibility to ensure that the citizens have access to justice. It goes further to state that in the event fees are in question, the fees should be, "reasonable and not impede access to Justice. Arbitration as has been stated earlier, The Arbitration process does not require, and sometimes restricts the participation of a Lawyer to a simply observatory role if allowed at all. This means that compared to Litigation where a lack of a lawyer may prove detrimental to the case, Arbitration overlooks this and to this extent makes the process cheaper than litigation. This assertion is not full proof as in the event of lengthy Arbitral proceedings the costs do exceed those of Litigation³⁵. This if considered with the fact that as per section 32 b of the act placing the burden of the determination of arbitrator's time, the fee of the arbitration forum, as well as all the normal litigation fees like legal fees and related costs solely on the selected Arbitrators, means that the fees could sky rocket even further. Article 48 of the constitution, like many incompletely defined articles of Law does not clearly dictate what this "reasonable" fees may be, making this completely discretionary.

Several factors as have been pointed out are to be considered in the setting up of an Arbitration. Unlike the Court process that stipulates the costs associated with litigation, the arbitration act does not follow suit. Parties to Arbitration proceedings more often than not have differing financial bargaining powers. This suggests that a party with a deeper pockets may elect to select an arbitrator who charges beyond the means of the other party. This is the legal right of the Party however this directly affects the other parties access to justice should they not be able to meet these costs. In some cases Arbitrators may withhold Judgement from the parties if the fees are not met.

³⁵ "Arbitration is generally less expensive than litigation, it can still become too expensive in the long run in case of any dragging" Kariuki Muigua

Furthermore unlike Court, Modern arbitration may be institutional or Ad hoc, may raise these costs even higher. It is however is important to note that unlike the Judicial system that is mired with Corruption at all levels, constitutional and statutory provision prevent the abuse of the arbitral process and a court may set aside a decision under Sec 35 (2) (v) of the Act, in the case that the decision was induce by fraud of some kind. Court intervention has been a major hindrance to development of Arbitration and to an extent access to justice. It is however unclear and not contemplated under the conditions envisaged by The Act³⁶, situations in which a court in enforcing Article 48, may step in to safe guard the latter part of the envisaged right.

There have been however several arguments that Arbitration does not promote the fundamental principles of Natural Justice. This is a sound place to proceed with the discussion in this chapter.

2.7 Natural Justice.

Natural Justice must be considered in evaluating the viability of Arbitration. This is because Arbitration entails privileges such as a considerable amount of control over the proceedings. Unless parties agree otherwise in an Arbitration agreement or choose subsequently³⁷ to resort to court, all the aspects of the case are privy to the parties. Secondly, Arbitration is a private and consensual process as parties who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure. Besides the choice of arbitrators, parties can control aspects of the proceedings as well. In Arbitration agreements, parties can consent to oust certain procedures. Such as choice of laws, and procedural changes for expedience. Arbitration further creates a less tense atmosphere for dispute settlement. It is also important to note that Arbitration awards arising out of Arbitration should be Final and binding subject to certain statutory restrictions mainly Section 10 of the Act. This read in line with Articles 47³⁸ and 48³⁹ of the constitution further emphasizes the importance of the principles of Natural justice.

³⁶ See Chapter 3.3

³⁷ Parties may not pull out of instituted Arbitral proceedings once instigated.

³⁸ Article 47 deals with fair administrative action. Clause (1) thereof provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair(Kariuki Muigua)

³⁹ Article 48 provides that the State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. This provision is not biased towards people dealing with public law only but also protects those dealing with private law(Kariuki Muigua)

2.7.1. Fairness

The principles of natural justice govern the operation of the Law and Administrative processes. The principles of natural justice entail the right to be heard (*Audi alteram partem*) and the right to a fair and unbiased administrative process (*Nemo iudex in re causa sua*). Arbitration has long been seen as a process where the courts influence has been minimized to the point that Fundamental Rights of the individuals may be derogated to come to a conclusion. Most Arbitral proceedings are held in private so the basic requirements for justice may be overlooked, further Kariuki Muigua suggests,

*“parties are sometimes not permitted to be represented by lawyers; rights of appeal are sometimes limited; there is a wide discretion of a tribunal at times, which may lead to inconsistent and illogical decisions”*⁴⁰.

The laws in Kenya have come a long way to circumvent this shortcoming. Section 13⁴¹ of the Arbitration Act (cap 4 of 1995) which provides that when a person is approached for appointment as an arbitrator he must disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. This is effectively the first instance that the Act seeks to safeguard the Natural Justice principles. Arbitration bases its autonomy as a result of consent between contracting parties. The selected Arbitrators possess immense power as these decisions are binding, thus this section requires any bias or conflict they must be declared. The onus here is essentially on the Arbitrators to disclose any information of a personal nature that may affect the contracting party's. The Arbitrator should thus consider the Parties to the conflict, the nature of the conflict and finally the subject matter at hand.

The Kenyan decision in *David Onyango Oloo vs The Attorney general* emphasized the importance of the principles Natural justice proclaiming its application, “to an administrative act in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit application of a law”. The Constitution however under the aforementioned Articles 47 and 48 have moved to remedy and guarantee this Natural right. These ensure the parties right to Fairness. Fairness entails both aspects of procedure and administration. The Avant-Garde nature of Arbitration means that existent laws need be called upon to streamline this process to acclimatize to the Kenyan context.

⁴⁰ Constitutional Supremacy over Arbitration in Kenya KARIUKI MUIGUA

⁴¹ <http://www.kenyalawresourcecenter.org/2011/07/principles-of-natural-justice-in.html#sthash.lxqNbON8.dpuf>

Article 50 of the Constitution provides for the right to a fair hearing. It further provides under clause 1 that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The supreme law thus dictates that in pursuance of a fair hearing, there need be transparency, rule of law, inclusion, human rights and non-discrimination⁴². Any deviation from such would render it unconstitutional.

2.7.2. Equity

This is ensured by Section 19 of the Arbitration Act that deals with equal treatment of parties and provides that the parties shall be treated with equality. This will be considered subject to section 20 dictating that parties be given a fair and reasonable opportunity to present their case. These provisions would be subject to Articles 27 and 50 of the Constitution on equality and fair hearing respectively. This position is supported by jurists aptly summed in the pronouncement that, “parties shall be treated with equality and each party shall be given full opportunity of presenting his case”⁴³: in accordance with the Arbitration Act. Despite these provisions within the operational Act, this right is not guaranteed as the Act is to be considered in line with the constitutional provisions. Privacy is a major aspect of Arbitration. Article 50 of the constitution mandates the proceedings be of a public Nature. The exception to this is however as put in *Miller Vs. Miller* [1988] KLR 555, the public nature of a trial may be waived with consent of both parties, further it may be conducted in private if access to justice is to be impeded otherwise. It was held by Judge JV Ogunda in his ruling dated 3rd of March 2010, that Arbitrations should be held in public subject to section 50(8). This considered in accordance with the rules of the supremacy of the constitution may render a private arbitral proceeding invalid. Article 50 1 (g) of the same requires that a party to a conflict has the right to obtain the services of a lawyer. Some Arbitration agreements derogate and waive this right. Article 25 of the Constitution goes further under sub section 25(b) to deem the right to fair trial and all it entails, not to be limited. These derogations despite being acceptable under the UNCITRAL model laws, which are in line with the Act, do not render these proceedings any more constitutional. This suggests Arbitration principles within the Kenyan context conflict with the constitution. Within the international framework however, the choice of law clause may

⁴² Article 10, Constitution of Kenya 2010

⁴³ Justice Deverrel: 248 of 2005 *EPCO BUILDERS LIMITED –Vs- ADAM S. MARJAN*

circumvent these hurdles as the UNCITRAL model law and rules are the *lex loci Arbitri* in conjunction, with the contracted upon national laws of the parties subjugated to this. This too under Article 1(2) has limitations to the extent of a repugnant conflict of laws.⁴⁴ Edward Nii Adja Torgbor suggests that on analysis of this article UNCITRAL rules may be, “subordinate to the mandatory provisions of the governing arbitration laws of the state”. One thus contemplates the place and arbitrability of disputes between parties subject to Kenyan law being businesses of individuals. Kenya is a signatory to the New York Convention, which came into force in Kenya on May 11 1989. This effectively means that arbitrations that are conducted outside the jurisdiction of Kenya but has significance or one of the parties is proximally related to Kenya, are enforceable in the Kenyan Jurisdictions by the Courts provided the other countries are signatories to this convention.

⁴⁴ “These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.”

CHAPTER THREE: THE LEGAL FRAMEWORK OF ARBITRATION IN KENYA

3.1 Introduction

The Kenyan Justice system like most jurisdictions is three fold, the Judiciary as the enforcement mechanism herein (referred to as the Bench), The Police charged with monitoring and prosecuting any offences and finally the Bar⁴⁵ which is essentially legal practitioner's i.e. lawyers. The justice system in Kenya has had several stages of development since the pre-colonial era, to the current post 2010 constitution era. The changes have been vast and varying with the core principles underlying the mandate of the judiciary constantly evolving as evidenced by the annual judicial reports post 2010. Up until recently the Judiciary on paper seemed to have solid principles for justice disposition however in practice the contrast was stark. Before we delve into the inner workings of the judiciary and its role in the access to justice, it is important to note that unlike the International Court of Justice (ICJ), that states access to justice is "promotion of the citizen's access to the courts of law in Kenya and Africa", this paper looks beyond the restrictions of the court system and demystify the perception that Justice can only be sought in a court of law.⁴⁶

3.2 Law and Regulation of Arbitration in Kenya.

In determining whether arbitration is a viable proposition as an alternative to the court system in accessing justice, this chapter will assess the merits of Arbitration based on cost, case disposition and the legal and regulatory frameworks in place. Prior to this dissection of the intricacies of the arbitration process and merits and demerits, and a history of the Laws of arbitration in Kenya up till now. The Law of Arbitration and ADR as a whole has been present in the Kenyan Jurisdiction much like most African jurisdictions⁴⁷ i.e Justice Charles Kajimanga of Zimbabwe⁴⁸ recognizes that that the use of ADR is one of the significant ways by which access to justice can be enhanced. He further asserts that this is possible because in most ADR mechanisms such as Mediation and

⁴⁵ The Bar includes Advocates that have qualified to practice law in Kenya. This appears to be a factor in the hindrance of access to justice as costs of admission and time investment are high which deter able advocates and pushes them towards the private sectors of employment. The link here to Arbitration is that a lawyer without a post graduate degree may actively participate in Arbitration practice but has no locus in courts of law.

⁴⁶ This premise is based on the fact that Africa both historically and practically has several alternatives from the traditional mechanisms to the more formal.

⁴⁷ ADR dates back to 1189, being the first year of the reign of Richard I and the start of the Plea Rolls. See Redgment J Introduction to the Legal System of Zimbabwe (1981) 20. Stellenbosch

⁴⁸ enhancing access to justice through alternative dispute resolution mechanisms – the zambian experience presented at the annual regional conference held at southern sun, mayfair nairobi, kenya on 25 – 26 july, 2013

Arbitration, parties themselves are actively involved in the resolution of their disputes. Though this perspective may appear conclusive it is far from absolute as despite the predominant use of ADR mechanisms in an informal setting such as in traditional settings, yielding authority to Elders to determine conflicts with transferee of resources as payment⁴⁹ (quite similar in practice and execution to arbitration)⁵⁰, has taken years to be incorporated into statute and the Legal System as a whole. Evidence of arbitration use in history spans as far back as the Holy books themselves.⁵¹ As a matter of fact Kenya's first true statute that pronounced the position of this ADR mechanism is The Arbitration Act (1995) Act No. 4 of 1995 Cap 49 Laws of Kenya. It has since been repealed by arbitration amendment Act of 2009 (Herein referred to as the Act). This statute commenced on the 2nd of January 1996 by virtue of Legal Notice No. 394 of 1995⁵². This was essentially due to the fact that courts had free reign to interfere with this process at any time and quash any decisions it deemed unacceptable. It is however a tragedy for the development of African culture, concepts and experience, that unless their practices and procedures are, "acknowledged by colonialist language or nomenclature, they are either condemned or ignored. At best the development and evolution of such procedures are stunted or, sadly, even unacknowledged by some Africans themselves". Consequently, the African contribution to human knowledge, advancement and experience, in the global context, is either unrecognized, minimized, marginalized or devalued as aptly stated by Edward Nii Adja Torgbor⁵³.

In conjunction with the Act the Constitution of 2010 recognizes the need of for arbitration and other ADR methods. Article 159(2) (c) of the Constitution provides that in the exercise of judicial authority, the Courts and tribunals must be guided by the principle of inter alia promotion of alternative forms of dispute resolution (ADR) including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. This serves as the supreme law of the land and the inclusion of such a crucial article may denote the desire or rather need for alternative to litigations, which will be illustrated in the coming chapters. This is crucial as if the courts are

⁴⁹"African customary arbitration". UNCITRAL Working Group, 39th session 19 June – 7 July 2006 (UN doc A/61/17).

⁵⁰ I. W. Zartman Ed., (2000) Traditional Cures for Modern African Conflicts;

⁵¹ The Holy Bible 111; Isaiah ch 2:4; the Quranic basis of arbitration is found in 4:35 and 49: 9-10

⁵² -See more at: <http://www.kenyalawresourcecenter.org/2011/07/arbitration-agreement.html#sthash.hLL6uRSV.dpuf>

⁵³ Edward Nii Adja Torgbor A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya.

solely charged with disposition of justice and the system is clogged, the main culprit for this Clogging, being the immense back log, that has triggered a backlog clearance initiative⁵⁴ on the part of the judiciary, Access to justice sought through the Court for most, given the current context, is difficult, but with the right management and assistance quite attainable.

In Conjunction with the Act and the constitution, Section 59 of the Civil Procedure Act 34 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 provided for by rules; further, Order 46 of the Civil Procedure Rules provides inter alia that at any time before 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. This has promoted the inclusion of arbitration clauses in contracts between parties and given leave to the courts to ease their burden by allowing such cases to be expedited through arbitration⁵⁵. International Arbitration has gained much more traction in Kenya. The current arbitration Act is based on a Model of the United Nations Commission on International Trade Law (UNCITRAL) which was adopted in 1985 with a view to encouraging an arbitration processes that would have global recognition. The idea is to evaluate the viability of Arbitration to enhancing “Access to Justice” for all, which as per Article 48 of The Constitution of Kenya 2010 stipulates that in accessing justice, if any fee is required, it shall be reasonable and shall not impede access to justice. These parties to International Arbitration tend to have the financial backing to see an arbitration through. This read with article 35(5) that allows tribunals to set their own fees⁵⁶ and grants tribunal to withhold decisions in lieu of payment, raises eyebrows with regards to its viability in enhancing access to justice - and it comes full circle to one of the main shortcomings of the court system such as affordability in sustaining a suit to its conclusion etc.

⁵⁴ Available at <http://www.judiciary.go.ke/portal/blog/post/high-court-case-backlog-clearance-initiative> accessed on 12/12/2015

⁵⁵ Section 6 of the Act

⁵⁶ <http://www.kenyalawresourcecenter.org/2011/07/arbitration-agreement.html#sthash.h1L6uRSV.dpuf>

3.3 Role of the Court in Arbitration Process.

The extent to which the court can interfere in the arbitral process is also key in determining the independence and viability of arbitration as an autonomous means of dispute resolution. This is based on the premise that arbitration, needs to be a voluntary process to submit a dispute to a freely chosen tribunal for a final⁵⁷ and binding decision (Kenneth S. Carlton, 1952)⁵⁸. This stems from the Section 10 of the Act provides for the extent of court intervention in arbitration proceedings. It provides that except as provided in this Act, no court shall intervene in matters encompassed by this Act. Prima facie, the Act seems to keep minimize the number of instances when the national court should intervene in arbitral matters. The caveats provided for under the Act occur where courts could come in either to determine issues where parties *fail to agree* or to assist the arbitral tribunal in some other way. Under Section 6 of the Act, powers are conferred to the High court powers to stay legal proceedings and refer the matter to arbitration where there is pre-existing agreement to refer the matter for arbitration. This bars cases that prior consented to an Arbitration agreement to rescind in the event the tide does not sway in their favor. Kenyan case law supports this position as in the case of Nancy Nyamira & Another V Archer Dramond Morgan Ltd⁵⁹, where it was stated that it is important that Courts enforce the time limits articulated in that Act – “*otherwise Courts would be used by parties to underwrite the undermining of the objectives of the Act.*”

3.3.1. Statutory power of court to intervene in the arbitration process.

Section 11(1) of the Act gives the High court the power to determine the number of arbitrators if parties fail to agree on the same. Section 12 of the Act further gives the court the power to appoint the arbitrator(s) where parties fail to agree on the procedure of appointing the arbitrator(s). Section 7 of the Act gives the High Court the power to grant interim measures of protection where a party so requests. However, the section provides that where the arbitral tribunal has already ruled on such an application, then the High court will treat such a ruling as a conclusive outcome of that application. This however does not consider the interest of the party against whom the ruling has been made and the harm suffered. Despite this, an application by a party for challenging an

⁵⁷ UNCITRAL Arbitration Rule (as revised in 2010) UNITED NATIONS UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW Art 34(2)

⁵⁸ law and contemporary problems volume 17 autumn, 1952 number 4 theory of the Arbitration process

⁵⁹ Civil Suit 110 of 2009, [2012]eKLR

arbitrator, Section 14(1) of the Act grants the High Court the power to decide on an application by a party in arbitration proceedings challenging an arbitrator. Further, Section 15(2) grants the High Court powers to decide on the termination of the mandate of an arbitrator who fails to act or whom it becomes impossible to act, where party are unable to do so. Section 17 thereof gives the High court the powers to make the final decision on the question of jurisdiction of the arbitral tribunal. Section 28 provides that the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the High Court assistance in taking evidence, and the High Court may execute the request within its competence and according to its rules on taking evidence. Section 35 confers the High court powers to set aside an arbitral award under the circumstances provided under that provision. Section 35(1) is to the effect that recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3). This implies that the Court will not act in such matters unless a discontented party invites it to do so. Subsection (2) sets out the grounds upon which the High Court will set aside an arbitral award. The grounds which the applicant must furnish proof for the arbitral award to be set aside are: incapacity of one of the parties; an invalid arbitration agreement; Lack of proper notice on the appointment of arbitrator, or of the arbitral proceedings or where the applicant was unable to present its case; where the award deals with a dispute not contemplated by or one outside the terms of reference to arbitration or matters beyond the scope of reference; where the composition of the arbitral tribunal or the arbitral procedure was contrary to the agreement of the parties except where such agreement was in conflict with provisions of the Act and the parties cannot derogate from such; or where fraud, undue influence or corruption affected the making of the award. Apart from the above, the High Court may also set aside arbitral awards where it finds that the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or the award is in conflict with the public policy of Kenya. The Act however limits the time frames within which the disgruntled party may lodge their applications with the High Court for setting aside of arbitral awards. Section 35(3) of the Act provides that where three months have lapsed since the award was entered the court will not entertain any applications to set the same aside. This limitation serves to prevent such applications to be made in bad faith and also to ensure that such decided matters are put to rest.

CHAPTER FOUR: REVIEW AND ANALYSIS.

4. Challenges

Despite the strides made in coming up with a sound legal framework for the use of arbitration in Kenya, there are still certain challenges in the effective application of the same to enhance access to justice, reduce backlogs and expedite conflict management.

4.1 Arbitrator training

These challenges relate to lack of capacity in terms insufficient personnel who can handle disputes using arbitration mechanisms and lack of understanding on the working of these mechanisms. The professional alternative dispute resolvers are overwhelmed by the large number of disputes due to a high population and cannot possibly deal with all the matters suggested by the various laws to be handled using arbitration mechanisms and supported by the constitution.

There are few institutions that train arbitrators in the entire country. The most significant one is the Chartered Institute of Arbitrators (Kenya Chapter), which provides training to its members. The Dispute Resolution Centre also deals with its members only without necessarily offering to the general public. These institutions cannot possibly meet the needs for training and therefore, more institutions ought to take up the training of arbitration practitioners, more so the several middle level university colleges spread all over the country. This suggests the proposed dispute resolution center at the Law society of Kenya may appear to be a good development oriented idea.

4.2 Code of Ethics

There is likelihood that there is going to be a flood of arbitrators if training efforts are enhanced. This is against a background of the fact that the code of ethics in place is specific to arbitrators and the provisions in the Arbitration Act provide for removal or disqualification of arbitrators only.⁶⁰ The major challenge will be regulating Independent practitioners unless it is made compulsory that every practitioner must be registered as a member of a professional body. This way it will be easier

⁶⁰ Kariuki Muigua, "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. Page 11, Available at [http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation Kenya.pdf](http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation%20Kenya.pdf)

to come up with an effective code of ethics and with better mechanisms of enforcement for their regulation.

4.3 Acceptance by the society

Arbitration seeks to serve the greater society. However the population is still a courts oriented one. Many people would rather have an order of the court or a decision of an administrative tribunal to enforce, rather than a negotiated agreement that is wholly dependent on goodwill. Even where the law has put in place enforcement mechanisms for negotiated settlements, people still desire the coercive nature of courts, as opposed to all the cordial talks that are arbitration tribunals. The society has become entranced by litigation (given the high risk high reward nature and vice versa) of courts that to convince disputants to embrace arbitration becomes an uphill task.

4.4 Institutional capacity

There is the need to enhance the capacity of various institutions to meet the demands for arbitration mechanisms introduced by the constitution. These institutions include: Chartered institute of Arbitrators (Kenya Chapter) established in 1984, Dispute Resolution Centre, a non-profit organization established in 1997. There is need to enhance the capacity of these institutions as well as putting in place mechanisms to establish more institutions. This will greatly improve the rolling out of arbitration services to a larger group of citizens.

4.5 The changing face of arbitration

The major selling point of the ADR approaches of dispute resolution is their attributes of flexibility, low cost and lack of complex procedures. These attributes are no longer tenable in arbitration as it is gradually becoming as expensive as litigation, especially when the arbitral process is challenged in court.⁶¹ When the matter goes to court, it is back to the same old technicalities that are present in civil proceedings. This challenge also brings in the other factor that is changing the face of arbitration; interference by courts. Ordinarily, courts are not supposed to inquire into the arena of the arbitral proceedings, even where the same are court mandated. Courts are entertaining all manner of applications by parties' intent on derailing the arbitral proceedings and thus delaying justice for all concerned. This means then that parties are slowly

⁶¹ Kariuki Muigua, Avoiding Litigation through the Employment of Alternative Dispute Resolution, page 8, Available at <http://www.chuitech.com/kmco/attachments/article/101/pdf>

losing confidence in the arbitral process at it makes no sense to engage in arbitration for years only for the dispute to end up in courts of law for determination. This comes at a time when the constitution is trying to do the opposite. This is however not a conclusive point.⁶²

4.6 Future of arbitration

Arbitration has been effective in administration of justice where they have been used. The inclusion of arbitration into the constitution means that there will be change in the policy on resolution of conflicts towards encouraging its use to enhance access to justice and the expeditious resolution of disputes without undue regard to procedural technicalities. A comprehensive policy and legal framework is in place to set the use of arbitration in motion. It should be realized that most of the disputes reaching the courts should never have reached there in the first place and can be resolved without resort to court if arbitration was to be applied and be treated not as an inferior alternative to litigation but as equally appropriate means to realization of justice. Where arbitration has been used in managing conflicts and seeking justice it have been effective since it are closer to the people, flexible, expeditious, foster relationships, and voluntary; in most cases cost-effective. Arbitration has also been said to have indirect benefits. As already noted elsewhere in this paper it can increase the effectiveness of courts by reducing backlog. This can in turn improve trust in the country's legal system, which may increase foreign investment.⁶³

⁶² See Chapter 3.3.1

⁶³ Inessa Love, *Settling Out of Court: How Effective Is Alternative Dispute Resolution?*, page 1, The World Bank Group Financial and Private Sector Development vice presidency, october 2011. Available at <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Sector> Accessed on 22/11/2015

CHAPTER FIVE: CONCLUSION

The direct inclusion, as opposed to inference, of arbitration as part of the means of conflict management in the Constitution and in Acts of Parliament is a ground breaking move. However, there is need for caution so that this effort is not defeated by capacity challenges, some of which have been discussed above. The Law Commission in Dublin observes that ‘Alternative dispute resolution must be seen as an integral part of any modern civil justice system. It must become such a well-established part of it that when considering the proper management of litigation it forms a part of our law and of our thought processes, as standard considerations like what, if any, procedure is to be deviated from or observed. Though litigation must always remain available for clients, more so access to it, litigation can be a very stressful undertaking and should be seen as the final result in resolving dispute.

It is essential that in the application of arbitration in view to achieve a just and expeditious resolution of disputes, the Bill of rights as enshrined in the constitution must at all times be kept in mind and upheld. The future of arbitration in Kenya is bright and really promising in bringing about a just society where disputes are disposed of more expeditiously and at lower costs, without having to resort to judicial settlements. Finally, a party who wishes to avoid the complexities of litigation can seek the services of ADR mechanisms experts and do so legally. There may come a time when ADR becomes the norm rather than the exception in conflict management in our fast growing country and one embracing globalization where court systems differ significantly.

Arbitration can rightly be referred to as Appropriate Dispute resolution mechanisms instead of alternative as the use of the word ‘alternative’ makes them appear inferior to litigation while this is not the case. The reality is that these mechanisms should at least be treated as equal if not better mechanisms when compared to litigation. These have the potential for being made applicable in all walks of life wherever there exist possibilities of any dispute, a potential only waiting to be tapped. This is the time to actualize the fact that alternative dispute resolution mechanisms and specifically arbitration stands independently and not as an alternative to any adjudicatory process.

BIBLIOGRAPHY

Books

Settling disputes through Arbitration in Kenya, Luanda Publishers 2012 Dr Kariuki Muigua

Amartya Sen, *The Idea of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2009) at 54 [Idea of Justice]

John Rawls, 'A Theory of Justice' revised edition of *A Theory of Justice*, published in 1971 by Harvard University Press

Anarchy, State, and Utopia (1974) Robert Nozick 1974

The Holy Bible 11; Isaiah ch 2:4; the Quranic basis of arbitration is found in 4:35 and 49: 9-10

H. Kelsen, *General Theory of standards*, Manzsche publishing and bookshop, Vienna 1979, Wien, 1979

Statutes and Conventions

Constitution of Kenya 2010

Civil Procedure Act, Cap 21, Laws of Kenya

UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002 (United Nations 2002) Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html

Accessed on 10 October, 2015

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) Arbitration Rule (as revised in 2010)

Arbitration Act (1995) Act No. 4 of 1995 Cap 49 Laws of Kenya

Arbitration (Amendment) Act of Kenya 2009

Journals and Articles

Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*

Jonnette Watson Hamilton *Pre-Dispute Consumer Arbitration Clauses: Denying Access to Justice?*

LEWIS L. MALTBY *Employment Arbitration and Workplace Justice*

“Overview of Arbitration and Mediation in Kenya” Kariuki Muigua

Kenya: Justice Sector and the Rule of Law by PK Mbote and M Akech

The Climate of Arbitration and ADR in Kenya Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003 Speaker: Brenda Brainch

“The Bastard Provision in Kenyas Arbitration act” Paul Ngotho

Alternative Dispute Resolution and article 159 of the constitution-Kariuki Muigua

Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya By Kariuki Muigua available at <http://www.kmco.co.ke/attachments/article/113/Heralding%20a%20New%20Dawn.%20Access%20to%20Justice%20PAPER.pdf> accessed on 11/12/2015

The Litigation Explosion and the Trial Lawyer’s Changing Role By David K. Watkiss

State of the Judiciary Reports available at http://www.judiciary.go.ke/portal/assets/filemanager_uploads/reports/SOJAR%20REPORT%202013%20%202014-min.pdf Accessed on 15/01.2016.

The Climate of Arbitration and ADR in Kenya Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003 Speaker: Brenda Brainch.

Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003 Speaker: Brenda Brainch.

<http://www.icj-kenya.org/index.php/about-us/success-stories/271-judicial-reform> accessed 10/11/2015

Kenneth s Carlston “Law and contemporary problems volume 17 autumn, 1952 number 4 theory of the Arbitration process available at;

https://www.jstor.org/stable/pdf/1190383.pdf?seq=1#page_scan_tab_contents

Kariuki Muigua, "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. Page 11, Available at [http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation Kenya.pdf](http://www.chuitech.com/kmco/attachments/article/83/Overview%20of%20Mediation%20Kenya.pdf)

Kariuki Muigua, Avoiding Litigation through the Employment of Alternative Dispute Resolution, page 8, Available at <http://www.chuitech.com/kmco/attachments/article/101/pdf>

Inessa Love, Settling Out of Court: How Effective Is Alternative Dispute Resolution? , page 1, The World Bank Group Financial and Private Sector Development vice presidency, October 2011 Available at <http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/282044-1307652042357/VP329-Sector> Accessed on 22/11/2015

Redgment J Introduction to the Legal System of Zimbabwe (1981) 20. Stellenbosch

Enhancing access to justice through alternative dispute resolution mechanisms – the Zambian experience presented at the annual regional conference held at southern sun, Mayfair Nairobi, Kenya on 25 – 26 July, 2013

"African customary arbitration". UNCITRAL Working Group, 39th session 19 June – 7 July 2006 (UN doc A/61/17).

I. W. Zartman Ed., (2000) Traditional Cures for Modern African Conflicts

Stempel's J W, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?*

Kariuki Muigua Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises

Brenda Brainch The Climate of Arbitration and ADR in Kenya Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, June 2003

Justice Sector and the Rule of Law PK Mbote, M Akech – 2011.

Internet Sources

<http://law-school.uonbi.ac.ke/node/1678>

www.abajournal.com>News Is Legal Profession Shakeout Long Overdue?

<http://www.oxforddictionaries.com/definition/english/variation>

<http://www.kenyalawresourcecenter.org/2011/07/arbitration-agreement.html#sthash.h1L6uRSV.dpuf>

<http://www.kenyalawresourcecenter.org/2011/07/principles-of-natural-justice-in.html#sthash.IxqNbON8.dpuf>

Case Law

High Court at Nairobi, Miscellaneous Civil Application No. 905 of 2001

Reily v. Russell, 34 Mo. 524, 528 (1864).

Justice Deverrel: 248 of 2005 **EPCO BUILDERS LIMITED –Vs- ADAM S. MARJAN**