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## **Construction Adjudication in Kenya: The Need to Develop Legal Framework for Effective Construction Adjudication Lucky**

By: *Lucky Philomena Mbaye\**

### **Abstract**

*Construction adjudication has long been favored as the primary method for resolving disputes in the construction industry due to its stringent time schedules. However, studies have revealed that the lack of a comprehensive legal framework for construction adjudication in Kenya has led to its inefficacy. This article critically examines the existing legal framework on construction adjudication in Kenya, identifying its inherent shortcomings. Drawing comparisons with jurisdictions possessing well-established legal frameworks for construction adjudication, such as England, the paper further explores the differences and similarities between the two systems, and provides recommendations for the development of a robust legal framework in Kenya to ensure the effectiveness of construction adjudication. By addressing these issues, the paper contributes to the enhancement of construction dispute resolution mechanisms in Kenya's legal landscape.*

### **Introduction**

Adjudication, as a legal process of dispute resolution, has gained prominence as a preferred alternative in the construction industry.<sup>1</sup> Construction adjudication, with its emphasis on an independent

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<sup>1</sup> Nazeem Ansary, Olanrewaju Abdul Balogun & Wellington Didibhuku Thwala, 'Adjudication and Arbitration as a technique in resolving construction industry disputes: A literature review' (2017) [https://www.researchgate.net/publication/323929575\\_Adjudication\\_and\\_arbitration\\_as\\_a\\_technique\\_in\\_resolving\\_construction\\_industry\\_disputes\\_A\\_literature\\_review/link/5ab6d87e45851515f59daac4/download](https://www.researchgate.net/publication/323929575_Adjudication_and_arbitration_as_a_technique_in_resolving_construction_industry_disputes_A_literature_review/link/5ab6d87e45851515f59daac4/download) accessed 23 October 2023.

third party, the adjudicator, addresses the unique complexities of the construction sector, making it the best choice for resolving disputes efficiently.<sup>2</sup> In Kenya, construction adjudication has emerged as a relatively recent development, inspired by the practices of the South African construction industry and supported by funding from entities such as the World Bank and other stakeholders.<sup>3</sup> Unlike other conflict resolution methods, in the construction domain, adjudication stands out for its hallmark of prompt and immediate compliance.<sup>4</sup> This characteristic proves advantageous in averting the escalation of existing disputes and acts as an insurance against project stalling, which can have significant cost implications.<sup>5</sup>

As construction projects continue to grow in scale and complexity, the need for an effective and expeditious resolution mechanism for disputes becomes paramount.<sup>6</sup> Despite the benefits and increasing popularity of construction adjudication, its efficacy in Kenya faces challenges due to the absence of comprehensive legal framework to

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<sup>2</sup> Nicholas Gould, 'Adjudication and ADR: an overview' (2007) [https://www.fenwickelliott.com/sites/default/files/nick\\_gould\\_-\\_adjudication\\_and\\_adr\\_-\\_an\\_overview\\_matrices\\_paper.indd\\_.pdf](https://www.fenwickelliott.com/sites/default/files/nick_gould_-_adjudication_and_adr_-_an_overview_matrices_paper.indd_.pdf) accessed 23 October 2023.

<sup>3</sup> Ibrahim Godofa & Barkley Odhiambo, 'Construction Adjudication in Kenya: A New Dawn?' *Africa Construction Law Journal* (<https://africaconstructionlaw.org/5997-2/>) accessed 13<sup>th</sup> November 2023.

<sup>4</sup> *Ibid* 1.

<sup>5</sup> Eric Hong Ying Ngai, 'Do those Textbook Examples of the Pros and Cons of Adjudication Necessarily Apply to the Hong Kong Construction Industry?' (2022), 24, *Asian Dispute Review*, Issue 2, pp. 82 - 87, <https://kluwerlawonline.com/journalarticle/Asian+Dispute+Review/24.2/ADR2022015>

<sup>6</sup> Ibrahim Godofa & Barkley Odhiambo, 'Construction Adjudication in Kenya: A New Dawn?' *Africa Construction Law Journal* (<https://africaconstructionlaw.org/5997-2/>) accessed 13<sup>th</sup> November 2023.

support and regulate the process.<sup>7</sup> This paper critically analyzes the existing legal framework for construction adjudication in Kenya, identifying its limitations and evaluating its impact on the effectiveness of dispute resolution within the construction industry. Drawing inspiration from jurisdictions like the UK, renowned for their well-established legal frameworks for construction adjudication, the paper undertakes a comparative examination, identifying best practices and potential areas for improvement in the Kenyan context. By exploring successful practices in other regions, the study offers valuable insights that can inform the development of a robust legal framework for construction adjudication in Kenya, paving the way for more efficient and equitable resolution of construction disputes. In the subsequent sections, this article will delve into the principles and processes governing construction adjudication in Kenya, examining the challenges faced by stakeholders in the absence of a comprehensive legal framework. It then turns to a detailed comparison with the UK's well-structured construction adjudication system, highlighting key differences and drawing relevant lessons. The paper concludes with a set of recommendations tailored to the Kenyan context, offering potential pathways for the development of an effective legal framework that ensures the success of construction adjudication in the country.

Through this exploration, the article seeks to contribute to the ongoing discourse surrounding construction dispute resolution in Kenya, fostering a greater understanding of the legal and procedural aspects that underpin successful construction adjudication processes worldwide. By establishing a comprehensive legal foundation for

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<sup>7</sup> Kariuki Muigua, 'Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of U.K; Its Development and Lessons for Kenya' (2011).

construction adjudication, Kenya can harness the full potential of this dispute resolution mechanism, fostering a more conducive environment for sustainable growth and development within its burgeoning construction industry.<sup>8</sup>

## The Current Legal Landscape and Regulatory Framework Governing Construction Adjudication in Kenya

### Constitution of Kenya 2010

In the pursuit of a more efficient and accessible justice system, the Constitution of Kenya, specifically Article 159(2), directs the courts and tribunals to promote the adoption of Alternative Dispute Resolution (ADR) Mechanisms.<sup>9</sup> Such ADR methods encompass a range of approaches, including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.<sup>10</sup> Among these options, it can be inferred that adjudication falls within the ambit of permissible alternatives.<sup>11</sup> This constitutional provision underscores the country's commitment to exploring alternative avenues for dispute resolution, signifying a recognition of the value and potential of adjudication as an effective means of resolving legal conflicts.<sup>12</sup>

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<sup>8</sup> Ibid 6.

<sup>9</sup> Constitution of Kenya 2010, Article 159 (2).

<sup>10</sup> Ibid 8.

<sup>11</sup> Chacha Odera & Meshack Kwaka, 'Speedy Resolve: Adjudication as a Means of Effective Alternative Dispute Resolution' (2023) < [<sup>12</sup> Kariuki Muigua, 'Alternative Dispute Resolution and Article 159 of the Constitution' < <http://kmco.co.ke/wp-content/uploads/2018/08/A-PAPER-ON-ADR-AND-ARTICLE-159-OF-CONSTITUTION.pdf>>](https://www.oraro.co.ke/speedy-resolve-adjudication-as-a-means-of-effective-alternative-disputeresolution/#:~:text=Though%20not%20expressly%20mentioned%2C%20adjudication,are%20called%20upon%20to%20promote.></a></p></div><div data-bbox=)

### **Adjudication Rules of the Chartered Institute of Arbitrators, Kenya branch (The CI Arb (K) Adjudication Rules)**

The Chartered Institute of Arbitrators (Kenya Branch) has laid down comprehensive adjudication rules that govern the process and scope of applying adjudication in Kenya's construction industry.<sup>13</sup> This legal framework comprises a combination of standard form contracts, laws, norms, and regulations that collectively establish the foundation for resolving construction disputes in the country.<sup>14</sup> To invoke the CI Arb Kenya adjudication rules, the dispute resolution clause within construction contract must expressly stipulate the submission of any arising disputes to adjudication.<sup>15</sup> However, parties have the flexibility to include procedural details in the contract to address scenarios where the Rules may not apply.<sup>16</sup> According to the Rules, the adjudicator assumes several critical responsibilities, including upholding the principles of natural justice, adhering to mutually agreed-upon timeframes, and issuing a written determination within 28 days of the reference or any other timeline established by the parties.<sup>17</sup> The adjudicator's decision holds finality and binds the parties unless mutually consented otherwise, or subject to arbitration or litigation in accordance with applicable laws.<sup>18</sup>

### **Agreement and Conditions of Contract for Building Works of 1999 (The Green Book)**

The Joint Building Council of Kenya, established by the Kenya Association of Building and Civil Engineering Contractors (KABCEC), introduced a widely utilized standard form contract known as "The Green Book" or the Agreement and Conditions of

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<sup>13</sup> CI Arb (K) Adjudication Rules

<sup>14</sup> Ibid 12.

<sup>15</sup> Ibid, Rule 6.

<sup>16</sup> Ibid, Rule 6.

<sup>17</sup> Ibid, Rule 6.

<sup>18</sup> Ibid, Rule 8.

Contract for Building Works of 1999.<sup>19</sup> Clause 45 of this contract addresses dispute resolution measures, requiring the party allegedly deprived of their contractual rights to notify the other parties about any contractual disputes. In the event of unsuccessful resolution attempts, the parties must then undergo binding arbitration proceedings.<sup>20</sup> Notably the Green Book lacks an adjudication clause despite its extensive usage in the Kenyan construction and building works sector.<sup>21</sup>

However, in a recent development, the Joint Building Construction Council (JBCC) recommended amending the Green Book to incorporate additional alternative dispute resolution mechanisms before resorting to arbitration proceedings.<sup>22</sup> One of the proposed mechanisms is the inclusion of adjudication.<sup>23</sup> The revised standard form contract suggests introducing pre-arbitral steps, including the lodging of complaints with a pre-selected adjudicator appointing body.<sup>24</sup> This body would appoint an adjudicator on ad-hoc basis.<sup>25</sup> The adjudicator would be obliged to issue a determination within thirty days of receiving the complaint, with a possible extension of

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<sup>19</sup> Agreement and Conditions of Contract for Building Works (<http://bonarch.co.ke/wp-content/uploads/2016/08/JBC-Std-Form-of-Contract.pdf>) accessed 13th November 2023.

<sup>20</sup> Nicholas Gould, 'Adjudication and ADR: an overview' (2007) [https://www.fenwickelliott.com/sites/default/files/nick\\_gould\\_-\\_adjudication\\_and\\_adr\\_-\\_an\\_overview\\_matrices\\_paper.indd\\_.pdf](https://www.fenwickelliott.com/sites/default/files/nick_gould_-_adjudication_and_adr_-_an_overview_matrices_paper.indd_.pdf) accessed 23 October 2023.

<sup>21</sup> KN Law LLP, 'A move from Dispute Resolution to Dispute Management in Construction' (2022) < [https://kn.co.ke/wp-content/uploads/2022/05/ADR-Construction-Disputes\\_Newsletter.pdf](https://kn.co.ke/wp-content/uploads/2022/05/ADR-Construction-Disputes_Newsletter.pdf) > accessed 10th October 2023.

<sup>22</sup> Ibrahim Godofa & Barkley Odhiambo, 'Construction Adjudication in Kenya: A New Dawn?' *Africa Construction Law Journal* (<https://africaconstructionlaw.org/5997-2/>) accessed 13th November 2023.

<sup>23</sup> *Ibid* 21.

<sup>24</sup> *Ibid* 22.

<sup>25</sup> *Ibid* 22.



fifteen days under exceptional circumstances.<sup>26</sup> Parties unsatisfied with the adjudicator's determination have the option to issue a notice of dissatisfaction (NOD) within seven days and refer the dispute to mediation, a preliminary step before arbitration.<sup>27</sup> This proposed amendment aims to enhance the dispute resolution process, providing parties with an interim resolution mechanism in the form of adjudication before resorting to the more formal and time-consuming arbitration proceedings.<sup>28</sup> By incorporating adjudication, the Green Book seeks to offer parties a more efficient and effective means of resolving construction disputes, ultimately contributing to a smoother and a more collaborative contractual environment within the Kenyan construction industry.<sup>29</sup>

### **The International Federation of Consulting Engineers Contract for Construction (2017)**

The International Federation of Consulting Engineers Contract for Construction (2017), commonly referred to as the 'Red Book', holds prominence in international civil engineering and building projects, and is notably favored within the local context for projects exceeding a minimum value of Ten Million United States Dollars (USD 10,000,000).<sup>30</sup> Clause 21 of this standard form contract delineates a structured dispute resolution mechanism. Initial recourse involves attempting conciliation, with the project manager serving as the conciliator. Should this endeavor prove unsuccessful, the parties

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<sup>26</sup> Ibid 22.

<sup>27</sup> Ibid 22.

<sup>28</sup> Ibid 22.

<sup>29</sup> Ibid 22.

<sup>30</sup> FIDIC Conditions of Contract for Building and Engineering Works Designed by the Employer Second Edition (2017) ([https://fidic.org/sites/default/files/Conditions%20of%20Contract%20for%20Construction%20%28Second%20Ed.%202017%29%20amendments\\_0.pdf](https://fidic.org/sites/default/files/Conditions%20of%20Contract%20for%20Construction%20%28Second%20Ed.%202017%29%20amendments_0.pdf)) accessed 13<sup>th</sup> November 2023.



possess the option to escalate the matter to a pre-established Dispute Avoidance/Adjudication Board (DAAB) tasked with facilitating non-binding discussions aimed at dispute resolution. Within eighty-four days from the referral of the dispute, the DAAB is mandated to provide its decision.<sup>31</sup> In the event that these approaches also falter, the parties retain the liberty to initiate arbitration, litigation proceedings, thereby ensuring an exhaustive progression of resolution avenues within the contractual framework.<sup>32</sup>

### **Best Practices: Construction Adjudication in UK**

The primary recourse for resolving construction disputes in the UK had traditionally been arbitration,<sup>33</sup> yet this approach began to lose its appeal within the dynamic landscape of the construction industry due to its escalating intricacies of projects and inequitable payment practices. Consequently, the spotlight shifted towards adjudication as a more responsive solution.<sup>34</sup> Around 1998, a significant turning point emerged, marked by a noteworthy shift towards adjudication. Esteemed voices such as Justice Coulson, as early as the *Severfield v Duro (2015)*<sup>35</sup> case, hailed it as the long-awaited panacea for the construction sector. This transformative trajectory culminated in the legislative enactment of the Housing Grants, Construction and

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<sup>31</sup> Eugenio Zoppis, 'DAAB and Dispute Resolution Under the 2017 FIDIC Forms of Contract' (2015), *Centre for Construction Law and Dispute Resolution King's College London* <https://bscl.bg/en/daab-and-dispute-resolution-under-the-2017-fidic-forms-of-contract-by-eugenio-zoppis/>

<sup>32</sup> Ibid 24.

<sup>33</sup> Sina Safinia, 'A review on Dispute Resolution Methods in the UK Construction Industry' (2014) *International Journal of Construction Engineering and Management*, pp. 105 – 108. [https://www.researchgate.net/publication/316663867\\_A\\_Review\\_on\\_Dispute\\_Resolution\\_Methods\\_in\\_UK\\_Construction\\_Industry/citation/download](https://www.researchgate.net/publication/316663867_A_Review_on_Dispute_Resolution_Methods_in_UK_Construction_Industry/citation/download)

<sup>34</sup> Ibid 26.

<sup>35</sup> *Severfield (UK) Ltd v Duro Felguera UK Ltd* (2015) EWHC 3352 (TCC) (<https://vlex.co.uk/vid/severfield-uk-ltd-v-792940001>).

Regeneration Act of 1996 (referred to as ‘the Act’), which became effective in May 1998. This legislation not only introduced provisions governing payment aspects in construction contracts but also provided a comprehensive legal framework for addressing disputes through construction adjudication within the UK.<sup>36</sup> Complementing the Act are additional legislations and schemes such as The Scheme for Construction Contracts (England and Wales) Regulations of 2011, designed to plug any gaps left by the Act.<sup>37</sup> In essence, these supplementary mechanisms operate within the confines defined by the overarching Act.

### **Definition of Adjudication in the Act**

In the realm of UK’s construction landscape, the term “construction adjudication” may sound similar to general adjudication, but it stands as a distinct and separate procedure.<sup>38</sup> Essentially, construction adjudication within the UK pertains to the process of resolving conflicts stemming from construction contracts.<sup>39</sup> In this scenario, a neutral third party, akin to an arbitrator, takes on the role of a judge.<sup>40</sup> Their responsibility extends beyond assessing substantive issues; they also oversee procedural aspects, making it a comprehensive adjudicative process.<sup>41</sup>

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<sup>36</sup> Housing Grants, Construction and Regeneration Act of 1996. (<https://www.legislation.gov.uk/ukpga/1996/53/contents> )

<sup>37</sup> The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011. (<https://www.legislation.gov.uk/ukdsi/2011/9780111512975#:~:text=1.,into%20of%20of%20these%20Regulations.>)

<sup>38</sup> Ibid 21.

<sup>39</sup> Housing Grants, Construction and Regeneration Act of 1996, Section 108 (1).

<sup>40</sup> Ibid 32.

<sup>41</sup> Ibid 32.

### **Adjudication Procedure under the Act**

In essence, the Act establishes the legal framework for addressing payment-related disputes within the construction industry, alongside other existing conflicts.<sup>42</sup> Notably, the parties involved hold the flexibility to select their preferred adjudication procedure, provided it aligns with the fundamental requisites outlined within the Act.<sup>43</sup> If a disparity arises regarding the chosen procedure or if the selected procedure does not adhere to the Act's pre-requisites, the England and Wales Scheme for Construction Contracts Regulations comes into play. This scheme essentially acts as a supplementary measure, bridging gaps in cases where the contract's provisions are incongruent with the stipulations of the Construction Act of 1996.<sup>44</sup>

Parties engaged in a construction contract hold the right to opt for adjudication as a means of settling disputes. Section 108 of the Act outlines a specific procedure for adjudicating conflicting matters. The initiation commences when a construction dispute surfaces, prompting the party desiring to resort to adjudication to draft and forward a written notice to the opposing party involved in the construction contract.<sup>45</sup> This notice encapsulates the nature of the conflict, the sought-after remedy to resolve it, and pertinent personal information of the parties embroiled in the dispute, encompassing their names and physical addresses.<sup>46</sup> This preliminary notice

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<sup>42</sup> Housing Grants, Construction and Regeneration Act 1996, Section 108 (2), (3), and (4).

<sup>43</sup> Housing Grants, Construction and Regeneration Act 1996, Section 108 (5).

<sup>44</sup> Derreck Simmonds, 'The Scheme for Construction Contracts (England and Wales) Regulations 1998' (2008) ([https://www.researchgate.net/publication/315751111\\_The\\_Scheme\\_for\\_Construction\\_Contracts\\_England\\_and\\_Wales\\_Regulations\\_1998](https://www.researchgate.net/publication/315751111_The_Scheme_for_Construction_Contracts_England_and_Wales_Regulations_1998)) accessed 13<sup>th</sup> October 2023.

<sup>45</sup> Housing Grants, Construction and Regeneration Act 1998, Section 108.

<sup>46</sup> Ibid 38.

essentially delineates the jurisdiction's scope for the adjudicator's role. Upon receipt of the notice, and its originator are tasked with collaboratively selecting an adjudicator within a seven-day span.<sup>47</sup> In situations where this concurrence is unattainable, the party who issued the adjudication notice reserves the right to approach an independent adjudicator nomination body, formally requesting their intervention in nominating an adjudicator.<sup>48</sup> Upon receiving such a request within a five-day window, the independent entity assumes the responsibility of designating an adjudicator to oversee the dispute resolution process.<sup>49</sup> Once the adjudicator is appointed, they proceed to furnish the disputing parties with a referral notice, outlining the intricacies of the dispute, supporting witness statements, and any additional evidence upon which the parties intend to anchor their respective claims.<sup>50</sup>

### **Finality of the Arbitrators' Decision**

In the context of challenging an adjudicator's determination, parties involved have the option to choose between two avenues: litigation or arbitration, and this choice is typically dictated by the terms laid out in the construction contract.<sup>51</sup> It's worth noting that if the parties opt for litigation, the resulting dispute is treated as a brand-new proceeding, distinct from an appellate review of the adjudicator's decision.<sup>52</sup> There are only two specific circumstances in which one

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<sup>47</sup> Ibid 38.

<sup>48</sup> Ibid 38.

<sup>49</sup> Ibid 38.

<sup>50</sup> Ibid 38.

<sup>51</sup> Housing Grants, Construction and Regeneration Act of 1996, Section 108 (3).

<sup>52</sup> HG Construction Ltd v Ashwell Homes (East Anglia) Ltd [2007] EWHC 144 7CCC.

can challenge an adjudicator's decision.<sup>53</sup> First, if the adjudication process violated the principles of natural justice and if the adjudicator exceeded the boundaries of their jurisdiction, going beyond what was initially established in the reference notice.<sup>54</sup>

In the recent case of *Exyte Hargreaves Ltd v NG Bailey Ltd (2023)*,<sup>55</sup> Judge Kelly made a significant ruling where she emphasized that adjudicators' decisions are temporarily binding, and they remain so until a court overturns them. The only grounds for non-enforceability are if these decisions breach the principles of natural justice or if the adjudicator had exceeded their jurisdiction.<sup>56</sup> Judge Kelly further clarified that an adjudicator's jurisdiction is not confined solely to the content of the adjudication notice; the Technology and Construction Court (TCC) will take into account various factors when considering the adjudicator's decision. This includes the positions taken by the parties during the adjudication process, the evidence presented to the adjudicator, as well as any claims and assertions made both before and during adjudication. This decision was also affirmed in the case of *Essential Living (Greenwich) Limited v Elements (Europe) Limited [2022]*<sup>57</sup> where the court held that adjudicators' decisions are temporarily binding. Consequentially, until the matter is ultimately addressed and resolved through litigation or arbitration, the parties

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<sup>53</sup> Emlyn Hudson, Holly Howarth & Wendy Greenwood, 'Adjudication enforcement: To challenge, or not to challenge?' <https://gateleyplc.com/insight/article/adjudication-enforcement-to-challenge-or-not-to-challenge/>

<sup>54</sup> *Construction v Devonport Royal Dockyard* [2020] EWHC 3314 (TCC) ; *Amec v Whitefriars* [2005] EWCA Civ. 1358.

<sup>55</sup> EWHC 94 (TCC)

<sup>56</sup> *Exyte Hargreaves Ltd v NG Bailey Ltd (2023)* EWHC 94 (TCC)

<sup>57</sup> EWHC 140 (TCC) (<https://www.keatingchambers.com/case-report/essential-living-greenwich-ltd-v-elements-europe-ltd/#:~:text=The%20dispute%20arose%20out%20of,modular%20units%20for%20the%20project>)

remain subject to the influence of the adjudicator's determination.<sup>58</sup> Notwithstanding, it is pertinent to observe that in practicality, upon the delivery of an adjudication award to the parties, a tacit consensus often arises that the matter has been conclusively settled.

### Costs of Adjudication

The cost of adjudication in the United Kingdom is notably economical for a couple of reasons.<sup>59</sup> Firstly, parties have the alternative of subsequently resorting to court for the resolution of substantive aspects of their dispute, which tends to discourage exhaustive exploration of every facet of the issue during adjudication.<sup>60</sup> Second, the process is intentional, leading to a situation where parties often don't have the luxury of delving into exhaustive detail as is common in arbitration.<sup>61</sup> As a result, minimal resources are typically expended during this method of dispute resolution. However, the fees attributed to the adjudicator can be established through two distinct approaches. First, the construction contract itself might contain a provision empowering the adjudicator to determine their own fees and charges.<sup>62</sup> Secondly, upon the adjudicator's appointment to oversee the dispute, they can propose their fees and charges, which

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<sup>58</sup> Ibid 50.

<sup>59</sup> Christopher Dancaster, 'Construction Adjudication in the United Kingdom: Past, Present, and Future' (2018) *Journal of Professional Issues in Engineering Education and Practice*.

[https://www.researchgate.net/publication/245291549\\_Construction\\_Adjudication\\_in\\_the\\_United\\_Kingdom\\_Past\\_Present\\_and\\_Future/citation/download](https://www.researchgate.net/publication/245291549_Construction_Adjudication_in_the_United_Kingdom_Past_Present_and_Future/citation/download)

<sup>60</sup> Proff. Renato Nazzini & Alexander Kalisz, '2022 Construction Adjudication in the United Kingdom: Tracing Trends and Guiding Reforms' (2022) *Centre of Construction Law & Dispute Resolution, King's College London* (<https://www.kcl.ac.uk/construction-law/assets/2022-construction-adjudication-in-the-united-kingdom-tracing-trends-and-guiding-reform.pdf> ) accessed 13 October 2023.

<sup>61</sup> Ibid 52.

<sup>62</sup> Housing Grants, Construction & Regeneration Act 1996, Section 108A(2b).

the parties can then mutually agreed upon.<sup>63</sup> It is important that any arrangement concerning the cost of adjudication be clearly documented in writing and subsequently integrated into the construction contract.<sup>64</sup>

### **Natural Justice and Adjudication**

During the adjudication process, the adjudicator is obligated to the principles of principles of procedural fairness and natural justice, as articulated in the case of *Glencot Development and Design Company Limited v. Ben Barrett and Son (Contractors) Limited [2001]*. This requirement arises from the fact that adjudication was introduced within the construction industry as a swift and pragmatic solution, often characterized as a 'rough but expedient' approach, as expressed by Lord Ackner. Consequently, this renders the entire process a mechanism designed for prompt resolution, unburdened by extensive legal formalities, to address construction disputes efficiently. The language of the Act itself indicates the intention for construction adjudication to be a relatively expeditious and unencumbered means for resolving such disputes.

### **Appointment of Adjudicator**

The Act stipulates that within their construction agreement, the involved parties must reach a consensus on the process of selecting an adjudicator.<sup>65</sup> Consequently, any adjudicator who fails to meet the prerequisites outlined in the parties' construction agreement will be

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<sup>63</sup> Ibid 20.

<sup>64</sup> Kariuki Muigua, 'Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of UK; Its Development and Lessons for Kenya' (2011) (<http://kmco.co.ke/wp-content/uploads/2018/08/Adjudication-Procedure-The-Housing-Grants-Construction-and-Regeneration-Act-1996-of-U.K.pdf>) accessed 13 October 2023.

<sup>65</sup> Housing Grants, Construction & Regeneration Act 1996, Section 108.



ineligible to preside over the adjudicative process.<sup>66</sup> Furthermore, it is crucial to emphasize that prior to the commencement of adjudication, a formal notice of an adjudicator's appointment must be duly provided to the opposing party.<sup>67</sup>

### **Recommendations to Scale up the Legal Framework for Construction Adjudication in Kenya**

As expounded upon above, the current legal framework overseeing construction adjudication in Kenya is lacking in comprehensiveness.<sup>68</sup> The country primarily leans on the JBCC Green Book and the regulations set forth by the CI Arb (K) for guidance.<sup>69</sup> However, the construction adjudication process is rapidly gaining popularity as the preferred method for resolving disputes within the industry.<sup>70</sup> This is largely attributed to its straightforwardness, confidential nature, and efficiency.<sup>71</sup> Consequently, there is a clear need to enhance the existing legal framework concerning construction adjudication in Kenya. In order to facilitate the effective utilization of adjudication, several recommendations are put forth for consideration:

#### **a) Amendment of the JBCC Green Book**

Clause 45 of the JBCC Green Book addresses the resolution of disputes that may arise among potential parties involved in a construction contract. However, this clause primarily emphasizes arbitration as the preferred method of dispute resolution, with minimal consideration given to construction adjudication. In light of this, efforts have been undertaken by the Architectural Association of

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<sup>66</sup> Ibid 58.

<sup>67</sup> Ibid 58.

<sup>68</sup> Kariuki Muigua, 'Dealing with Conflicts in Project Management' [2005].

<sup>69</sup> Ibid 61.

<sup>70</sup> Ibid 21.

<sup>71</sup> Ibid 4.

Kenya (AAK) to enhance the legal framework surrounding construction adjudication.<sup>72</sup> One proposal involves amending the provisions of the Green Book, particularly within its dispute settlement clause, to explicitly include provisions for construction adjudication.<sup>73</sup> Despite these proposed changes, the implementation of such amendments is still pending and has yet to be realized.<sup>74</sup>

### **b) Legislation/Statutory Ratification of Construction Adjudication**

In order to establish a cohesive and effective framework for adjudication practices within the construction sector, it is imperative to introduce an Adjudication Bill in parliamentary proceedings. Subsequently, the enactment of an Adjudication Act becomes crucial to realize this goal. This envisioned legislation should encompass both substantive and procedural dimensions, incorporating the following key components:

- **Definition & Clarity:** The legislation should provide a clear and concise definition of adjudication, articulating its fundamental essence and scope within the context of the construction industry.
- **Procedural Guidelines:** It is essential to articulate the required procedural steps and protocols to be followed during construction adjudication proceedings.
- **Scope of Applicability:** A comprehensive and exhaustive catalog of issues suitable for adjudication should be outlined, ensuring that all relevant matters have a suitable recourse through this process.

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<sup>72</sup> Ibid 21.

<sup>73</sup> Ibid 15.

<sup>74</sup> Ibid 21.

- **Finality of Decisions:** The legislation must affirm the binding nature of the adjudicator's verdict, instilling certainty and conclusiveness in the adjudication process.
- **Qualification Criteria for Adjudicators:** Prerequisites that an individual must meet to be recognized as a qualified and competent adjudicator should be specified.
- **Available Remedies:** Enumeration of the potential remedies that parties can pursue following the conclusion of construction adjudication proceedings.

Furthermore, it is vital to align these legislative endeavors with the constitutional principles enshrined in Article 50(1) of the 2010 Constitution in Kenya. This provision safeguards the right of every individual to a just and open hearing, either within a court of law or an independent and impartial tribunal. With this in mind, several critical assurances must accompany the introduction of such legislation, encompassing:

- **Impartiality:** Adjudicators must remain impartial and devoid of personal interests in the disputes they preside over, mirroring the precedent set forth in Section 108 of England's Housing Grants, Construction and Regeneration Act.
- **Equity:** An unequivocal commitment to ensuring fairness throughout the adjudication process is foundational to the effectiveness of alternative dispute resolution mechanisms within the construction industry.

The realization of optimal construction adjudication practices in Kenya hinges upon these proposed amendments and the enactment of comprehensive legislative measures. This paradigm shift stands to foster equitable, transparent, and robust dispute resolution mechanisms within the construction industry. It is a significant step

towards ensuring fairness, clarity, and efficiency in construction adjudication procedures.

**c. Borrowing a Leaf from the UK Legal Framework on Construction Adjudication (The Housing Grants, Construction and Regenerations Act 1996)**

Recognizing that not all facets of the UK's legal practices can be seamlessly transplanted into our own system, it is evident that there are indeed valuable elements we can adopt from their construction adjudication methods. One notable example is the time framework established in the UK's Housing Grants, Construction and Regeneration Act. Incorporating a comparable time limitation, like the 28-day window for resolving construction disputes, into our envisioned adjudication legal framework could substantially enhance the expeditious resolution of disputes, ultimately resulting in improved efficiency.<sup>75</sup>

Moreover, we can embrace the notion of temporary binding decisions, a concept drawn from the UK's construction adjudication system.<sup>76</sup> Given the common occurrence of disputes throughout construction projects, the incorporation of a mechanism for temporary binding resolutions can prove highly advantageous.<sup>77</sup> This approach facilitates the seamless progress of projects by offering interim solutions, all the while preserving the option for a final resolution of substantive issues through a formal legal process, be it in court or arbitration.<sup>78</sup> As such, it is imperative that our envisioned

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<sup>75</sup> Housing Grants, Construction & Regeneration Act 1996, Section 108.

<sup>76</sup> Housing Grants, Construction and Regeneration Act of 1996, Section 108 (3).

<sup>77</sup> Ibid 46.

<sup>78</sup> Ibid 46.

construction adjudication framework includes provisions that clearly delineate the interim and temporary character of the adjudicator's decisions.<sup>79</sup>

Integrating the compulsory adherence to the principles of natural justice by adjudicators is yet another advantageous feature that can be adopted from the UK's construction adjudication model. By mandating that adjudicators strictly follow these principles, our system would demonstrate a commitment to impartiality and fairness.<sup>80</sup> The unwavering adherence of adjudicators to the principles of natural justice is pivotal for preserving the integrity of their decisions and ensuring the satisfaction of all parties engaged in the process. In cases where these principles are violated or disregarded, our proposed legal framework should provide a clear avenue for contesting the adjudicator's decision on these grounds.

Regarding the role of adjudicators, it is advisable to follow the UK's model by explicitly outlining the entities responsible for appointing adjudicators and defining their qualifications. This approach guarantees that the individuals entrusted with dispute resolution possess the essential expertise and relevant knowledge in the relevant areas.<sup>81</sup> By including such specifications in our legal framework, we can elevate the credibility and competence of the selected adjudicators.<sup>82</sup> In conclusion, while adapting practices from the UK's construction adjudication model to our jurisdiction requires careful consideration and medication, there are valuable elements that can

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<sup>79</sup> Kariuki Muigua, 'Dealing with Conflicts in Project Management' (2011).

<sup>80</sup> CI Arb K Adjudication Rules, Rule 11.

<sup>81</sup> Kariuki Muigua, 'Adjudication Procedure: The Housing Grants, Construction and Regeneration Act, 1996 of U.K; Its Development and Lessons for Kenya' (2011).

<sup>82</sup> Ibid 74.

integrated to improve the efficiency, fairness, and effectiveness of our own constitution dispute resolution processes.

## **Conclusion**

In summary, adjudication has emerged as the favored alternative dispute resolution mechanism within the construction industry, owing to its inherent strengths and alignment with the unique demands of this sector.<sup>83</sup> As a result, construction adjudication has made significant strides in advancement. Notably, there is a confluence between adjudication and the involvement of third-party experts in determining matters.<sup>84</sup> Kenya, as a developing nation with a pronounced focus on infrastructural development through construction projects, can draw inspiration from the experiences of countries like Malaysia, the United Kingdom and Singapore. These countries have successfully integrated construction adjudication, yielding substantial benefits for their populations.<sup>85</sup> It is evident that a gap exists within the Kenyan legal framework, and the incorporation of relevant laws should be undertaken with meticulous care. Given that this field of jurisprudence is still evolving, it is crucial to navigate this process thoughtfully, avoiding potential pitfalls such as excessive legislative measures. In conclusion, as the construction sector continues to expand in Kenya, embracing the lessons and successes of other nations in implementing construction adjudication can contribute significantly to efficient dispute resolution and overall progress of the industry.

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<sup>83</sup> Ibid 72.

<sup>84</sup> Ibid 74.

<sup>85</sup> Ibid 74.

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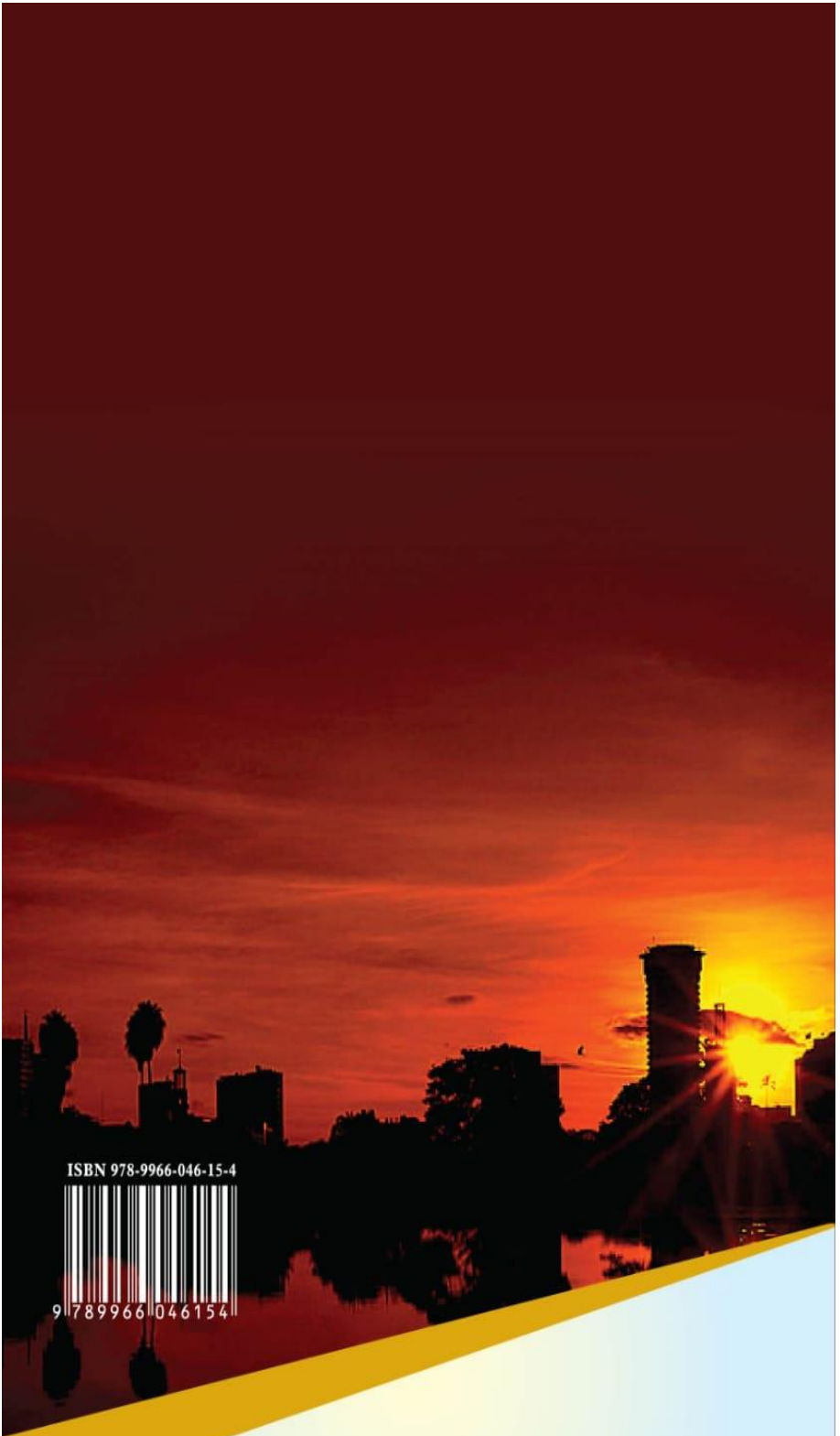
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