Access to Justice in Kenya: A Critical Analysis of the Challenges Facing Arbitration as a Tool of Access to Justice in Kenya

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Abstract

Access to justice refers to a system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state.[1] It is also a situation where people in need of help find effective solutions from justice systems that are accessible, affordable, comprehensible to ordinary people and which dispense justice fairly, speedily and without discrimination, fear or favour.

In Kenya, it is a constitutional right which every citizen is entitled to as expressed in the constitution.[2] All persons have a right to access the justice system but now various questions may arise out of this such as; how do the disadvantaged people including women, the poor and persons with disabilities fair in accessing justice? Is there public awareness and information about the available methods of accessing and achieving satisfactory results of justice? How do the associated costs and expenses affect access to justice? Are the available services, methods and mechanisms for achieving justice suitable to the perceived needs of the people?

Until now, there has been an outcry over the backlog of cases that are yet to be resolved in the Kenyan courts and the statistics have shown that the numbers keep on rising. Arbitration and the other Alternative Dispute Resolution mechanisms have played a major role is reducing these numbers. However, there is no guarantee to most of the Kenyans that justice will be served as arbitration has a few shortcomings. These challenges make it difficult for arbitration to be the most preferred method of dispute resolution in Kenya.

There is therefore a need to analyze these challenges affecting arbitration as a tool for accessing justice in Kenya and further to discuss various ways in which we can overcome these challenges to make arbitration a more effective alternative to dispute resolution.

1.0 Introduction

Human conflicts are inevitable and therefore disputes are equally inevitable. They arise among people in relation to all the aspects of their lives including g their personal life, economic life and political life. The fact that disputes are inevitable creates a need to find a quick and easy method of resolving them. Disputes must be resolved at the minimum possible cost both in

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[1] K. Muigua; *Alternative Dispute Resolution; Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, 2013, Vol. 1, No. 1 (Glenwood Publishers, Kenya) page 54.

[2] The Constitution of Kenya 2010 (Government Printer, Nairobi, 2010) Article 48.

terms of money and time so that more time and more money can be spared and used for more constructive pursuits.[3]

The strict western concept of access to justice was understood as access of courts of law. According to people's perception, the courts were the only way in which one could achieve justice. These days the courts have become inaccessible due to various barriers such as poverty, social and political backwardness, ignorance, procedural formalities and the like. These are some of the challenges encountered by a person who refers a matter through the complex and costly procedures involved in litigation.[4]

Therefore, a movement started throughout the world for ADR, and arbitration is one among them because with the Economic Liberalization and the opening up of the market, there was a phenomenal growth of international trade, commerce, investment, development and construction works, banking activities and the like. In all these fields, disputes are bound to arise and the parties therein often times opt to adopt mechanisms that take less time and are cost-effective, in which the aftermath does not also damage the relationship between parties as the companies need to keep their customers as well as their businesses.[5]

In a perfect world there would be no conflict, but the world today is far from perfect. In the society we live in today, conflict arises everywhere. Conflict arises because of various reasons including but not limited to differing opinions or lack of respect for others' opinions which may also lead to a conflict.

2.0 Historical Development of Arbitration

Many writers have attempted to trace the origins and evolution of arbitration, with a consensus that it was being used long before the 20th Century.[6] One of its earliest roots can be traced back to the biblical story where King Solomon is seen to be the first arbitrator when he took it up to determine the real mother of a child in a case where two mothers were laying claim to one baby boy.[7]

[3] K. Muigua, "*Settling Disputes through Arbitration in Kenya*", (Glenwood Publishers, Kenya 2012) page 4.
[4] K. Muigua, "*Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010*", www.kmco.co.ke (Accessed on 05/03/2018).
[5] Ibid, (n 1) page 5.
[6] See generally, K. Noussia, "The History, Importance and Modern Use of Arbitration," In *Confidentiality in International Commercial Arbitration*, pp. 11-17. Springer, Berlin, Heidelberg, 2010; E.S. Wolaver, "The Historical Background of Commercial Arbitration," *University of Pennsylvania Law Review* 83, no. 2 (1934): 132.
[7] The King James Bible, 1 Kings 3:16-28.

In England, arbitration began even before the establishment of the King's Courts.[8] It is also documented that Philip the second, the father of Alexander the Great also used arbitration as a means of settling territorial disputes from a peace treaty he had negotiated with the state of Greece.[9]

The first Arbitration Act was enacted in 1968 and was seen as the exact replica of the Arbitration Act 1950 of the United Kingdom. It was later repealed in 1995.[10] Arbitration has continually gained popularity all over the world and its incorporation under the United Nation Charter[11] as one of the recognised means of settling international disputes between states and persons shows a great significance in its development.

In Kenya, arbitration, among other forms of Alternative Dispute Resolution mechanisms has been incorporated in the constitution of Kenya 2010 where it expressly states that in exercising judicial authority, the courts and tribunals should be guided by the principle of promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and negotiation.[12]

The elevation of arbitration and other ADR mechanisms to constitutional recognition under the 2010 Constitution of Kenya demonstrates their significance and central role that they can play in enhancing access to justice for all.

3.0 Arbitration as a Tool of Access to Justice in Kenya

This paper seeks to explore the various ways in which arbitration and the other forms of Alternative Dispute Resolution mechanisms can be employed as a tool for enhancing, to boost their participation in conflict management, governance matters and improve socio-economic aspects of their lives.[13] It highlights the main challenges and barriers in the efforts to empower the Kenyan people to in access justice through the ADR mechanisms. The paper also suggests ways and recommendations as to how this issue can be resolved, ways in which the empowerment of the Kenyan people can be achieved and the realization of an environment based on the values of human values and goal enshrined under the constitution of Kenya 2010.[14]

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[8] W. Herbert Page, *The Law of Contract*, vol. 4, (The W.H. Anderson Company, 1919) c. 75 at 2526ff (As quoted in G., Xavier, "Evolution of Arbitration as a Legal Institutional and the Inherent Powers of the Court," Asian Law Institute Working Paper Series No. 009 (2010), p.2.).
[9] Ibid.
[10] Arbitration Act, No. 4 of 1995 (2009) (Government Printer, Nairobi, 1995)
[11] United Nations, Charter of the United Nations, 24th October 1945, Article 33.
[12] The Constitution of Kenya, Article 159 (2) (c).
[13] See also K. Muigua, "*Alternative Dispute Resolution; Empowering the Kenyan People through Alternative Dispute Resolution*", (2015) Vol. 3, No.2, Glenwood Publishers Ltd, Kenya), page 64.
[14] The Constitution of Kenya, the preamble and Article 10 (2) (b).

It is widely understood that access to justice is one of the most critical human rights since it acts as the basis for the enjoyment of other rights and it requires an enabling framework for realization.[15] The constitution provides for the right of access to justice and obligates the state to ensure access to justice for all.[16] This right to access justice has been hampered by many unfavourable factors such as high court charges, bureaucracy, complex procedures, illiteracy and lack of legal knowhow thus making litigation accessible for only a chosen few.[17] This goes against the constitutional right to access justice for all enshrined under the constitution and also the right of equality of all persons before the law[18].

In light of the foregoing, it is worth pointing out that although the legal recognition and use of arbitration and the other ADR mechanisms is growing at a high rate in Kenya, many people are not aware of its existence which is the main reason why it is not widely practiced in Kenya, at least in its formal conceptualisation. Secondly, for those who use Arbitration and ADR mechanisms, there are fundamental problems that need to be addressed to make them the most preferred mechanism of resolution of disputes in Kenya. The next section looks at some of these challenges and consequently makes recommendations to address the same. The discussion focuses on the challenges facing the practice of arbitration in Kenya, the arbitrators themselves as well as the arbitral institutions in Kenya.

2.0 Challenges Facing Access to Justice and the Practice of Arbitration in Kenya

In a perfect world there would be no conflict, but the world today is far from perfect. Conflicts are therefore inevitable. They arise among people in relation to all the aspects of their lives which include their personal life, economic life and political life. There is therefore a need to find a quick and easy method of resolving disputes. Disputes must be resolved at the minimum possible cost both in terms of money and time so that more time and more money can be spared and used for more constructive pursuits.[19]

The Traditional western concept of access to justice was understood as access of courts of law. According to this perception, the courts were the only way in which one could achieve justice. These days the courts in many jurisdictions especially in the developing world have become inaccessible due to various barriers such as poverty, corruption, backlog of cases, few judges and magistrates, social and political backwardness, ignorance, procedural formalities and the

[15] See generally, Republic of Kenya, *Sessional Paper No 3 Of 2014 on National Policy and Action Plan on Human Rights*, August 2014 (Government Printer, Nairobi, 2014); N.S. Okogbule, "Access to justice and human rights protection in Nigeria: problems and prospects," *Sur. Revista Internacional de Direitos Humanos* 2, no. 3 (2005): 100-119.
[16] The Constitution of Kenya, Article 48.
[17] See Muigua, Kariuki, "Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya," *Alternative Dispute Resolution*: 40.
[18] The Constitution of Kenya, Article 27 (1).
[19] K. Muigua, *Settling Disputes through Arbitration in Kenya, op cit.*,, page 4.

like. These are some of the challenges encountered by a person who refers a matter through the complex and costly procedures involved in litigation.[20]

Kenya has had laws on Arbitration from as early as 1914 yet up to date it has not won the people's confidence as one of the most efficient and effective dispute resolution mechanisms in the country. The level of utilization of this important method of dispute resolution is significantly low and there is an overwhelming paradigmatic shift of emphasis of litigation to Arbitration.[21]

Other challenges affecting access to justice and the growth of arbitration in Kenya as pointed out by other writers include, politicization of disputes, lack of professional interaction, lack of diversity, proliferation of regional arbitration centers, language and territorial barriers, the African cultural context, corruption, experience (the law of diminishing returns), professional training and mentorship of arbitrators, open bias, arbitrability, implementation among others.[22] These challenges have led to the resolution of disputes through other means other than arbitration and ADR mechanisms.[23]

Various scholars have explored this subject and have highlighted some of the challenges arbitral institutions in Africa experience to include breach of confidentiality of their matters to third parties through publications unless the parties enter into a separate confidentiality agreement limiting disclosure of their dealings.[24] A challenge also exists in the capacity of the institutions to handle disputes as well as the regulation of the arbitration process. It is believed that some of these institutions both in Kenya as well as in Africa need a greater focus on capacity building to improve the number and quality of training for arbitrators and also more funds to facilitate efficient administrative services thus making the arbitration process more effective.[25]

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[20] See generally, K. Muigua, "Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010."

[21] J.K., Gakeri, "Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR," *International Journal of Humanities and Social Science,* Vol. 1 No. 6; June 2011, 219-241 at 219.

[22] P. Ngotho, "*Challenges Facing Arbitrators in Africa,"* Paper presented at the Chartered Institute of Arbitrators (Kenya Branch) & Centre For Alternative Dispute Resolution (CADR), An East Africa International Arbitration Conference held at The Norfolk Hotel, Nairobi on 28th and 29th July 2014. Available at http://www.ngotho.co.ke/assets/challenges.norfolk.july2014.pdf (Accessed on 07/03/2018).

[23] Ibid.

[24] K. Muigua, "*Reawakening Arbitral Institutions for Development of Arbitration in Africa*" (May 2015) Available at http://www.kmco.co.ke/attachments/article/154/Reawakening%20Arbitral%20Institutions%20for%20Development%20of%20Arbitration%20in%20Africa.pdf (Accessed on 06/03/2018).

[25] K. Muigua, "*Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya*", page 14 - Available at https://profiles.uonbi.ac.ke/kariuki_muigua/publications/making-east-africa-hub-international-commercial-arbitration-critical-exa (Accessed on 06/03/2018).

Another major challenge and one that should be taken into great consideration is the national court's interference with the arbitration process. Litigators who are in most cases lawyers who are also practicing advocates infuse the litigation procedures which slows down the arbitral process through unnecessary requests for adjournments and interlocutory applications at the national courts such as injunctions, which only delay the process and increase the associated costs.[26] For example, in Kenya, the arbitral institutions do not allow the arbitrators to issue summons to witnesses or injunctions to restrain continuing events pending the full determination of the dispute, instead they opt for the courts for such orders which ends up corrupting the whole process of arbitration.[27]

One of the key pillars of arbitration that has been in practice is the autonomy of the parties who are disputants.[28] It is believed that parties are at liberty to choose the impartial third party to solve their disputes and this is well explained in the flexibility principle.[29] The challenge now comes in the appointment of international Arbitrators by the parties. Notwithstanding the national individuals and institutions with the relevant knowledge, skill and experience specialized in the resolution of dispute through arbitration and the other forms of dispute resolution mechanisms, there has been a great tendency by parties to a dispute to select non-Africans instead of focusing on development of local home-grown talent thereby ending up in choosing incompetent arbitrators because their main focus is on their nationality and not their expertise and experience.[30]

Arbitrability is yet another challenge that poses great challenge to the process of arbitration and its practice.[31] It refers to the determination of the type of disputes that can be settled through

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[26] Kariuki Muigua, 'Reawakening Arbitral Institutions for Development of Arbitration in Africa' (May 2015); See also C. Namachanja, "Meeting the challenges: CIArbs in Africa: Learning from Africa," CIArb Centenary Conference, 15-17 July, 2015. Available at https://www.ciarb.org/docs/default-source/centenarydocs/speaker-assets/collins-namachanja.pdf?sfv (Accessed on 14/03/2018).

[27] J.T. McLaughlin, "Arbitration and Developing Countries" *The International Lawyer,* Vol. 13, No. 2 (Spring: Dordrecht: Martinus Nijhoff, 1979) page 212.

[28] See generally, L.O.W., Odoe, *Party autonomy and enforceability of arbitration agreements and awards as the basis of arbitration* (Doctoral dissertation, University of Leicester, 2014), available at https://lra.le.ac.uk/bitstream/2381/28773/1/2014OdoeLOWphd.pdf (Accessed on 14/03/2018).; N.R. Nguyo, *Influence Of Arbitration On Dispute Resolution In The Construction Industry: A Case Of Nairobi County, Kenya*, M.A. Diss., University of Nairobi, 2014; N.R.A. Salama, "Nature, extent, and role of parties' autonomy in the making of international commercial arbitration agreements." PhD diss., University of Manchester, 2016.

[29] Ibid.

[30]C. Namachanja, "Meeting the challenges: CIArbs in Africa: Learning from Africa," CIArb Centenary Conference, 15-17 July, 2015.

[31] K. Muigua, "Promoting International Commercial Arbitration in Africa," Paper Presented at the East Africa International Arbitration Conference, held on 28-29 July 2014, at Fairmont the Norfolk, Nairobi. Available at https://profiles.uonbi.ac.ke/kariuki_muigua/files/promoting_international_commercial_arbitration_in_africa-eaia-conference_presentation.pdf (Accessed on 14/03/2018); See also G.A., Bermann, "The"

arbitration and those that are in the domain of the national courts. It deals with the question of whether specific classes of disputes are barred from the scope arbitration covers because of the subject matter of the dispute. In most cases, you will find that matters that are arbitrable in one jurisdiction fail the test of arbitrability in other jurisdictions.[32]

In Tanzania, for example, the Arbitration Act is not clear on arbitrability of subject matter under the Act. It has also been argued that under the Kenyan law, arbitrability might have acquired a broader scope after the passage of the current Constitution 2010 which has elevated the status of the Alternative Dispute Resolution as one of the guiding principles of the judiciary in the exercise of judicial authority by the court and tribunals.[33]

The recognition of international arbitral awards is yet another challenge facing the process of arbitration and in this, the issue comes in when the recognition and enforcement of a foreign arbitral award poses a threat to the public policy of the country where such recognition and enforcement are sought. The Arbitration Act 1995, notably provides for this and states that international arbitration shall be recognized and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is a signatory and relating to arbitral awards.[34] Despite of these express provisions, arbitral awards are still a challenge to enforce them where the award is against the public policy of that jurisdiction.[35]

Corruption is also another major challenge that affects most if not all spheres of government as well as private enterprises. Though nothing much is revealed about the transactions that involve corrupt practices, we can all attest to the fact that it still exists in the country. One of the reasons why it is so prevalent in Kenya is that there is no law regulating corruption and it is not a crime to accept bribes and other corrupt practices in Kenya as it is the case in other countries. The perception of corruption in various counties and governments is believed to be interfering

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Gateway" Problem in International Commercial Arbitration," *Yale Journal of International Law* 37, no. 1 (2012): 2.

[32] C. Namachanja, "*The Challenges facing Arbitral Institutions in Africa*" Alternative Dispute Resolution Journal Vol. 3, No.2, Glenwood Publishers Ltd, Kenya (2015) page 138.

[33] R. Rana, "*The Tanzania Arbitration Act: meeting the Challenges of Today with Yesterday's Tools*", in Chartered Institute of Arbitrators, Kenya, Alternative Dispute Resolution Journal, Vol. 2, No. 1, 2014. Page 231.

[34] Arbitration Act, Chapter 49, Laws of Kenya, section 36 (2).

[35] G.A., Bermann, "Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts." In *Recognition and Enforcement of Foreign Arbitral Awards*, pp. 1-78. Springer, Cham, 2017; R. Sharma, "Enforcement of Arbitral Awards and Defence of Sovereignty: The Crouching Tiger and the Hidden Dragon." In *in March 2010, the Chair of Legal Linguistics, the Legal Linguistics Association of Finland and the University of Lapland hosted a conference on legal linguistics. The focus was on law and language in international partnerships and conflicts. The members of the organizing committee were Professor Tarja Salmi-Tolonen (Chair), Ms Iris Tukiainen and Mr Richard Foley.*, p. 252. 2011; H.N. Mboce, *Enforcement of International Arbitral Awards: Public Policy Limitation in Kenya*, LLM Diss., University of Nairobi, 2014.

with private commercial arbitration matters. For example, the government may try to interfere with the outcome of the process especially where its interests are at stake and put forth the argument of ground of public policy. This negatively impacts on investors as well as disputants to have the confidence to uptake the resolution of their disputes through international commercial arbitration.[36]

There are other challenges which face arbitrators themselves as they arbitrate over their matters where some of the problems facing arbitrators in Africa are Afro-centric while others are universal.[37]

3.0 Recommendations

There is need for increased investment and assistance in the arbitration sector to boost its relevance and efficiency in promoting access to justice. The assistance can be in form of supporting or facilitating enforcement of international and domestic arbitral awards as well as ensuring that there is minimal interference in the process so as to win the confidence of the potential users inside and outside the region. Parliament and Courts should also work in promoting law reforms to reflect the current trends in arbitration practice in the world.

Public confidence in arbitrators may be enhanced through publication of available arbitrators in the region for consideration by prospective parties to an arbitration dispute. This may only be addressed if the other building blocks of arbitration are considered, such as increase in capacity of the arbitrators.

There is also need for putting up the relevant infrastructure which includes ICT and other physical structures. This should be coupled enhanced training for purposes of capacity building. Training should start at school level as opposed to institutional professional courses as is the case with most countries. A good example is the University of Nairobi School of Law which currently offers international commercial arbitration as a course in its Masters of Law Programs.

Political instability, being a matter not within the control of the arbitral institutions may not be directly addressed at an individual institution level. However, the institutions should participate in awareness campaigns, and support research into the relationship between actions of political leadership on dispute resolution. This may contribute through sensitization of political leaders on the impact of their actions on arbitration, and more pertinently on the economic results of diverting foreign direct investment to other regions of the world.

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[36] K. Muigua; *Alternative Dispute Resolution; Heralding a New Dawn: Achieving Justice through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya*, page 21.

[37] P. Ngotho, "*Challenges Facing Arbitrators in Africa,"* Paper presented at the Chartered Institute of Arbitrators (Kenya Branch) & Centre for Alternative Dispute Resolution (CADR), An East Africa International Arbitration Conference held at The Norfolk Hotel, Nairobi on 28th and 29th July 2014.

Regarding challenges faced by the judiciary, to enhance the levels of knowledge and experience in arbitration, it is proposed that the arbitral institutions in each country and especially Kenya give particular attention to training of the judges of the superior courts on arbitration. Moreover, we need special training of experts in the area, outreach programs, public sensitization programs and more important is adopting regular training to judges, magistrates and advocates for them to suit the international dynamism of trade and commerce.

Lawyers must be more involved in arbitration training efforts. Due to the stake the arbitral institutions have in smooth development of the arbitral process, the institutions should organize seminars, workshops and training sessions for lawyers as well as non-lawyers across the continent. This focus should not be confined to lawyers who intend to be arbitrators, but also to general counsel who should be abreast of the nature of arbitration process. The training would also be especially important to lawyers involved in drafting of the arbitration clauses in contracts, to ensure that the clauses withstand the possible challenges at the initial stages of arbitration.

An accountant would be more comfortable appearing before an arbitrator (or judge) who has studied and understands accounting. The same would also be ideal for a doctor, engineer or any other professional. The multi professional training will enhance cultural backgrounds that will develop arbitration and arbitrators. This will also bring in competition and quality assurance standardization in the field of arbitration since the regulation and misconduct of a professional member arbitrator can be taken up by his professional association.

This will reduce the controversial arbitral awards and decisions. What needs to be done is to ensure that the training to the multi professional practitioners ensure the standards of fair judicial practice and the right for a fair hearing and trial to any party to a dispute are maintained. This may promote arbitration while reducing the consistency in the arbitration practice. This argument is further substantiated by Justice Torgbor in his recent paper "Opening up International Arbitration in Africa".[38]

Lastly, there is need to conduct further in-depth research in the area. Due to the geographical spread of counties in the country the problems prevalent in Nakuru and Kericho may not be exactly similar to the ones present in the counties of Wajir and Garisssa and thus there may exist unique challenges in the inculcation of arbitration within the counties. More justice sector players should also be involved extensively in this research. Justice is a collective responsibility. The private sector, Non-Governmental Organizations and governance sector players should also be approached to give and input. Attaining justice is a pooled action for a better nation.

[38] Justice Edward Torgbor, "*Opening up International Arbitration in Africa,*" ADR Journal (2015) Vol 3 Nairobi ISBN 978-9966-046-04-8 Page 21 and 23.

4.0 Conclusion

It is evident from the discussion herein above that arbitration is a suitable method of resolving commercial disputes in Kenya. The paper has in essence discussed and met the set objectives as were outlined herein above which were to bring into the attention of the public of the existing modes and ways in which they can access justice in Kenya in a potentially more affordable and quicker way and to inform them that it is a constitutional right enshrined in the constitution and the courts also treat it with the seriousness it deserves. This paper therefore predicts that if these challenges are addressed, the future of arbitration in Kenya is brighter and really promising in brings about just society where disputes are disposed of more expeditiously and cost effectively.

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