

Applicability of Arbitration in Management of Community Land Disputes

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Abstract

Pursuant to the spirit of Article 159 (2) (c) of the Constitution of Kenya, 2010, the Community Land Act, No. 27 of 2016 envisages the use of ADR mechanisms in managing disputes related to community land. These mechanisms include arbitration as provided for under section 41 of the Community Land Act.

The paper seeks to interrogate the viability of managing community land disputes through arbitration. It proceeds on the hypothesis that arbitration is not an appropriate tool in managing community land disputes.

The paper first examines the nature of community land disputes in Kenya. Indigenous communities in Kenya are bound by certain values and principles whereby they prioritise the ‘common good’ over ‘individual interest’. The paper argues that arbitration may not achieve this goal since it is a form of settlement and does not address the underlying issues in a dispute. It examines the characteristics and shortcomings of arbitration vis-à-vis the nature of community land disputes and the underlying needs in managing such disputes.

The paper then offers suggestions on how to achieve effective management of community land disputes under the Community Land Act.

1.0 Introduction

Arbitration is one of the forms of Alternative Dispute Resolution that has been recognised by the Constitution of Kenya. Alternative Dispute Resolution refers to the set of mechanisms that are used to manage disputes without resort to litigation.¹ The Constitution requires that courts and tribunals, while exercising judicial authority, to be guided by several principles such as the promotion of alternative forms of dispute resolution including reconciliation, mediation,

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¹ Muigua, K., ‘*Alternative Dispute Resolution and Access to Justice in Kenya*’, Glenwood Publishers Ltd, 2015, p 19.

arbitration and traditional dispute resolution mechanisms.² Constitutional recognition of ADR as a dispute resolution mechanism can be attributed to the unique advantages inherent in the various ADR mechanisms. They have been heralded as being expeditious, efficient, flexible and cost effective.³ It is thus not surprising that most of the legislations enacted subsequent to the promulgation of the Constitution of Kenya, 2010 have upheld the principle of ADR. The Community Land Act is one of such legislations.

The Community Land Act⁴ was enacted to give effect to Article 63 (5) of the Constitution of Kenya on community land; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.⁵ Part 8 of the Act provides for management of disputes relating to community land and encapsulates various dispute resolution mechanisms that may be adopted by a registered community for purposes of managing disputes and conflicts relating to community land. Under this part, the Act provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer the dispute to arbitration.⁶ Despite arbitration being one of the forms of ADR recognised under the Constitution of Kenya due to its unique advantages, the paper argues that it might not be effective in managing community land disputes. Community land disputes are sui generis in nature requiring a carefully customized approach. Owing to the adversarial nature of arbitration, it is contended in this paper that the use of arbitration may not resolve the underlying issues in such disputes.⁷

2.0 Dispute Resolution within Kenyan Communities

This part gives an overview of the characteristics of Communities in Kenya and the dispute management processes that have been utilized by these communities over the course of time. Against this backdrop, the paper proceeds to discuss whether arbitration is a viable tool in management of community land disputes.

² Constitution of Kenya, 2010, Article 159 (2) (c).

³ See generally, Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Ltd, 2015.

⁴ Community Land Act, No. 27 of 2016, Laws of Kenya.

⁵ Ibid.

⁶ Ibid, Section 41 (1).

⁷ Njuguna, J.N., *Arbitration as a tool for Management of Community Land Conflicts in Kenya* *Journal of Conflict Management and Sustainable Development*, Volume 3, Issue 1 (2019).

For purposes of use of community land, the Act defines a community as a consciously distinct and organized group of users who are citizens of Kenya and share any of the following attributes: Common ancestry; similar culture or unique mode of livelihood; Socio-economic or other similar common interest; geographical space; ecological space; or ethnicity.

Communities in Kenya are normally identifiable by a common ancestry, language and shared geographical location.⁸ Due to these characteristics, Kenyan communities normally identify themselves as a group with a high degree of brotherhood and collectivity. Peaceful co-existence is always emphasized and conflicts are abhorred as they are viewed as a threat to the social fabric holding the community together.⁹ Throughout Africa and Kenya in particular, African traditions have since time immemorial emphasized harmony/togetherness over individual interests.¹⁰ Thus, African communities developed dispute resolution mechanisms aimed at fostering healing and reconciliation and re-establishing social solidarity and restoring broken relationships in the community.¹¹

Even before promulgation of the Constitution of Kenya, 2010 and the enactment of the Community Land Act 2016, the concept of community land existed especially among the pastoralist communities in Kenya. In many communities, the grazing and watering points were accessed equally by members of a particular clan that possessed them.¹² Whenever a dispute arose over such land, the communities had elaborate forms of dispute resolution that effectively managed such disputes before they escalated in order to ensure harmony in the community. In such communities, the council of elders determined the use of water and grazing land.¹³

⁸ See generally, Sobania, N.W., *Culture and customs of Kenya*. Greenwood Publishing Group, 2003. Available at https://www.sahistory.org.za/sites/default/files/file%20uploads%20/real_sobania_culture_and_customs_of_kenya_cultubook4you.pdf.

⁹ Muigua, K., 'Traditional Conflict Resolution Mechanisms' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Traditional-Conflict-Resolution-Mechanisms-and-Institutions-24th-October-2017.pdf> accessed on 17/09/2019.

¹⁰ Supra note 1.

¹¹ Muruthi, K., 'A Survey on ADR Strengths, Weaknesses and Policy Gaps: A Case Study of Meru, Isiolo and Nairobi Counties, Kenya' *Alternative Dispute Resolution, CIArb (K)*, Volume 4, No. 1 (2016).

¹² Supra note 7.

¹³ Pkalya, R., Adan, M. & Masinde, I., 'Indigenous Democracy: Traditional Conflict Reconciliation Mechanisms Among the Pokot, Turkana, Samburu and the Marakwet' (ed. Rabar, B. & Kirimi, M., Intermediate Technology Development Group-Eastern Africa, 2004), 89-95.

Indigenous communities in Kenya have always had their own Traditional Justice System Resolution mechanisms to effectively manage disputes within such communities. These are based on cooperation, communitarism, strong group coherence, social obligations, consensus-based decision-making, social conformity, and strong social sanctions.¹⁴ Whenever disputes arise amongst many African communities, parties often resort to negotiations or to the institution of council of elders or elderly to aid in the resolution of conflicts. The Council of elders is an established institution in most indigenous Kenyan communities and normally comprises of the elderly and 'wise' members of the community. It is often mandated to manage disputes within the community and its decisions are based on accepted norms, beliefs, cultural values and common good of the community.¹⁵ Due to the composition of the council of elders and its understanding of the values and beliefs of the particular community, it has the advantage of making decisions that reflect the common good of the community and which have the ability of fostering peace and co-existence within the community.¹⁶

The underlying principle in these conflict management processes is maintaining social harmony and restoring social bonds. The process was wholesome and tried to resolve all the underlying causes of conflict by ensuring that the parties to the conflict participated and reached an amicable solution. In some cases, fines and compensation were used but only as means to acknowledge the wrongs done and restore the parties.¹⁷ These were not retributive in nature but were compensatory.¹⁸ This is unlike in arbitration whereby the arbitral tribunal renders an award that may result in more division rather than restoring the parties.

3.0 Applicability of Arbitration in Management of Community Land Disputes

Under the Community Land Act, disputes may range from members of a registered community over the use of community land, an individual member against the whole community or between a registered community and another registered community.¹⁹ In

¹⁴Kariuki, F., 'African Traditional Justice Systems' available at <http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf> accessed on 17/09/2019.

¹⁵Supra note 7.

¹⁶ See generally, Muigua, K., *Resolving Conflicts through Mediation in Kenya*, Glenwood Publishers, Nairobi, 2013.

¹⁷ Kariuki, F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-I.pdf> accessed on 17/09/2019.

¹⁸ Ibid.

¹⁹ Sec. 39, Community Land Act, No. 27 of 2016.

managing such disputes, the Act envisages various dispute resolution mechanisms that include Arbitration.²⁰

Despite being one of the methods of Alternative Dispute Resolution as envisaged under Article 159 (2) (c) of the Constitution, arbitration has several drawbacks especially with regards to courts' interference; and thus, may not accord the parties in case of community land disputes the benefits envisioned under the Constitution. Arbitration has received increasing criticism based largely on the contention that it closely resembles conventional litigation, producing undue burdens and costs.²¹ The issues of delay, costs and binding nature of the arbitral award makes the process less suitable in managing disputes relating to community land in Kenya.

The Community Land Act envisions an arbitration process conducted under the provisions of the Arbitration Act, No. 4 of 1995.²² The Arbitration Act governs all issues with regards to arbitration including composition and jurisdiction of arbitral tribunal, conduct of arbitral proceedings, arbitral award and termination of arbitral proceedings. The first problem that may arise in using arbitration to manage community land disputes is the appointment of the arbitral tribunal. Under the Community Land Act, where the parties to an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators, the provisions of the Arbitration Act, No.4 of 1995, relating to the appointment of arbitrators should apply.²³ These provisions are contained in section 12 of the Arbitration Act where by in default of agreement by parties, the High Court has powers to appoint an arbitrator.

It has been identified that community land disputes are peculiar in nature and requires a person with a deep understanding of the affairs of the community to effectively deal with the underlying issues in such a dispute. Where an arbitrator is appointed by the High Court, this purpose may be defeated. Further, community land disputes would not normally occur in urban areas where most of the arbitrators in Kenya are located. These disputes are likely to arise in rural areas where pastoralist or agriculturist communities are located. Appointing someone with little or no background knowledge on such disputes may not effectively resolve them. The law on ADR in Kenya contemplates some formal process in appointing these

²⁰ Sec. 41, Community Land Act, 2016.

²¹ Steven C Bennett, 'Hard Tools for Controlling Discovery Burdens in Arbitration' *The International Journal of Arbitration, Mediation and Dispute Management*, Vol. 84, No. 4 (2018), p 295

²² Community Land Act, No. 27 of 2016, S 41 (2)

²³ Ibid

experts, which may not necessarily be synonymous with possession of actual expertise.²⁴ It has also been argued that the impact of arbitration is yet to be felt especially among the local population, since it has been presented as an exotic idea oblivious to the prevailing circumstances of the local populace.²⁵

It has been pointed out that the spirit of conflict management among indigenous Kenyan communities emphasizes harmony/togetherness over individual interests for the common good of the community.²⁶ This is more so important when it comes to disputes relating to community land where there is a need to effectively resolve such disputes in order to keep the community together. The Arbitration Act requires an arbitral tribunal to make an award after the proceedings.²⁷ An arbitral award is a determination by the arbitral tribunal on the merits of the arbitration.²⁸ It is synonymous to a judgment in a court of law and is binding and enforceable in the same manner unless challenged in court.²⁹ The award may be monetary or non-monetary in nature.

In community land disputes, the arbitral award may be a recipe for chaos. The aim of dispute resolution within the context of a community is not to punish an action since this would be viewed as harming the group a second time. It is geared towards re-establishing harmony and reintegrating the deviant members with the ultimate goal of restoring good relations.³⁰ In the context of community land, where an arbitral award has been made, this goal may not be achieved. The party being dissatisfied with the decision may end up challenging the award in

²⁴ See *Draft Alternative Dispute Resolution Policy 2019 (Zero draft)*. Draft developed through the joint efforts of the Judiciary, the IDLO, USAID, and the Nairobi Center for International Arbitration (NCIA). Available at https://www.ncia.or.ke/wp-content/uploads/2019/08/ZERO-DRAFT-NATIONAL-ADR-POLICY_P.pdf; See also *Draft Alternative Dispute Resolution Bill, 2019*, Senate Bills No. 19 (Government printer, Nairobi, 2019). Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/AlternativeDisputeResolutionBill_2019.pdf.

²⁵ Gakeri J. K., '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.

²⁶ *Supra* note 1.

²⁷ Arbitration Act, No. 4 of 1995, S 32.

²⁸ Muigua, K., *Settling Disputes Through Arbitration in Kenya* Glenwood Publishers Limited (2017), 3rd edition, p 146.

²⁹ *Ibid.*

³⁰ Wanende, E.O., 'Assessing the Role of Traditional Justice Systems in Resolution of Environmental Conflicts in Kenya,' thesis, University of Nairobi, Centre for Advanced Studies in Environmental Law and Policy.

court in accordance with the provisions of the Arbitration Act.³¹ This will ultimately strain the relationship between the parties and result in delays contrary to the principles underpinning dispute resolution among indigenous Kenyan communities where there is need to expeditiously resolve disputes and maintain relationships between parties in order to enhance peace and harmony in the community. Further, in case of a dispute between an individual member and the community over the use of community land, where the award is made in favour of the individual, the community may feel aggrieved. Such an individual will end up being treated with contempt and suspicion and it may end up being difficult to integrate with the rest of the community. This is irrespective of whether the individual has a valid claim against the community.

Thus, where arbitration is used to resolve community land disputes, it is hard to draw a line between individual interests and communal interests since arbitration is a formal process based on established legal principles and the arbitrator is required to issue an award based on law. As discussed, traditional justice systems give preference to communal interests over individual interests and it is possible to suppress individual rights and interest for the good of the entire community.³²

Another drawback with the use of arbitration in resolving community land disputes is that arbitration does not settle the underlying issues in a dispute posing the risk of a dispute re-emerging in future. In the case of community land disputes where there is need to preserve peace and co-existence among members of the community, this may affect the fabric of the community. Land holds an important position among indigenous Kenyan communities and is much more than just physical soil.³³ As pointed out by the *Njonjo Commission Report*, 'For indigenous Kenyans, land also has an important spiritual value. For land is not merely a factor of production; it is; first and foremost, the medium which defines and binds together social and spiritual relations within and across generations. Land ownership and control therefore touch on the structure of social and cultural relations as well as access to material livelihoods.'³⁴ Due to the nature of land among indigenous Kenyan communities, disputes related to land necessitates the use of an approach that would resolve rather than settle them.

³¹ Arbitration Act, No. 4 of 1995, S 35.

³² Supra note 14.

³³ Ojienda T, *Principles of Conveyancing in Kenya: A Practical Approach*, May 2007.

³⁴ Republic of Kenya, *Report of the Commission of Inquiry into Land Law System of Kenya on Principles of a National Land Policy Framework Constitutional Position of Land and New Institutional Framework for Land Administration*, Government Printer, Nairobi, November 2002; See also Ojienda, T. "Principles of conveyancing in Kenya, A practical approach." (2008).

Settlement is a power-based approach which focuses on interests of parties to a dispute.³⁵ It fails to address needs that are inherent in all human beings, parties' relationships, emotions, perceptions and attitudes in dealing with a dispute. Resolution on the other hand entails an outcome based on mutual problem-sharing whereby parties to a conflict engage with each other in order to redefine their conflict and their relationship.³⁶ This results in outcomes that are non-coercive, enduring and which address the root cause of conflicts.³⁷ Thus, community land disputes are better managed through resolution rather than settlement in order to guarantee long lasting and mutually acceptable solutions. Since arbitration is a form of dispute settlement, it may not guarantee the desired outcomes.

4.0 Conclusion

The paper has explored the viability of using arbitration in managing community land disputes. It has discussed the constitutional underpinnings of ADR mechanisms including arbitration and the subsequent adoption of the use of ADR in managing disputes related to community land under the Community Land Act. The paper has also brought out the unique nature of community land disputes based on the structure and composition of indigenous Kenyan communities. The aspect of communalism over individualism has been discussed where the common good of the community is valued over individual interests. The shortcomings of arbitration as a form of settlement have been brought out and the paper argues that arbitration might not resolve underlying issues in a dispute creating uncertainty and the likelihood of the dispute reoccurring in future. In the context of community land, there is need to effectively deal with any dispute to ensure harmony and cohesion within the community. Where this has not been achieved, the social structure of the community may be in jeopardy. There is thus need for a customized approach to ensure effective management of disputes relating to community land.

5.0 Recommendations

5.1 Public Awareness on Community Land Rights

³⁵Muigua, K., 'ADR: The Road to Justice in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2018/08/PAPER-ON-ADR-THE-ROAD-TO-JUSTICE-IN-KENYA-CIArb-Conference-Presentation.pdf> accessed on 17/09/2019.

³⁶ Ibid

³⁷ Ibid

Though not a novel concept in the country, most Kenyans may not be familiar with the idea of community land ownership. Land holding is primarily understood to be either private or public. The ideal starting point would be to create public awareness on matters related to community land such as ownership, utilization and administration. This should majorly focus in areas where community land ownership is practiced especially among the pastoralists communities in Kenya. Once the populace has appreciated the issues related to community land, disputes will be mitigated since each person will appreciate his/her rights and interests in relation to those of other members of the community.

5.2 Efficiency in the Process of Recognition, Registration, Management and Utilisation of Community Land

This is another process that can help in reducing conflicts related to community land. The Community Land Act provides for the process of recognition, adjudication and registration of community land. The Community Land Registrar appointed under section 9 of the Act and the Adjudication Officers appointed under section 11 of the Act should ensure efficiency in the process of adjudication and registration of community land. Further, the Community Land Management Committees appointed under section 15 of the Act should ensure efficient management and utilization of community land for sustainable development and common good of the entire community.

5.3 Streamlining the Dispute Management Mechanisms under the Community Land Act

Part 8, of the Community Land Act enshrines various dispute resolution mechanisms including internal dispute resolution, mediation, arbitration and judicial proceedings. However, as discussed, community land disputes are sui generis in nature and there are underlying issues that need to be addressed in such disputes to ensure that unity and cohesion is maintained within the community. Some of these mechanisms such as judicial proceedings and arbitration may not achieve this ultimate goal due to the endless litigation that may ensue. It has also been identified that indigenous Kenyan communities had their own dispute resolution mechanisms premised on negotiation and mediation through institutions such as the Council of Elders. The advantages of such mechanisms have been highlighted which include long lasting and mutually acceptable decisions. Management of Community Land disputes should thus be geared more on such internal dispute resolution mechanisms.

However, there is need to streamline these mechanisms in line with the provisions of the Constitution and formulation of an institution and regulatory framework to govern these

mechanisms.³⁸ This would ensure certainty in the application of these mechanisms and ensure that they abide by the constitutional provisions of equality and non-discrimination since these mechanisms may discriminate against women due to the patrilineal nature of most indigenous Kenyan communities.

5.4 Use of Med-Arb to Manage Community Land Disputes

Med-Arb is a hybrid form of dispute resolution mechanism that combines the use of both mediation and arbitration.³⁹ Parties to a dispute first subject their dispute to mediation and then resort to arbitration in case the mediation fails. Med-Arb recognizes the weaknesses of these two processes and seeks to give parties to a dispute an opportunity to benefit from both mediation and arbitration. With the aid of relevant experts in the field of mediation and arbitration, this form of dispute resolution can be embraced as a form of ADR in Kenya. In the context of community land disputes, this form can be adopted with focus being given on the mediation to resolve such dispute and arbitration being used only as a last resort. Med-Arb can be effective in managing community land disputes by removing the barriers posed by both mediation and arbitration by providing finality to a dispute whilst preserving the relationship among the disputants.

6.0 Conclusion

While the Constitution of Kenya and the Community Land Act has commendably expanded the use of ADR mechanisms in addressing land conflicts, this paper has clearly demonstrated that not all ADR mechanisms can effectively be applied to all disputes. The discourse particularly challenges the use of arbitration in addressing community land disputes due to the unique nature of these disputes and the intrinsic characteristics of arbitration which make it difficult to apply to these types of conflicts or disputes.

The paper has not however fully condemned arbitration; it has made some recommendations that, if considered, would make arbitration applicable to some aspects of these kinds of disputes.

³⁸ Muigua, K., 'Institutionalising Traditional Dispute Resolution Mechanisms and Other Community Justice Systems' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Institutionalising-Traditional-Dispute-Resolution-Mechanisms-and-other-Community-Justice-Systems-25th-April-2017.pdf> accessed on 17/09/2019.

³⁹ Pappas, B., 'Med-Arb and the Legalization of Alternative Dispute Resolution,' *Harvard Negotiation Law Review*, Vol 20 (2015) pp 159-200.