



**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**A CRITIQUE OF SECTION 6 OF THE ARBITRATION ACT**

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**THESIS PRESENTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR  
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## **ABSTRACT**

In any legal relationship, domestic or international, disputes are bound to occur. When such disputes occur in trade they should be settled as expeditiously, flexibly and confidentially as possible so that the economy does not stall. An example of such a dispute settlement mechanism is arbitration.

Arbitration is based on an arbitration agreement. An arbitration agreement excludes the jurisdiction of courts in settling disputes it contemplates. Consequently the courts should not seize jurisdiction over disputes contemplated by an arbitration agreement unless in instances set out in law. Section 10 of the Kenyan Arbitration Act, 1995 (as amended) has expressly provided for this. However, section 6 of the same Act goes against the principle of non-interference by courts in arbitration by mandating courts to uphold technicalities. Upholding technicalities has had the effect that disputes meant to be resolved by arbitration have found themselves in the courts. The net effect has been delays, inconveniences and publicity.

This research is conducted with the principle of party autonomy in mind. The researcher argues that freedom to contract should be upheld at all times. The researcher further argues that section 6 of the Kenyan Act not only goes against the intention of section 10 of the Kenyan Act but also it is against the overall purpose of the Kenyan Act, the Constitution of Kenya, the principle of freedom of contract and other laws. The researcher in advancing this argument is aided by the following theories: positivism; natural school of thought; and freedom of contract theory.

The law in the United Kingdom, the Arbitration Act, 1996, and the practice is analysed as a comparative study. This comparative study aids in the recommendations made by the researcher.

The researcher recommends reform of section 6 of the Kenyan Act to conform with Article 8 of the Model Arbitration Law and section 9 of the UK Act.

This research will aid the Kenya Law Reform Commission, the Honourable Attorney General and subsequently the National Assembly in giving investors a law that conforms to international best standards.

**DECLARATION**

I hereby declare that this thesis is my original work and has not been presented for a degree in any other University.

**NAME:** JIMMY WINNY MWENDE

**DATE:** 17/11/14

**SIGNATURE:** 

This thesis has been submitted for examination with my approval as the University Supervisor.

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## DEDICATION

To all that help others achieve their dreams.



## **ACKNOWLEDGEMENT**

I have sincere gratitude to the University of Nairobi for granting me the opportunity to pursue a Master of Laws (LL.M) degree.

I also acknowledge the direction, guidance and support of Dr. Kariuki Muigua without which I could not produce this work.

## **LIST OF ABBREVIATIONS**

1. A.C. – Appeal Cases
2. A.D.R.L.J. – Arbitration and Dispute Resolution Law Journal
3. ADR – Alternative Dispute Resolution
4. All E. R. – All England Reports
5. Ch. – Chancery
6. CiArb – Kenya – Chartered Institute of Arbitrators Kenya Branch
7. CPA – Civil Procedure Act
8. CPRs – Civil Procedure Rules
9. E.W.H.C. – England & Wales High Court
10. EALR – East Africa Law Reports
11. edn – Edition
12. eKLR – electronic Kenya Law Reports
13. H.L. Cas – Clark & Fennelly’s House of Lords Reports
14. HCCC – High Court Civil Case
15. I.L.R.M – Irish Law Reports Monthly
16. JSTOR – Journal Storage
17. K.B. – King’s Bench
18. KLR – Kenya Law Reports
19. KLRC – Kenya Law Reform Commission
20. Lloyds Rep. – Lloyds Law Reports
21. LSK – Law Society of Kenya
22. MAL – Model Arbitration Law

23. N.S.C.A. – Nova Scotia Court of Appeal
24. N.S.R. – New Source Review
25. Q.B. – Queen’s Bench
26. QC – Queens Counsel
27. UK – United Kingdom
28. UK CPR – United Kingdom Civil Procedure Rules
29. UNCITRAL – United Nations Commission on International Trade Law
30. UNCITRAL MAL – United Nations Commission on International Trade Law Model  
Arbitration Law
31. vol – Volume
32. vols – Volumes
33. W.L.R. – Weekly Law Reports

## **LIST OF STATUTES AND REGULATIONS**

1. The Civil Procedure Act, Chapter 21 of the Laws of Kenya
2. The Civil Procedure Rules, 2010
3. The Constitution of Kenya, 2010
4. The Kenyan Arbitration Act, 1968
5. The Kenyan Arbitration Act, 1995
6. The Kenyan Arbitration Act, 1995 (as amended in 2009)
7. The Nairobi Center for International Arbitration Act No. 26 of 2013.
8. The UK Arbitration Act 1950 (the 1950 Act)
9. The UK Arbitration Act 1975 (the 1975 Act)
10. The UK Arbitration Act 1979 (the 1979 Act)
11. The UK Arbitration Act 1996 (the 1996 Act)

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1. *Africa Spirits Limited v Prevab Enterprises Limited* [2014] eKLR HCCC No. 410 of 2013 Nairobi.
2. *Agip (K) Limited v Kibutu* [1981] KLR 20.
3. *Bashir Haji Abdullahi v Adan Mohamed Nooru & 3 Others* [2014] eKLR.
4. *Bedouin Enterprises Limited v Charles Njogu Lofty & Another* HCCC (Nairobi) No. 1756 of 2007 (unreported).
5. *Billy Graham Owuor v Daudi Sabin Bahira & Another* [2012] eKLR, Mombasa HCCC No. 18 of 2012.
6. *Brighton Marine Palace & Pier Limited v Woodhouse* [1893] 2 Ch. 486.
7. *Capital Trust Investments Limited v Radio Design and Others* [2002] 1 All E.R. 514.
8. *Channel Tunnel Group Limited v Balfour Beauty Construction Limited* [1993] A.C. 334.
9. *Charles Njogu Lofty v Bedouin Enterprises Limited* Nairobi Civil Appeal No. 253 of 2003.
10. *China Young Engineering Company v L.G. Mwacharo T/A Mwacharo Associates & Another* [2013] eKLR, HCCC (Nairobi) No. 81 of 2011.
11. *Corporate Insurance Company Limited v Loise Wanjiru Wachira* [1996] eKLR, Nairobi Civil Appeal 151 of 1995.
12. *Cott UK Limited v FE Barber Limited* [1997] 3 All E.R. 664.
13. *Eagle Star Insurance Company Limited v Yuval Insurance Company Limited* [1978] Lloyds Rep. 357.
14. *Ford's Hotel Company Limited v Bartlett* [1896] A.C. 1.

15. *Golden Forest Holdings Limited v Bank of Nova Scotia* (1991) 98 N.S.R. (2d) 429 (1990, NSCA).
16. *Halki Shipping Corp v Sopex Oils Limited (the Halki)* [1998] 2 All E.R. 23.
17. *Housing Finance Company of Kenya v Rose Wangari Ndegwa* Mombasa Court of Appeal, Civil Appeal 83 of 2008.
18. *International Legal Consultancy Group v Senate & Another* [2014] eKLR.
19. *Joel Kamau Kibe v Kenyan Alliance Insurance Company Limited* [2008] eKLR, Nairobi HCCC 602 of 2007.
20. *Kanti & Company Limited v South British Insurance Company Limited* Nairobi Civil Appeal No. 39 of 1980.
21. *Kenindia Assurance v Mutuli* [1993] KLR 2833.
22. *Kenya Magistrates & Judges Association v Judges & Magistrates Vetting Board & Another* [2014] eKLR.
23. *Kenya Seed Company Limited v Kenya Farmers Association Limited* HCCC (Nairobi) No. 1218 of 2006.
24. *Lombard North Central PLC & Another v GATX Corporation* [2012] EWHC 1067.
25. *London Central and Suburban Developments v Banger* [1999] A.D.R.L.J. 119.
26. *Maison 425 v Kenya Ports Authority* [2012] eKLR, Mombasa HCCC 43 of 2009.
27. *Mara Conservancy v County Council of Transmara* HCCC No. 110 of 2009.
28. *Midroc Water Drilling Company Limited v Cabinet Secretary, Ministry of Environment, Water & Natural Resources & 2 Others* [2013] eKLR, Nairobi HCCC 267 of 2013.

29. *Mombasa Trade Centre Limited v Blue Shield Insurance Company Limited (Under Statutory Management)* Mombasa HC Miscellaneous Civil Application No. 17 of 2013.
30. *Nectel (K) Limited v Eastern & Southern African* HCCC 208 (Nairobi) of 2008.
31. *Niazsons (K) Limited v China Road & Bridge Corporation (K)*[2001] KLR 12.
32. *O'flynn v Bord Gais Eireann* [1983] 1 I.L.R.M 324.
33. *Omino v LaljiMeghji Patel & Company Limited* [1995-98] 1 EALR 264.
34. *Oyugi v Law Society of Kenya & Another* (2005) 1 KLR 463.
35. *Pangaea Development Holdings Limited v Hacienda Development Limited & 3 Others* [2011] eKLR, HCCC (Nairobi) No. 800 of 2009.
36. *Parker, Gaines & Company Limited v Turpin* [1918] 1 K.B 358.
37. *Patel v Patel* [1998] 3 WLR 322.
38. *Peter Mwema Kahoro & Another v Benson Maina Githethuki* [2006] eKLR HCCC Nairobi 1295 of 2005.
39. *Petro Oil Kenya Limited v Kenya Pipeline Company Limited* [2010] eKLR Mombasa HCCC Number 16 of 2009.
40. *Pollock House v Nairobi Wholesalers* (1974) EALR 152.
41. *Rose Wangui Mambo & 2 Others v Limuru Country Club & 17 Others* [2014] eKLR.
42. *Roussel-Uchaf v G.D. Searle & Company Limited and G.D. Searle & Company* [1978] 1 Lloyd's Rep. 225.
43. *Russell Bros. & Company Limited. v Lawrence Breen T/A L & E Properties Pringle J.,* unreported, March 14, 1997).
44. *Scott v Avery* (1856) 5 HL Cas 811.

45. *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR.
46. *The Rena K* [1979] Q.B. 377.
47. *Timothy M. Rintari v Madison Insurance Company Limited* [2005] eKLR, Nairobi HCCC No. 208 of 2004.
48. *TMAM Construction (Africa) Group v Attorney General* [2001] eKLR.
49. *Treadsetters Tyres Limited v Elite Earth Movers Limited Nairobi HCCC No. 440 of 2005(Milimani)(Unreported).*
50. *Trishcon Construction Company Limited v Leo Investments Limited* [2013] eKLR.
51. *Victoria Furnitures Limited v African Heritage Limited & Another* Nairobi HCCC No.904 of 2001.
52. *Westmont Power Kenya Limited v Kenya Oil Company Limited* Nairobi Court of Appeal, Civil Appeal No. 154 of 2003 (unreported).
53. *Zaid Iqubal Dean v Samuel Gakiria Kingori & Another* [2014] eKLR, Civil Case Number 116 of 2013.



## CHAPTER ONE

### 1.0 INTRODUCTION

#### 1.1 BACKGROUND

Arbitration is a legal consensual process of settling a dispute in a judicial manner by a person other than a court of law.<sup>1</sup> It is one of the mechanisms contemplated by Article 33 of the Charter of the United Nations<sup>2</sup> as a means of resolving disputes in the first instance.<sup>3</sup> People started settling disputes by arbitration from time immemorial<sup>4</sup> due to its various advantages such as flexibility, confidentiality and because arbitral awards can be recognized in more countries than court judgments.<sup>5</sup>

Arbitration is premised on fundamental principles one of which is party autonomy.<sup>6</sup> Party autonomy means that parties to a dispute can agree that their dispute(s) should be settled by arbitration and how the arbitration is to be conducted: who the arbitral tribunal should be; the

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<sup>1</sup> E A Marshall *Gill: The Law of Arbitration* (4th edn Sweet & Maxwell 2001), 1; K Muigua 'Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya' (2013) 1 (1) *Alternative Disputes Resolution CiArb-Kenya Journal*, 43-78, 58.

<sup>2</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October, 1945).

<sup>3</sup> K Muigua *Settling Disputes Through Arbitration in Kenya* (Glenwood Publishers Limited 2012), 2.

<sup>4</sup> P Capper *International Arbitration: A Handbook* (3<sup>rd</sup> edn Lovells 2004), 1.

<sup>5</sup> KI Laibuta *Principles of Commercial Law 'Commercial Arbitration and Alternative Dispute Resolution'* (Law Africa 2006) 418-440, 418.

<sup>6</sup> O Chukwumerije *Choice of Law in International Commercial Arbitration* (Quorum Books, 1994), 30; P Capper, note 4 *op.cit.*, 9.

number of arbitrators; the place of arbitration; the law of arbitration and so on.<sup>7</sup> The Arbitration Act<sup>8</sup> (the Kenyan Act<sup>9</sup>) emphasizes party autonomy.<sup>10</sup>

A party, however, may choose to ignore the arbitration agreement and commence a court action when a dispute arises.<sup>11</sup> The other party may apply to stay such a court action<sup>12</sup> under section 6 of the Kenyan Act<sup>13</sup>.

Section 6 of the Kenyan Act calls for a mandatory simultaneous filing of the application for stay at the time of acknowledging the claim such as entering appearance. Kenyan Courts have adopted a strict literal interpretation of ‘acknowledging a claim’ with a result that they are seized with jurisdiction over the dispute. The disadvantages that are associated with litigation then come into play<sup>14</sup> with a result that parties cannot enjoy the advantages of arbitration outlined above.

Arbitration is an appropriate method of dispute resolution.<sup>15</sup> It fosters business relationships, it is voluntary and flexible.<sup>16</sup> Arbitration comes in handy to solve problems of a fast developing

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<sup>7</sup>P Capper, note 4 *op.cit.*, 3.

<sup>8</sup>Chapter 69 of the Laws of Kenya.

<sup>9</sup>There will be much comparison with the UK Arbitration Act, 1996, in this work to be referred as “the UK Act”.

<sup>10</sup>Sections 4 and 10 of the Kenyan Act.

<sup>11</sup>St. John D Sutton and J Gill *Russell on Arbitration* (22<sup>nd</sup> edn Sweet & Maxwell 22<sup>nd</sup> 2003), 12.

<sup>12</sup>Section 6 of the Kenyan Act and section 9 of the UK Arbitration Act, 1996.

<sup>13</sup>There will be much comparison with the UK Arbitration Act, 1996.

<sup>14</sup>Such as court delays and publicity.

<sup>15</sup>M Wambua, ‘The Challenges of Implementing ADR as an Alternative Mode of Access to Justice’ (2013) 1 (1) *Alternative Disputes Resolution CiArb-Kenya Journal*, 15-35, 16.

<sup>16</sup>M Wambua *ibid.*, 17.

country such as Kenya.<sup>17</sup> As a result litigation should be the final resort of resolving a commercial dispute which parties initially intended to be resolved by arbitration.<sup>18</sup> Courts should only play a complimentary role in arbitration, coming in when it is absolutely necessary such as recognition and enforcement of awards<sup>19</sup>.

## **1.2 STATEMENT OF THE RESEARCH PROBLEM**

The Constitution at Articles 159 (2) (c) and 189 (4) recognizes and emphasizes arbitration as an alternative dispute resolution mechanism.<sup>20</sup> Further, the Civil Procedure Act<sup>21</sup> calls on courts to *inter alia* expedite the settlement of disputes.<sup>22</sup> One of the ways of expediting disputes is settling of disputes out of court through arbitration.<sup>23</sup> Section 6 of the Kenyan Act runs in the face of these provisions.<sup>24</sup>

Kenya is a Commonwealth country hence judicial precedent is key.<sup>25</sup> Therefore, although paragraph 7 of the Sixth Schedule of the Constitution of Kenya, 2010 calls on Courts to construe

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<sup>17</sup>K Mbobu 'Efficacy of Court- Annexed Alternative Dispute Resolution: Accessing Justice Through ADR'(2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 102-114, 113.

<sup>18</sup>M Wambua, note 15 *op.cit*, 17. This is when the arbitration agreement is null and void, inoperative or incapable of being performed contemplated by the Kenyan Act at section 6 (1) (a) of the Kenyan Act.

<sup>19</sup>See section 36 of the Kenyan Act on recognition and enforcement of arbitral awards.

<sup>20</sup>K Mbobu, note 17 *op.cit*, 114; K Muigua, note 3 *op.cit*, 7.

<sup>21</sup>Chapter 21 of the Laws of Kenya.

<sup>22</sup>Sections 1A and 1B of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

<sup>23</sup>K Muigua, note 1 *op.cit*, 26-27.

<sup>24</sup>P Ngotho 'The Bastard Provision in Kenya's Arbitration Act' (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 148-162, 148; M Wambua, note 15 *op.cit*, 27.

<sup>25</sup>M Bwonong'a *Procedures in Criminal Law* (East African Educational Publishers Limited 1994), 20.

existing statutes in line with the principles and purpose of the Constitution, the researcher is apprehensive that Courts may follow their predecessors in interpreting section 6 of the Kenyan Act. Further, judges do not have discretion in the section. With such a state of affairs parties who had initially intended to settle their disputes by arbitration face the vagaries of litigation such as delays and publicity.

Section 6 of the Kenyan Act has been abused by lawyers in a bid to aid their clients who are out to frustrate arbitrations by opposing applications for stay.<sup>26</sup> Submissions and the ruling on the application can even take a year to determine the objection.<sup>27</sup> Courts on the other hand have not helped the situation by upholding, rightly at the time, the strict literal meaning of the section.<sup>28</sup> Such actions prolong settlement of disputes.<sup>29</sup>

Nairobi is on the way to becoming an international arbitration center<sup>30</sup> because of the prospective establishment of the Nairobi Centre for International Arbitration<sup>31</sup> and the Law Society of Kenya Centre for Arbitration.<sup>32</sup> Further, the Kenyan Act applies to both domestic and international

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<sup>26</sup>K Muigua, note 1 *op.cit*, 64.

<sup>27</sup>Ar Gor S Dursun 'A Critical Examination of the Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent' <[http://www.yalova.edu.tr/Files/UserFiles/83/8\\_Dursun.pdf](http://www.yalova.edu.tr/Files/UserFiles/83/8_Dursun.pdf)> (13 March 2014), 162; K Muigua, note 1 *op.cit*, 46.

<sup>28</sup>P Ngotho, note 24 *op.cit*, 150.

<sup>29</sup>ArGor S Dursun, note 27 *op.cit*, 126; K Muigua, note 1 *op.cit*, 46.

<sup>30</sup>P Ngotho, note 24 *op.cit*, 151. The enactment of the Nairobi Center for International Arbitration Act, 2013 also attests to this fact.

<sup>31</sup>Established under s 4 (1) of the Nairobi Center for International Arbitration Act No. 26 of 2013.

<sup>32</sup>K Muigua, note 1 *op.cit*, 20.

arbitration.<sup>33</sup> With a bad provision such as section 6 it is difficult to attract international arbitration.<sup>34</sup>

The Kenyan Act was enacted alongside the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law (MAL).<sup>35</sup> Entering appearance under MAL cannot deprive a party the right to file an application for stay later on.<sup>36</sup> Consequently, section 6 of the Kenyan Act is incompatible with MAL. It is difficult to fathom why the National Assembly decided to retain the contentious section 6.<sup>37</sup> As a result investors are likely to run away from Kenya.<sup>38</sup>

Globalization has led to increased commercial disputes and foreign investors preferring arbitration as the mode of dispute resolution.<sup>39</sup> When Courts are seized of jurisdiction of matters that are arbitrable the result is a rise in case backlog.<sup>40</sup> The result of case backlog is loss on

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<sup>33</sup>Section 2 of the Kenyan Act.

<sup>34</sup>K Muigua 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya' <<http://www.kmco.co.ke/index.php/publications/114-making-east-africa-a-hub-for-international-commercial-arbitration>> (28 March 2014), 19.

<sup>35</sup>P Ngotho, note 24 *op.cit*, 148.

<sup>36</sup>P Ngotho, note 24 *op.cit*, 152.

<sup>37</sup>P Ngotho, note 24 *op.cit*, 148.

<sup>38</sup>K Muigua, note 34 *op.cit*, 20.

<sup>39</sup>Chief B Ojo 'Achieving Access to Justice Through Alternative Dispute Resolution' (2013) 1 (1) *Alternative Disputes Resolution CiArb-Kenya Journal*, 1-6, 2; M Wambua, note 15 *op.cit*, 15.

<sup>40</sup>K Muigua, note 1 *op.cit*, 51.

judicial resources such as time and money which could be spent on disputes that are not arbitrable.

The research is, therefore, set out to critique section 6 of the Kenyan Act in the context of the existing law in Kenya. The research will also examine section 6 in the context of the law and practice in the United Kingdom (UK). The UK has been chosen for the following reasons: firstly, the UK Act has withstood the test of time and made London the leading international arbitration hub<sup>41</sup>; secondly, the UK Act is progressive and very popular in international arbitration<sup>42</sup>; thirdly, the UK Act has been said as ‘succeeding where the Kenyan Act has failed...and it is hailed as the most exciting to arbitrators and those practicing around them’<sup>43</sup>; and fourthly, the UK Act is backed by rich case law.<sup>44</sup>

### **1.3 RESEARCH QUESTIONS**

The study will seek to address the following questions.

- (a) Does failure to file an application for stay at the time a party takes a step entitle the Court to be seized of jurisdiction over the matter?
- (b) What is the effect of a Court refusing to grant an application for stay of court proceedings because the applicant failed to file the application simultaneously with the time of taking a step?

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<sup>41</sup>P Ngotho, note 24 *op.cit*, 154.

<sup>42</sup>K Muigua ‘The Arbitration Acts: A Review of Arbitration Act, 1995 of Kenya vis-a-viz Arbitration Act 1996 of United Kingdom’ A lecture delivered at the Chartered Institute of Arbitrators Kenya Branch Entry Course held at College of Insurance on 25-26<sup>th</sup> August, 2008 (Revised on 2<sup>nd</sup> March, 2010), 1.

<sup>43</sup>K Muigua, note 1 *op.cit*, 23.

<sup>44</sup>P Ngotho, note 24 *op.cit*, 154.

- (c) How has the United Kingdom Courts interpreted 'taking a step' in applications for stay?
- (d) What is the way forward for Kenya on applications for stay of court proceedings where there is an arbitration agreement?

#### **1.4 RESEARCH OBJECTIVES**

The main objective of the study is to examine whether failing to file an application for stay of legal proceedings simultaneously with acknowledging a claim is fatally defective to deny parties' intention to settle their disputes by arbitration.

The specific objectives of the study include:

- (a) To review literature on applications for stay of court proceedings where there is an arbitration agreement;
- (b) To examine how the United Kingdom has interpreted 'taking a step' in applications for stay of court proceedings where there is an arbitration agreement;
- (c) To stimulate further research on applications for stay of court proceedings where there is an arbitration agreement;
- (d) To make proposals for reform.

#### **1.5 HYPOTHESIS**

The research will test the following hypotheses:

- (a) Declining to grant an application for stay of court proceedings because a party has taken a step infringes on the principle of party autonomy;
- (b) There exist conflicting jurisprudence in Kenya on the interpretation of 'taking a step';
- (c) Litigants have pleaded the literal interpretation of section 6 to run away from their contractual obligations;

(d) The United Kingdom has tested and established a standard with regard to applications for stay of court proceedings where there is an arbitration agreement.

## **1.6 THEORETICAL FRAMEWORK**

Section 6 of the Kenyan Act does not give a judge the discretion to allow an application for stay if it is filed after ‘taking a step’ such as entering appearance.<sup>45</sup> Neither is the section ambiguous. The research posits that Kenyan judges have, in interpreting section 6, upheld the letter of the law according to positivism. Positivism is the view that the validity of law depends on its sources.<sup>46</sup> The positivists are concerned with what the law is and not what the law ought to be.<sup>47</sup> The cure of a bad law from a positivist side of view is amending or repealing the statute.<sup>48</sup> In that regard positivism will aid the research in advocating for the amendment of the section.

Natural law proponents such as John Finnis have argued that positivism is a legal theory and not a theory of legal practice such as adjudication.<sup>49</sup> These scholars argue that the law should reflect reason otherwise that law is bad.<sup>50</sup> In this regard the natural school of thought will aid the researcher in critiquing the enactment of section 6. Natural law school of thought will also aid the researcher in advancing the argument for repeal of section 6.

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<sup>45</sup>The section uses the word ‘shall’.

<sup>46</sup>B Bix *Jurisprudence: Theory and Context* (6<sup>th</sup> edn Sweet & Maxwell London 2012), 33; G Leslie ‘Legal Positivism, the Stanford Encyclopedia of Jurisprudence’ <http://plato.stanford.edu/entries/legal-positivism/> (12 February 2014), 33.

<sup>47</sup>As put forward by John Austin quoted by B Bix *ibid*, 34.

<sup>48</sup>G Leslie, note 46 *op.cit*, 23; B Bix, note 46 *op.cit*, 78.

<sup>49</sup>B Bix, note 46 *op.cit*, 74; G Leslie note 46 *op.cit* 23.

<sup>50</sup>J W Harris *Legal Philosophies* (2<sup>nd</sup> edn Butterworths London 1997), 6; B Bix, note 46 *op.cit*, 77.



An arbitration agreement is the construction of the parties' way to settle their disputes.<sup>51</sup> An arbitration agreement excludes the courts jurisdiction over disputes between the parties.<sup>52</sup> An arbitration agreement reflects the parties' autonomy.<sup>53</sup> Party autonomy is tied to the principle of freedom of contract.<sup>54</sup> Freedom of contract means that parties are free to decide what rights and obligations come with contracts they enter into without the government interfering.<sup>55</sup> Enacting a law that goes against this principle is an example of unnecessary interference. This study will use the freedom to contract theory in advancing the argument for the amendment of section 6 of the Kenyan Act.

## **1.7 LITERATURE REVIEW**

Paul Ngotho has analysed section 6 of the Kenyan Act.<sup>56</sup> Ngotho's article was written with emphasis to access to justice in mind.<sup>57</sup> On the other hand, this research has freedom to contract as the main goal. Secondly, Paul Ngotho has analysed section 6 of the Kenyan Act in comparison

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<sup>51</sup>M Pryles 'Limits to Party Autonomy in Arbitral Procedure' <[http://www.arbitration-icca.org/media/0/12223895489410/limits\\_to\\_party\\_autonomy\\_in\\_international\\_commercial\\_arbitration.pdf](http://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf)> (17 May 2014), 14.

<sup>52</sup>Ar Gor S Dursun, note 27 *op.cit*, 161.

<sup>53</sup> O Chukwumerije, note 6 *op.cit*, 10; M Pryles, note 51 *op.cit*, 9.

<sup>54</sup>A Redfern and others *Law and Practice of International Commercial Arbitration* (4<sup>th</sup> edn Sweet & Maxwell 2004), 265.

<sup>55</sup>Business Dictionary 'Definition of Freedom of Contract' <<http://www.businessdictionary.com/definition/freedom-of-contract.html>> (21 April 2014); 'Freedom of Contract' <<http://definitions.uslegal.com/f/freedom-of-contract/>> (17 May 2014).

<sup>56</sup>P Ngotho, note 24 *op.cit*, 148-162.

<sup>57</sup>L B Morrison 'Justice Through Empowerment: A Transformative Difference' (2013) 1 (1) *Alternative Disputes Resolution CiArb-Kenya Journal*, 124-147, 124; P Ngotho, note 24 *op.cit*, 148.

to other jurisdictions such as the UK but the analysis is rather shallow creating a gap. That is the gap that this research attempts to fill. Thirdly, Ngotho gives recommendations some of which are arguably wrong. For instance, he reiterates the provisions of the Kenyan Act as recommendation for amendment thus:

*“s. 6. (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies **not later than the time when that party enters appearance [emphasis mine]** or otherwise acknowledges the claim against which the stay proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds...”<sup>58</sup>*

Here, Ngotho gives a recommendation which is the same as the impugned section. This research therefore seeks to give other recommendations.

Dr. Kariuki Muigua has analysed how the courts have interpreted section 6 of the Arbitration Act.<sup>59</sup> The cases analysed by Dr. Muigua were decided before the 2009 amendment to the Arbitration Act.<sup>60</sup> The researcher will argue that even with the 2009 amendment, the pre-2009 rigidity still glares. In that regard, Dr. Muigua’s analysis will aid the research in examining how the courts have interpreted section 6 of the Kenyan Act over the years. The research will also add cases decided post the 2009 amendment.

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<sup>58</sup>P Ngotho, note 24 *op.cit.*, 162.

<sup>59</sup>K Muigua, note 3 *op.cit.*, 30.

<sup>60</sup>K Muigua, note 3 *op.cit.*, chapter 3 generally.

John Tackaberry Q.C. and Arthur Marriott Q.C.<sup>61</sup> have greatly analysed section 9<sup>62</sup> of the UK Arbitration Act, 1996 (the UK Act). The researcher will borrow much of the practice in England from these two volumes.

Similarly, David St. John Sutton and Judith Gill<sup>63</sup> will aid the comparative jurisprudence part of the research generally. In particular, this work will help in the analysis of factors that courts in England have considered in determining applications for stay of proceedings under section 9 of the UK Act.

Enid A. Marshall<sup>64</sup> discusses the position in England as regards stay of proceedings. This book will also aid the researcher in general arbitration law in England.

The research will also refer to cases analysed in the International Dispute Resolution Cases<sup>65</sup>. These cases will be quoted to show how section 9 of the UK Act has been interpreted by the UK courts.<sup>66</sup>

Phillip Capper<sup>67</sup> will aid the research as a point of reference on international commercial arbitration law generally and in particular on the analysis on international conventions and treaties governing international arbitration law.

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<sup>61</sup>J Tackaberry Q.C. and A Marriott Q.C, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice* (4<sup>th</sup> edn Sweet & Maxwell in conjunction with The Chartered Institute of Arbitrators 2003) vols 1 and 2, 1.

<sup>62</sup>This is the section that provides for stay of proceedings applications.

<sup>63</sup>St. J D Sutton and J Gill, note 11 *op.cit*, 21.

<sup>64</sup>E A Marshall, note 1 *op.cit*, 6

<sup>65</sup>J Tackaberry, Q.C.L Anglade and V Bui *International Dispute Resolution* (Sweet & Maxwell 2004) vol 2, 1.

<sup>66</sup>J Tackaberry *et al* *ibid*, 264.

## **1.8 RESEARCH METHODOLOGY**

The principle approach to this research will be based on secondary data. In that regard the bulk of information will be sourced from books, journals, law reports and other related materials.

The information will also be sourced from physical libraries, electronic libraries such as JSTOR and Lexis@Library, and websites.

## **1.9 LIMITATIONS**

The main goal of this research is to critique section 6 of the Kenyan Act. The study of how applications for stay of court proceedings have been handled in the United Kingdom is limited to comparison only.

The other limitation is that the researcher will rely majorly on secondary data. The researcher may conduct informal interviews.

## **1.10. CHAPTER BREAKDOWN**

### **1.10.1 Chapter One**

Chapter one is the proposal of the study and it contains: the background of the study; a statement of the research problem; the literature review; the research objectives; the research questions; the research methodology; the hypotheses; the limitations; and the chapter breakdown.

### **1.10.2 Chapter Two**

This chapter focuses on section 6 of the Kenyan Act and how the Courts have interpreted it over time. The chapter discusses the effects of the section on arbitration. It also looks at the effects of the decisions on arbitration.

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<sup>67</sup>P Capper, note 4 *op.cit*, 10.

### **1.10.3 Chapter Three**

Chapter three examines how the United Kingdom has dealt with the issue of stay proceedings where there is an arbitration agreement. The chapter also addresses the lessons Kenya can learn from the United Kingdom.

### **1.10.4 Chapter Four**

Chapter four it briefly examines the discussion in chapters one to three on: whether the objectives have been met; whether the research questions have been answered; and whether the hypotheses have been proved.

### **10.5 Chapter Five**

This chapter is the conclusion. It summarizes the discussion in Chapters One to Four. Further, this chapter embodies recommendations. The recommendations consist of proposals on how to handle applications to stay proceedings where parties had agreed to settle their disputes by arbitration.

## CHAPTER TWO

### 2.0 REFLECTIONS ON KENYA

#### 2.1 INTRODUCTION

In this Chapter, the researcher examines section 6 (1) of the various Arbitration Acts<sup>68</sup> (the section). The Chapter begins with an examination of the evolution of the section and various interpretations given by the courts on the section over time. The Chapter then looks into the section and the interpretations by the courts in the context of the Constitution of Kenya, 2010 (the Constitution), other statutes and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Commercial Arbitration (MAL).

#### 2.2 THE HISTORY AND INTERPRETATIONS BY COURTS

The history of the section cannot be isolated from the evolution of the statute as a whole. Kenyan arbitration law began with the Arbitration Act 1968<sup>69</sup>.<sup>70</sup> What followed was the Arbitration Act, 1995 (the 1995 Act) and later in 2009 (the current Act) amendments to various sections of the statute were made.<sup>71</sup> The repeal and amendments, respectively, sought to achieve *inter alia* minimal interference by courts in arbitration and alignment of the statute with the MAL.<sup>72</sup> All these amendments affected the section in a way or another as discussed below.

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<sup>68</sup>The three statutes: the 1968; 1995; and 2010 statutes.

<sup>69</sup>Also Chapter 49 of the Laws of Kenya.

<sup>70</sup>K Muigua, note 42 *op.cit*, 1.

<sup>71</sup>K Muigua, note 42 *op.cit*, 1.

<sup>72</sup>K Muigua, note 42 *op.cit*, 34; P Ngotho, note 24 *op.cit*, 152.

### 2.2.1 Section 6 (1) of the Arbitration Act, Chapter 49

The relevant part of the section read as follows:

... (a) any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings (emphasis mine), apply to that court to stay the proceedings...

Courts interpreted the section to mean that a party could enter appearance and file an application for stay later but before filing any pleadings.<sup>73</sup> Therefore, filing a defence was a ‘step’ that disentitled a party from applying for stay.<sup>74</sup> In that regard, in *Kenindia Assurance v Mutuli*<sup>75</sup> it was held that filing a defence disentitles the applicant the right to rely on the arbitration clause.<sup>76</sup> Similarly, in the case of *Corporate Insurance Company v Loise Wanjiru Wachira*<sup>77</sup> where the appellant had entered appearance and filed a defence, the Court of Appeal held that he had lost his right to make an application for stay.

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<sup>73</sup>*Bedouin Enterprises Limited v Charles Njogu Lofty & Another* HCCC (Nairobi) No. 1756 of 2007 (unreported); *Kenya Seed Company Limited v Kenya Farmers Association Limited* HCCC (Nairobi) No. 1218 of 2006; *Charles Njogu Lofty v Bedouin Enterprises Limited* Nairobi Civil Appeal No. 253 of 2003; *Kanti & Company Limited v South British Insurance Company Limited* Nairobi Civil Appeal No. 39 of 1980; *Corporate Insurance Company Limited v Loise Wanjiru Wachira* [1995 – 1998] 1 EALR 20; *Agip (K) Limited v Kibutu* [1981] KLR 20.

<sup>74</sup>*Mombasa Trade Centre Limited v Blue Shield Insurance Co. Limited (Under Statutory Management)* Mombasa HC Miscellaneous Civil Application No. 17 of 2013; *Agip (K) Limited v Kibuto*, *ibid*; *Niazsons (K) Limited v China Road & Bridge Corporation (K)* [2001] KLR 12; *Peter Mweha Kahoro & Another v Benson Maina Githethuki* (2006) eKLR; *Corporate Insurance Company Limited v Loise Wanjiru Wachira*, *ibid*.

<sup>75</sup>[1993] KLR 2833.

<sup>76</sup>KI Laibuta, note 5 *op.cit*, 426.

<sup>77</sup>Nairobi Court of Appeal, Civil Appeal No. 151 of 1995.

In this era some of the judges sought to enforce the arbitration clause by shifting the burden to the respondent to prove why the arbitration agreement should not be upheld. For instance, in *Omino v Lalji Meghji Patel & Co. Limited*<sup>78</sup> the court held that the opposing party must show why effect should not be given to the arbitration agreement.<sup>79</sup>

### **2.2.2 Section 6 of the Arbitration Act, 1995**

With the repeal of Chapter 49 of the Laws of Kenya and subsequent enactment of the 1995 Act, section 6 (1) of the 1995 Act read as follows:

A court before which proceedings are brought in a matter which is the subject of an arbitration agreement **shall** (emphasis mine), if a party so applies **not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings** (emphasis mine) stay the proceedings and refer the parties to arbitration

...<sup>80</sup>

The new section altered the position in section 6 of Chapter 49 above.<sup>81</sup> It required the application for stay to be made at the time of entering appearance or at the time of filing a pleading or at the time of taking any other step in the proceedings.<sup>82</sup> In that regard, the latest the

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<sup>78</sup>[1995-98] 1 EALR 264.

<sup>79</sup>KI Laibuta, note 5 *op.cit.*, 426.

<sup>80</sup> Section 6(1) of the Arbitration Act 1995; *TM AM Construction (Africa) Group v Attorney General* [2001] eKLR.

<sup>81</sup> *Charles Njogu Lofty v Bedouin Enterprises Limited*, note 73 *op.cit.*; *Kenya Seed Company Limited v Kenya Farmers Association Limited*, note 73 *op.cit.*

<sup>82</sup> *ibid.*



application for stay could be made was when a party entered appearance.<sup>83</sup> The interpretation has been applauded for various reasons: one, because any other interpretation would be ‘superfluous and meaningless’<sup>84</sup>; two, it prevents delay tactics by the defence<sup>85</sup>; three, by taking the impugned steps the applicant submits to the jurisdiction of the court;<sup>86</sup> and four, by taking the impugned steps the applicant waives their right to enforce the arbitration agreement.<sup>87</sup>

Courts found that the section was clear<sup>88</sup> and judges considered *inter alia* whether a party has taken a step in the proceedings.<sup>89</sup> A ‘step’ ranges from filing a pleading such as a defence to raising a preliminary objection as discussed below.

In *TM AM Construction Group (Africa) v Attorney General*<sup>90</sup> Mbaluto J (as he then was) dismissed an application for stay of court proceedings because it had been made about 41 days after the honorable Attorney General had entered appearance.<sup>91</sup> *TM AM Construction Group*

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<sup>83</sup>*Victoria Furnitures Limited. v African Heritage Limited and Another* Nairobi HCCC No.904 of 2001; *Charles Njogu Lofty v Bedouin Enterprises Limited*, note 73 *op.cit*; *Kenya Seed Company Limited v Kenya Farmers Association Limited*, note 73 *op.cit*.

<sup>84</sup>*Timothy M. Rintari v Madison Insurance Company Limited* [2005] eKLR, Nairobi HCCC No. 208 of 2004; *Victoria Furnitures Limited. v African Heritage Limited & Another*, *ibid*.

<sup>85</sup>*Bedouin Enterprises Limited v Charles Njogu Lofty & Another* Nairobi HCCC No. 1756 of 2007 (*unreported*); *Treadsetters Tyres Limited v Elite Earth Movers Limited Nairobi HCCC No. 440 of 2005 (Milimani) (Unreported)*

<sup>86</sup>Kariuki Muigua, note 3 *op.cit*, 50.

<sup>87</sup>KI Laibuta, note 5 *op.cit* 426.

<sup>88</sup>*Nectel (K) Limited v Eastern & Southern African* [2008] HCCC 208 of 2008- Nairobi.

<sup>89</sup>*Niazsons (K) Limited v China Road and Bridge Corporation (K) Limited*, note 74 *op.cit*.

<sup>90</sup>HCCC (Nairobi) No. 236 of 2001.

<sup>91</sup>Kariuki Muigua, note 3 *op.cit*, 53.

(Africa) was followed in *Victoria Furniture Limited v African Heritage Limited & Another*<sup>92</sup>. In the latter case an application for stay was dismissed because the applicant had filed the application about two months upon entering appearance.<sup>93</sup>

In *Niazons (K) Limited v China Road and Bridge Corporation (K) Limited*<sup>94</sup> it was held that an applicant cannot file an application under section 6 and file a statement of defence simultaneously.

In *Timothy M. Rintari v Madison Insurance Co. Limited*<sup>95</sup> an application for stay or proceedings under section 6 was dismissed because it had been filed 13 days later on entering appearance.

Justice P Kihara in *Peter Mwema Kahoro & Another v Benson Maina Githethuki*<sup>96</sup> brought an interesting jurisprudence that the applicant should only seek the prayer of stay: no grounds of opposition; no prayer to strike out.<sup>97</sup>

In *Bedouin Enterprises Limited v Charles Njogu Lofty & Another*<sup>98</sup> the defendant had filed the application two weeks after entering appearance. Failure to make the application for stay simultaneously with entering appearance was interpreted as a waiver to the right of the applicant

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<sup>92</sup>HCCC (Nairobi) No. 904 of 2001; *Kenya Seed Co. Limited v Kenya Farmers Association Limited*, note 73 *op.cit.*

<sup>93</sup>K Muigua, note 3 *op.cit.*, 53.

<sup>94</sup>[2001] 2 EALR 503.

<sup>95</sup>[2005] eKLR, Nairobi HCCC No. 208 of 2004.

<sup>96</sup>[2006] eKLR HCCC Nairobi 1295 of 2005.

<sup>97</sup>*Peter Mwema Kahoro & Another v Benson Maina Githethuki* *ibid.*

<sup>98</sup>HCCC No. 1756 of 2007 (*unreported*).

to have the dispute settled by arbitration. The result was that the application was dismissed. This interpretation has been followed in various decisions.<sup>99</sup>

In *Kenya Seed Company Limited v Kenya Farmers Association Limited*<sup>100</sup> the Defendant applied for stay of proceedings and reference to arbitration some 33 days after it entered appearance. The Plaintiff opposed the application stating that it was clearly made outside the time stipulated by section 6 (1) of the Arbitration Act 1995. The Court held that the application was incompetent and not properly before the court.<sup>101</sup>

However, in this era too some of the judges were forward looking. For instance, in *Chevron Kenya Limited v Tamoil Kenya Limited*<sup>102</sup> the defendant had filed the application two days after filing a notice of appointment.<sup>103</sup> The court held that this did not amount to the step contemplated by section 6.<sup>104</sup>

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<sup>99</sup>Such as in *Joel Kamau Kibe v Kenyan Alliance Insurance Co. Limited* [2008] eKLR, Nairobi HCCC 602 of 2007 relying on *Charles Njogu Lofty v Bedouin Enterprises Limited*, note 73 *op.cit*; *Victoria Furnitures Limited v African Heritage Limited & Another*, note 83 *op.cit*; *Billy Graham Owuor v Daudi Sabin Bahira & Another* [2012] eKLR, Mombasa HCCC No. 18 of 2012; *Africa Spirits Limited v Prevab Enterprises Limited* [2014] eKLR HCCC No. 410 of 2013 Nairobi relying on *TM AM Construction Group Africa v Attorney General*, note 90 *op.cit*, *Westmont Power Kenya Limited v Kenya Oil Company Limited* Nairobi Court of Appeal, Civil Appeal No. 154 of 2003 (unreported) and *Corporate Insurance Company Limited v Loise Wanjiru Wachira*, note 79 *op.cit*.

<sup>100</sup>[2007] eKLR HCCC 1218 of 2006.

<sup>101</sup>*Kenya Seed Company Limited v Kenya Farmers Association Limited*, note 73 *op.cit*.

<sup>102</sup>HCCC (Nairobi) No. 155 of 2007.

<sup>103</sup>K Muigua, note 3 *op.cit*, 52.

<sup>104</sup>K Muigua *ibid*.

### 2.2.3 Section 6 (1) of the Current Act

With the 2009 Amendment Act, the section now reads:

A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, **if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought** (emphasis mine), stay the proceedings and refer the parties to arbitration...<sup>105</sup>

The words “**or files any pleading or takes any other step in the proceedings**” in the previous section were deleted and replaced with “**or otherwise acknowledges the claim against which the stay of proceedings is sought**”.<sup>106</sup>

Justice Havelock has said that the section is ill defined because on the rules of procedure there is not another way of acknowledging a claim other than entering appearance.<sup>107</sup>

In *Trishcon Construction Co. Limited v Leo Investments Limited*<sup>108</sup> an application for stay was dismissed because it had been made 21 days after entering appearance.<sup>109</sup>

In *Petro Oil Kenya Limited v Kenya Pipeline Company Limited*<sup>110</sup> the applicant entered appearance on 27<sup>th</sup> April 2009 and filed the application for stay on 11<sup>th</sup> May 2009 long after entering appearance. The court held that 11 days was too late.<sup>111</sup>

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<sup>105</sup>Section 6 (1) of the Arbitration Act, Chapter 49 of the Laws of Kenya (as amended).

<sup>106</sup>K Muigua, note 3 *op.cit*; *Trishcon Construction Co. Limited v Leo Investments Limited* [2013] eKLR; *Africa Spirits Limited v Prevab Enterprises Limited*, note 99 *op.cit*.

<sup>107</sup>In *Trishcon Construction Co. Limited v Leo Investments Limited*, note 106 *op.cit*.

<sup>108</sup>Note 106, *op.cit*.

<sup>109</sup>*Trishcon Construction Company Limited v Leo Investments Limited*, 106 *op.cit*.

In *Africa Spirits Limited v Prevab Enterprises Limited*<sup>112</sup> the defendant entered appearance and contemporaneously filed an application for stay of proceedings, a statement of defence and a counter claim.<sup>113</sup> The plaintiff argued that by filing a defence, the defendant had submitted to the jurisdiction of the court and waived the arbitration agreement. In dismissing the application the court held that section 6 requires the application for stay to be filed at the earliest.<sup>114</sup>

As at 3<sup>rd</sup> April, 2014 judges are still in the old order upholding technicalities contrary to the letter and spirit of the Constitution. For instance Lady Justice Mary Kasango in *Zaid Iqbal Dean v Samuel Gakiria Kingori & Another*<sup>115</sup> held that raising a preliminary objection was a ‘step’ barred by section 6 of the Kenyan Act and therefore she dismissed the application for stay of court proceedings.<sup>116</sup> She relied on the decision of *Peter Mwema Kahoro & Another v Benson Maina Githethuki*<sup>117</sup> in which the learned judge dismissed an application for stay<sup>118</sup> because the defendant/applicant had filed grounds of opposition.

Some of the judges have detached from the jurisprudence set out above to uphold the Constitution. One of them is Justice A Mabeya who has held that although couched in mandatory

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<sup>110</sup>[2010] eKLR; HCCC (Mombasa) No. 16 of 2009.

<sup>111</sup>*Petro Oil Kenya Limited v Kenya Pipeline Company Limited*, *ibid*.

<sup>112</sup>*Peter Mwema Kahoro & Another v Benson Maina Githethuki*, note 97, *op.cit*.

<sup>113</sup>*Africa Spirits Limited v Prevab Enterprises Limited*, note 99 *op.cit*.

<sup>114</sup>*Africa Spirits Limited v Prevab Enterprises Limited*, note 99 *op.cit*.

<sup>115</sup>[2014] eKLR; HCCC (Nairobi) No. 116 of 2013.

<sup>116</sup>*Zaid Iqbal Dean v Samuel Gakiria Kingori & Another*, note 115 *op.cit*.

<sup>117</sup>*Peter Mwema Kahoro & Another v Benson Maina Githethuki*, note 97, *op.cit*.

<sup>118</sup>The Defendant/Applicant used this application as if one for stay of proceedings.

terms, the requirements in section 6 are only procedural.<sup>119</sup> He further held that an order for a party to comply within a specified period would be a sufficient remedy.<sup>120</sup>

### **2.3. SECTION 6 IN LIGHT OF THE PREVAILING LEGAL REGIME**

#### **2.3.1 The Constitution**

Most of the decisions outlined above were decided before the Constitution of Kenya, 2010. However some of the decisions were forward looking only requiring prompt making of the application.<sup>121</sup>

Article 159 (2) (d) of the Constitution calls on courts to dispense justice without *undue (emphasis mine)* regard to technicalities.<sup>122</sup> Dismissing an application for stay because it was not filed at the time of entering appearance is contrary to Article 159 2(d) of the Constitution of Kenya.

Further the Constitution, at Article 159 (2) (c) as read with Article 189 (4), calls on courts to promote alternative dispute resolution mechanisms, one being arbitration.<sup>123</sup> In that regard it is

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<sup>119</sup>In *China Young Engineering Company v L.G. Mwacharo T/A Mwacharo Associates & Another* [2013] eKLR, HCCC (Nairobi) No. 81 of 2011.

<sup>120</sup>*China Young Engineering Company v L.G. Mwacharo T/A Mwacharo Associates & Another*, *ibid*.

<sup>121</sup>As in *Niazsons (K) Limited v China Road & Bridge Corporation Kenya*, note 74 *op.cit*, 25.

<sup>122</sup>*Housing Finance Company of Kenya v Rose Wangari Ndegwa* Mombasa Court of Appeal, Civil Appeal 83 of 2008.

<sup>123</sup>*Pangaea Development Holdings Limited v Hacienda Development Limited & 3 Others* [2011] eKLR, HCCC (Nairobi) No. 800 of 2009; *China Young Engineering Company v L.G. Mwacharo T/A Mwacharo Associates & Another*, note 119 *op.cit*.

against the letter and the spirit of the Constitution for judges to allow technicalities to prevail in applications for stay under section 6.

The Constitution is the supreme law<sup>124</sup> and any law that is inconsistent with the Constitution is, to the extent of its inconsistency, null and void.<sup>125</sup> The researcher, therefore, argues that the preamble of the section is inconsistent with the Constitution and should be repealed.

### **2.3.2 The Civil Procedure Act<sup>126</sup> (the CPA)**

Section 1A (1) of the CPA captures the overriding objective of the CPA. The overriding objective is to facilitate the just, expeditious and affordable resolution of disputes. The purpose of the overriding objective is to increase courts' efficiency in dispensing justice. Further section 1B mandates courts to further the overriding objective above by, *inter alia*, ensuring efficient use of judicial resources.<sup>127</sup> Arbitration gives a forum where disputes are determined expeditiously.<sup>128</sup> Where a court dismisses an application for stay, the court is seized of jurisdiction over the dispute with a result that judicial resources such as time are constrained.

Courts have the inherent power to make such orders as are necessary for the ends of justice to be met or to prevent abuse of the process of the court. Section 3A of the CPA stipulates that nothing in the CPA should otherwise limit this inherent power of the court. The researcher argues that the Court has the power to allow an application for stay if the applicant is willing to arbitrate.

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<sup>124</sup>Article 2 (1) of the Constitution.

<sup>125</sup>Article 2 (4) of the Constitution.

<sup>126</sup>Chapter 21 of the Laws of Kenya.

<sup>127</sup>Section 1B (1) (c) of the CPA.

<sup>128</sup>*Midroc Water Drilling Co. Limited v Cabinet Secretary, Ministry of Environment, Water & Natural Resources & 2 Others* [2013] eKLR, Nairobi HCCC 267 of 2013.

Dismissing an application for stay because of a procedural technicality goes against this inherent power.

Arbitration as a method of dispute resolution is also contemplated by section 59C of the CPA. Under this section the court may refer a matter for arbitration if the court finds such a dispute suitable and even order the arbitral procedure where the parties do not agree.<sup>129</sup> In this regard the researcher cannot fathom how judges have dismissed applications for stay on a procedural technicality.

### **2.3.3 The Civil Procedure Rules, 2010 (the CPR)**

Order 46 rule 20 (1) of the CPR furthers the object of section 59 C of the CPA above by requiring courts to adopt and implement any other appropriate means of dispute resolution. Courts are also required to make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.<sup>130</sup> With these provisions it is difficult to explain why courts would dismiss an application for stay on a procedural technicality.

### **2.3.4 The UNCITRAL MAL**

Article 8 of the UNCITRAL MAL deals with applications for stay of proceedings pending arbitration. It requires the applicant to make the application not later than when submitting its first statement on the substance of the matter.<sup>131</sup> Kenyan arbitration law was heavily borrowed

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<sup>129</sup>Section 59 C (1) and (2) of the CPA.

<sup>130</sup>Order 46 rule 20 (2) of the CPR.

<sup>131</sup>Article 8 (1) of the MAL; International Commercial Arbitration UNCITRAL Secretariat Explanation of Model Law, 5.



from the MAL.<sup>132</sup> It is however a wonder why the legislature retained entering appearance as the cut-off point to make an application for stay.

## **2.4 CONCLUSION**

Section 6 has evolved over the years culminating, to date, in three versions since the first enactment. In the three instances the section has been interpreted variously by the courts. Most of the applications that have gone against the express provision of the section have been dismissed. However some of the judges have upheld substantive justice and referred the parties to arbitration.

An examination of section 6 and the interpretations thereof by the courts in light of the new constitutional dispensation gives worrying results. Whereas the Constitution is pro-substantive justice we have a provision which is pro-technicalities. Further, the international arbitration model, the UNCITRAL MAL, is reluctant to courts intervention in arbitration. The researcher therefore argues that as a country we should do away with this backward provision.

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<sup>132</sup>P Ngotho, note 24 *op.cit*, 152.

## **CHAPTER THREE**

### **3.0 THE UNITED KINGDOM (UK) EXPERIENCE**

#### **3.1 INTRODUCTION**

The focus in this Chapter is the UK. The Chapter examines briefly the evolution of the equivalent of section 6 of Kenya in the UK. The history is coupled with the decisions made on the relevant section at the time in consideration. In examining the evolution of the equivalent of section 6 of Kenya in the UK, the Chapter focuses on how the UK Courts have resolved cases in which a 'step' has been taken. The researcher briefly compares the decisions by the UK Courts and those by the Kenyan Courts as far as 'taking a step' and the effect thereto is concerned.

The Chapter briefly analyses how the UK Courts have utilized the inherent jurisdiction to mitigate the adverse effect of taking the forbidden 'step'. The conclusion then follows.

#### **3.2 THE EVOLUTION**

Like its Kenyan counterpart, the UK arbitration statute has witnessed evolution over time beginning with the formal statute in 1889 to the current arbitration legislation of 1996. Similarly, the historical development has had an effect on the section on stay of legal proceedings pending arbitration in the various UK arbitration statutes overtime as discussed below.

##### **3.2.1 Pre- 1950s**

This era is covered by various UK arbitration legislations enacted from 1889 to 1934. UK Courts started interpreting what amounts to a 'step' as early as 1893. However in this era there was conflicting jurisprudence on what amounts to a 'step' when considering an application for stay.

For instance, in *Brighton Marine Palace & Pier Limited v Woodhouse*<sup>133</sup> it was held that applying for extension of time to deliver a defence does not amount to a ‘step’.

On the other hand, in *Ford’s Hotel Company Limited v Bartlett*<sup>134</sup> it was held that applying for extension of time amounts to ‘taking a step’. Similarly in *Parker, Gaines & Company Limited v Turpin*<sup>135</sup> it was held that applying for a disclosure or further particulars amounts to ‘taking a step’.

### **3.2.2 The UK Arbitration Act 1950<sup>136</sup> (the 1950 Act)**

The UK enacted the 1950 Act to consolidate the various arbitration statutes running from 1889 to 1934.<sup>137</sup> Under this statute, the provision on stay of legal proceedings was section 4 (1). The relevant portion of section 4 (1) provided:

If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings (emphasis mine), and that court or a judge thereof, if

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<sup>133</sup> [1893] 2 Ch. 486 quoted in R Breen & G James ‘Arbitration: To Stay or Not to Stay? A Step, Estoppel and a Step Too Far- An Overview of Recent Judicial Decisions in Ireland’, 2 <<http://www.lexology.com/library/detail.aspx?g=72eccbc4-964a-4236-9f31-9b601d7799da>> (28 June 2014).

<sup>134</sup> [1896] A.C. 1 486 quoted in R Breen & G James *ibid*.

<sup>135</sup> [1918] 1 K.B. 322 quoted in St. J D Sutton and J Gill, note 11 *op.cit*, 369.

<sup>136</sup> Chapter 27 14 Geo 6 to be found in <<http://www.legislation.gov.uk/ukpga/Geo6/14/27/introduction>> (21 June 2014).

<sup>137</sup> As per the Introductory Text in <<http://www.legislation.gov.uk/ukpga/Geo6/14/27/introduction>> (21 June 2014).

satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement... may (emphasis mine) make an order staying the proceedings.<sup>138</sup>

At this time the would-be applicant could enter appearance and file the application later on: an hour later or a day or two later. The researcher argues that entering appearance under this legislation was not the cut-off point. Also, under the 1950 Act stay was subject to the judges discretion.<sup>139</sup>

### **3.2.3 The UK Arbitration Act 1975<sup>140</sup> (the 1975 Act)**

The 1975 Act was enacted to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>141</sup> (the New York Convention).<sup>142</sup> This statute, at section 1(1), provided for the stay of legal proceedings, in order to arbitrate, thus:

If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the

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<sup>138</sup><[http://www.legislation.gov.uk/ukpga/1950/27/pdfs/ukpga\\_19500027\\_en.pdf](http://www.legislation.gov.uk/ukpga/1950/27/pdfs/ukpga_19500027_en.pdf)> (21 June 2014).

<sup>139</sup>The section talks of ‘...court **may**...’

<sup>140</sup>Chapter 3 as per <<http://www.legislation.gov.uk/ukpga/1975/3/introduction>> (21 June 2014).

<sup>141</sup>New York Convention (adopted 10 June 1958, entered into force 7 June 1959).

<sup>142</sup>As per the Introductory Text to be found in <<http://www.legislation.gov.uk/ukpga/1975/3/introduction>> (21 June 2014).

proceedings, apply to the court to stay the proceedings (emphasis mine); and the court...shall (emphasis mine) make an order staying the proceedings.<sup>143</sup>

It is clear that under the 1975 Act the court was mandated to grant the application if the conditions set out therein had been met.<sup>144</sup> The 1975 Act had shifted from the use of ‘may’ in the 1950 Act to the use of ‘shall’. However, the 1950 Act and the 1975 Act were similar in that entering appearance was not prejudicial to the would-be applicant.

In this era ‘taking a step’ or a ‘step’ has been analyzed by various UK judges. For example, in *Roussel-Uchaf v G.D. Searle & Company Limited and G.D. Searle & Company*<sup>145</sup> parties to a licensing contract had agreed that their disputes would be settled by arbitration. When a dispute arose, contrary to the arbitration clause, the aggrieved party filed for interim injunction to stop infringement of the licencing contract. The defence entered appearance but indicated that they would in due course file an application for stay of the proceedings. When the defendant filed the application the claimant argued that the application should be dismissed because the defendant had taken a ‘step’ in defending the interim application. In allowing the application for stay, the Court held that the application should be allowed under the inherent jurisdiction of the court. The Court further held that the disadvantages that come with refusing the application outweigh the advantages of dismissing the application. In this case, the learned judge held that defending the application was not ‘taking a step’ contemplated by section 1 of the 1975 Act.

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<sup>143</sup><[http://www.legislation.gov.uk/ukpga/1975/3/pdfs/ukpga\\_19750003\\_en.pdf](http://www.legislation.gov.uk/ukpga/1975/3/pdfs/ukpga_19750003_en.pdf)> (21 June 2014).

<sup>144</sup>J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit*, 60.

<sup>145</sup>[1978] 1 Lloyd’s Rep. 225 quoted in J Tackaberry Q.C. and A Marriott Q.C, J Tackaberry, Q.C. L Anglade and V Bui, note 65 *op.cit*, 263-264.

In 1978 Lord Denning MR defined 'taking a step' with clarity in *Eagle Star Insurance Company Limited v Yuval Insurance Company Limited*.<sup>146</sup> The Lord Justice held that a 'step' is one which impliedly affirms the correctness of the proceedings and the willingness of the defendant to go along with the determination by the courts instead of arbitration.<sup>147</sup> He held further that 'taking a step' is an action that is in favor of litigation as opposed to arbitration.<sup>148</sup> Here we can see that the judge interpreted a 'step' or 'taking a step' widely. In Kenya, on the other hand, judges have adopted a narrow interpretation of section 6 of the Kenyan Act. For instance, in *Niazons (K) Limited v China Road and Bridge Corporation (K) Limited*<sup>149</sup> and *Africa Spirits Limited v Prevab Enterprises Limited* filing a defence simultaneously with the application for stay has been condemned as 'taking a step' or as 'step' impugned by section 6 of the Kenyan Act.

In *Channel Tunnel Group Limited v Balfour Beatty Construction Limited*<sup>150</sup> parties had agreed to settle their disputes by a determination by a panel of experts failure of which they would go for arbitration.<sup>151</sup> The respondent made an application for stay to the High Court and the High Court dismissed it on grounds *inter alia* that none of the parties was in a position to commence arbitration since no reference had been made to the experts.<sup>152</sup> The applicants, in the High Court, appealed to the Court of Appeal which held that a court should exercise its inherent jurisdiction

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<sup>146</sup>[1978] Lloyds Rep. 357.

<sup>147</sup>K Muigua, note 3 *op.cit*, 50; St. J D Sutton and J Gill, note 11 *op.cit*, 368.

<sup>148</sup>St. J D Sutton and J Gill, note 11 *op.cit*, 358.

<sup>149</sup>[2001] 2 EA 503.

<sup>150</sup>[1993] A.C. 334 as cited in J Tackaberry, Q.C. L Anglade and V Bui, note 65 *op.cit*, 88.

<sup>151</sup>J Tackaberry, Q.C. L Anglade and V Bui, note 65 *op.cit*, 88-89.

<sup>152</sup>J Tackaberry, Q.C. L Anglade and V Bui, note 65 *op.cit*, 89.

in dismissing an application brought contrary to the agreed mode of dispute settlement.<sup>153</sup> This decision was upheld by the House of Lords.<sup>154</sup>

In this era the courts were pro-arbitration and no objections from those who ran away from the arbitration agreements would be heard by the courts.

### **3.2.4 The UK Arbitration Act 1979<sup>155</sup> (the 1979 Act)**

The 1979 Act was enacted mainly to *inter alia* limit appeals to the High Court<sup>156</sup> on points of law only.<sup>157</sup> On its face there is no provision as to stay of legal proceedings pending arbitration.

### **3.2.5 The Arbitration Act 1996<sup>158</sup> (the 1996 Act)**

The 1996 Act was enacted into law on 17<sup>th</sup> June 1996.<sup>159</sup> It came into force on 31<sup>st</sup> January, 1997.<sup>160</sup> Before the 1996 Act, the arbitration law in the UK was scattered in the 1950 Act, the

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<sup>153</sup> *ibid.*

<sup>154</sup> J Tackaberry Q.C. and A Marriott Q.C, note 61, 89-90.

<sup>155</sup> Chapter 42 as stated in <[http://www.legislation.gov.uk/ukpga/1979/42/pdfs/ukpga\\_19790042\\_en.pdf](http://www.legislation.gov.uk/ukpga/1979/42/pdfs/ukpga_19790042_en.pdf)> (21 June 2014).

<sup>156</sup> Appeals from the arbitral tribunals.

<sup>157</sup> K, Noussia *Confidentiality in International Commercial Arbitration A Comparative Analysis of the Position in English, US, German and French Law* (Springer 2010), 13; Lord Hacking 'The Story of the Arbitration Act 1979' Reprinted from (2010) 76 Arbitration 125-129, 125 <<http://www.lordhacking.com/Documentation/The%20Story%20of%20the%20Arbitration%20Act%201979.pdf>> (21 June 2014).

<sup>158</sup> Chapter 23 as cited in <<http://www.legislation.gov.uk/ukpga/1996/23/data.pdf>> (21 June 2014).

<sup>159</sup> As per the Introductory Text to be found on <<http://www.legislation.gov.uk/ukpga/1996/23/introduction>> (21 June 2014).

<sup>160</sup> J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit.*, 30.

1975 Act and the 1979 Act.<sup>161</sup> The 1996 Act, therefore, was enacted to codify the 1950 Act, the 1975 Act and the 1979 Act.<sup>162</sup> The 1996 Act was also an adoption of the UNCITRAL MAL.<sup>163</sup>

The 1996 Act came to limit the role of the court in the arbitral process in the following terms:

...the Court ***shall*** (***emphasis mine***) not intervene except as provided by this Part<sup>164</sup> ....<sup>165</sup>

Further, the 1996 Act reinforced party autonomy at section 1 (b) thus:

...the parties ***shall*** (***emphasis mine***) be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest....<sup>166</sup>

The current equivalent of section 6 (1) of the Kenyan Act is section 9 (1) as read with section 9 (3) of the 1996 Act.<sup>167</sup> Section 9 (1) provides:

A party to an arbitration agreement against whom legal proceedings are brought...in respect of a matter which under the agreement is to be referred to an arbitration

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<sup>161</sup>G Pendell and D Bridge, CMS *Arbitration in England and Wales* [https://eguides.cmslegal.com/pdf/arbitration\\_volume\\_I/CMS%20GtA\\_Vol%20I\\_ENGLAND%20WALES.pdf](https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_ENGLAND%20WALES.pdf), 299 (21 June 2014).

<sup>162</sup>J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit*, 30.

<sup>163</sup>*ibid*.

<sup>164</sup>Part 1 of the 1996 Act.

<sup>165</sup>St. D J Sutton, J Gill and M Gearing J, note 11 *op.cit*, 10; Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit*, 32.

<sup>166</sup>J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit*, 32; H Dickson 'The Arbitration Act 20 Frequently Asked Questions' <<http://www.hilldickinson.com/pdf/The%20Arbitration%20Act.pdf>>, 12 (21 June, 2014).

<sup>167</sup>E A Marshall, note 1 *op.cit*, 8.



may...apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.<sup>168</sup>

In addition section 9(3) provides:

An application **may not** (**emphasis mine**) be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim (**emphasis mine**).<sup>169</sup>

The 1996 Act gives the court discretion to consider whether or not ‘taking a step’ is prejudicial to arbitration. Further, a ‘step’ or ‘taking a step’ has been interpreted by the UK Courts in this era. Of significance is the case of *Patel v Patel*.<sup>170</sup> In *Patel*, the respondent had made an application for an interim injunction. As is the course of civil procedure, the applicant made its response to the application for an interim injunction. After the application was heard and determined, the applicant made an application for stay of the legal proceedings since there was an arbitration agreement. The respondent in opposing the application argued that the court should not allow the application since in replying to the interim injunction application, the applicant had taken a ‘step’ contrary to section 9 (3) of the 1996 Act. The Court held that an action to resist an

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<sup>168</sup>St. J D Sutton and J Gill, note 11 *op.cit.*, 555; also in <<http://www.legislation.gov.uk/ukpga/1996/23/section/9>> (21 June 2014).

<sup>169</sup>*ibid.*

<sup>170</sup>[1998] 3 WLR 322.

interim injunction is not a 'step' in proceedings.<sup>171</sup> The Court of Appeal emphasized that the spirit of the 1996 Act was to do away with technicalities.<sup>172</sup>

In the UK including other prayers in the application for stay is not a 'step' to disentitle one an application for stay. For instance, in *Capital Trust Investments Limited v Radio Design and Others*<sup>173</sup> it was held that asking for other relief in the alternative does not amount to a 'step'.<sup>174</sup> However, in Kenya, courts have held that making any other prayer in the application for stay amounts to a 'step' disallowed by section 6 of the Kenyan Act. For instance, Justice P Kihara in *Peter Mwema Kahoro & Another v Benson Maina Githethuki*<sup>175</sup> stated that including grounds of opposition and a prayer to strike out a suit, was a 'step' impugned by section 6 of the Kenyan Act.<sup>176</sup>

Since the *Patel* decision in 1978 judges in the UK have been reluctant to impugn a 'step' taken by the applicants. Examples of 'taking a step' in this era are detailing your response to the claim in the defence as was held in *Russell Bros. & Co. Limited. v Lawrence Breen t/a L & E*

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<sup>171</sup>Kariuki Muigua, note 3 *op.cit.*, 55; J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit.*, 64.

<sup>172</sup>J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit.*, 64.

<sup>173</sup>[2002] 1 All E.R. 514 quoted in J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit.*, 65.

<sup>174</sup>P Aeberli, 'Jurisdictional Disputes Under the Arbitration Act 1996: A Procedural Map' (2005) 21 (3) *Arbitration International*, 253 – 300, 261 <<http://www.aeberli.com/uploads/articles/ARBI2005025.pdf>> (21 June 2014).

<sup>175</sup>*Peter Mwema Kahoro & Another v Benson Maina Githethuki*, note 97, *op.cit.*

<sup>176</sup>*Ibid.*

*Properties*<sup>177</sup> and indicating that you await the full details of the claim as was held in *London Central and Suburban Developments v Banger*<sup>178</sup>.

Where the parties have taken a 'step' impugned by section 9 (3) of the 1996 Act, the UK Courts have been helpful. The UK Courts have encouraged parties who intend to make an application for stay to indicate that early enough. For instance when filing a defence the defendant may indicate that '...at the opportune time the defendant shall make an application for stay...'<sup>179</sup>

### **3.3 THE USE OF INHERENT JURISDICTION**

The inherent jurisdiction of a court has been defined as "...the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."<sup>180</sup>

The inherent jurisdiction is provided for in the UK Civil Procedure Rules (UK CPRs) Rule 3.1 (2) (f).<sup>181</sup> Rule 3.1 (2) (f) of the UK CPRs provides:

...(2) Except where these Rules provide otherwise, the court may –....

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<sup>177</sup>(Pringle J., unreported, March 14, 1997).

<sup>178</sup>[1999] A.D.R.L.J. 119 quoted in J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit*, 65.

<sup>179</sup>St. D J Sutton, J Gill and M Gearing J, note 11 *op.cit*, 359.

<sup>180</sup>In *Golden Forest Holdings Limited v Bank of Nova Scotia* (1991) 98 N.S.R. (2d) 429 (1990, NSCA) quoted in <<http://www.duhaime.org/LegalDictionary/I/InherentJurisdiction.aspx>> (22 June 2014).

<sup>181</sup>St. J D Sutton and J Gill, note 11 *op.cit*, 358.

(f) stay the whole or part of any proceedings or judgment either generally or until a specified date or event...

In a bid to give effect to the spirit of the 1996 Act and international commercial arbitration, Courts in the UK have utilized their inherent jurisdiction to refer matters to arbitration.<sup>182</sup> In *Cott UK Limited v FE Barber Limited*<sup>183</sup> the Court, using its inherent jurisdiction, stayed proceedings for the parties to honour a dispute resolution clause.

Similarly, in *Lombard North Central PLC & Another v GATX Corporation*<sup>184</sup> the applicant prayed for stay under section 9 (1) of the 1996 Act and under the inherent jurisdiction of the Court. The Court allowed the application. It is arguable this would be the position in Kenya considering various decisions such as the decision by Justice Kihara in *Peter Mwema Kahoro* above.

### **3.4 CONCLUSION**

Like Kenya the UK arbitration law has been amended variously over time. The UK Act started with the 1889 statute to the current 1996 Act. The amendments were premised on various reasons *inter alia* domestication of arbitration conventions such as the New York Convention and the UNCITRAL MAL.

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<sup>182</sup>P Aeberli, note 174 *op.cit*, 279.

<sup>183</sup>[1997] 3 All E.R. 664, HL as quoted by J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit*, 61.

<sup>184</sup>[2012] EWHC 1067 (Comm) as quoted by G Born *et al* 'Interpreting Section 9 (1) of the Arbitration Act 1996: Lombard v GATX' <<http://kluwerarbitrationblog.com/blog/2012/05/24/interpreting-section-91-of-the-arbitration-act-1996-lombard-v-gatx/>> (21 June 2014).

Also, the section on stay of legal proceedings to enforce an arbitration agreement has changed with time to give effect to the various objectives in the various statutes. It is apparent that the UK legislature has been pro - arbitration.<sup>185</sup>

Courts in the UK have not been left behind in promoting arbitration. In the UK, judges make orders for parties to resolve their disputes through Alternative Dispute Resolution Mechanisms (ADRs) including arbitration.<sup>186</sup> It is no wonder that the courts have disregarded technicalities and upheld the spirit of the subsisting arbitration law.

The UK courts have been reluctant in impugning any steps taken to acknowledge a claim. Even where the applicant had taken the impugned 'step' the courts have inclined to their inherent jurisdiction to grant the applications for stay.

In Kenya, on the other hand, the legislature has arguably deliberately omitted to enact a law that reflects international conventions to which Kenya is a signatory. Further, Courts have inclined to the whims of the legislature depriving a party to an arbitration agreement the advantages of arbitration based on technicalities.

The researcher argues that the UK legislature and the judiciary have set the pace for the best international commercial arbitration. Jurisdictions that have been lukewarm in promoting arbitration such as Kenya should follow suit.

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<sup>185</sup>G Pendell and D Bridge, CMS, note 161 *op.cit*, 318.

<sup>186</sup>D Fraser 'English Arbitration Act 1996: Arbitration of International Commercial Disputes Under English Law' <<https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=8+Am.+Rev.+Int%271+Arb.+1&srctype=smi&srcid=3B15&key=c9ea12c7ba9614fea8da9ac0f1a55ccb>> (21 June 2014).

## CHAPTER FOUR

### 4.0 FINDINGS

The main objective of the study was to examine whether failing to file an application for stay of legal proceedings simultaneously with acknowledging a claim is fatally defective to deny parties' intention to settle their disputes by arbitration. The research has shown that failing to file an application for stay simultaneously with acknowledging a claim should not go against the parties' initial intention to settle their disputes by arbitration. This finding is premised on analysis of the spirit of the Kenyan Act, the letter and the spirit of the Constitution, the UNCITRAL MAL and the law and practice in the UK.

The specific objectives of the research were four: to review literature on applications for stay of court proceedings where there is an arbitration agreement; to examine how the United Kingdom has interpreted 'taking a step' in applications for stay of court proceedings where there is an arbitration agreement; to stimulate further research on applications for stay of court proceedings where there is an arbitration agreement; and to make proposals for reform.

The researcher reviewed various materials on stay of proceedings in cases where there is an arbitration agreement both in Kenya and the UK. In addition to the fairly few materials on stay of proceedings, the researcher analyzed fairly a huge number of cases to determine the position of stay of proceedings in Kenya. For the UK, discussed in Chapter 3, the researcher relied on written texts to find out the position in the UK.

One of the limitations of the research was that it was only qualitative (desk) research. Whereas the researcher fairly analyzed the judicial position in Kenya, the researcher only relied on written

texts to identify the position in the UK. In that regard, the third objective has been achieved in that future researchers on stay of legal proceedings will be prompted to comprehensively analyze judicial decisions in the UK.

The fourth objective has been achieved as the researcher has made proposals for reform in Chapter Five.

The study began with the following hypotheses. The first hypothesis was that declining to grant an application of stay of court proceedings because a party has taken a step infringes on the principle of party autonomy. This hypothesis has been proved in Chapter Two. One of the fundamental principles in international commercial arbitration is party autonomy. Party autonomy encompasses such things as the decision on how disputes should be resolved. When technicalities fly on the face of this principle the result is that international commercial arbitration is killed.

The second hypothesis was that there exists conflicting jurisprudence in Kenya on the interpretation of 'taking a step'. Different judges in Kenya have had conflicting interpretation of the preamble to section 6 of the Kenyan Act as discussed in Chapter Two. Accordingly, this hypothesis has been proved.

The third hypothesis was that litigants have pleaded the literal interpretation of section 6 to run away from their contractual obligations. This hypothesis shows the intention of the parties. The intention can only be deciphered from a person's action. The insistence on the Courts to uphold technicalities by the respondents in applications made under section 6 of the Kenyan Act cannot be explained. None of the respondents in the cases reviewed in the research proved to court that

they would suffer any prejudice if the Court ordered parties to arbitrate. All this discussion is in Chapter Two. Consequently, this hypothesis has also been proved.

The fourth hypothesis was that the UK has tested and established a standard with regard to applications for stay of court proceedings where there is an arbitration agreement. From the literature reviewed this hypothesis has been proved. The UK legislature has adopted the UNCITRAL MAL in formulating the current Act (the 1996 Act). Further, the UK Courts are pro - arbitration so much so the Courts have utilized their inherent jurisdiction to promote arbitration even where impugned steps have been taken.

The study sought to address the following questions. One, whether failure to file an application for stay at the time a party takes a step entitles the Court to be seized of jurisdiction over the matter? This question has been answered in the negative. The Court should utilize all the powers in its disposal to promote arbitration due to the advantages that arbitration has over litigation.

Two, what is the effect of a Court refusing to grant an application for stay of court proceedings because the applicant failed to file the application simultaneously with the time of 'taking a step'? The effects of the Court upholding technicalities as opposed to substantive justice are various: it infringes on the doctrine of freedom of contract; it promotes the tendency of parties not to honor their contractual obligations; and it invites the vagaries of litigation into settling a dispute.

Three, how has the United Kingdom Courts interpreted 'taking a step' in applications for stay? The UK Courts have interpreted 'taking a step' very broadly. Even where parties have taken any impugned step, the UK courts have leaned on their inherent jurisdiction to promote arbitration.



Four, what is the way forward for Kenya on applications for stay of court proceedings where there is an arbitration agreement? Kenya needs to adopt short term, medium term and long term solutions. In the short term, the research proposes, in Chapter Five, that judges adopt a liberal interpretation of the preamble to section 6 so as to promote arbitration. In the medium term, the research proposes that the National Assembly gives Kenya a law that is in tandem with the spirit of the Kenyan Act, the letter and spirit of the Constitution, the UNCITRAL MAL and the law and practice in the UK. Finally, in the long term, there is need to create awareness of the importance of arbitration to all stake holders. These stakeholders include law students, lawyers, Advocates and the Kenyan public. The mandate to create this awareness falls on such organizations as the law schools, the Law Society of Kenya and the Chartered Institute of Arbitrators – Kenya.

## **CHAPTER FIVE**

### **5.0 RECOMMENDATIONS**

#### **5.1 INTRODUCTION**

To realize her goal as an international commercial arbitration hub, Kenya must align herself to the arbitration conventions and international commercial arbitration best practices.<sup>187</sup> Consequently, in this Chapter the researcher makes proposals to reform section 6 of the Kenyan Act (the section). The Chapter starts with a proposal to repeal the section. The Chapter then proposes to amend the section. Thereafter, the researcher recommends how the Courts can help in giving effect to arbitration agreements. The researcher then looks at how other stakeholders can help Kenya realize her goal as an arbitration hub as far as the section is concerned. The conclusion then follows.

#### **4.2 THE NATIONAL ASSEMBLY**

##### **5.2.1 Repeal Section 6**

Section 6 of the Kenyan Act does not conform to the UNCITRAL MAL where it is substantially borrowed from. This is despite Article 2 (5) of the Constitution making conventions ratified by Kenya part of Kenyan laws. Further, the section does not tally with the equivalent provisions of jurisdictions that have adopted international commercial arbitration best practice such as the UK. The section has set entering appearance as the cap to make an application for stay. In that regard, it is time that the Kenyan National Assembly repeals section 6 of the Kenyan Act.

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<sup>187</sup>K Laibuta 'Proportionality of Costs in Pursuit of Effective Remedies: A Conceptual Imperative' (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 86-101, 95; K Muigua, note 34 *op cit*, 18.

On repeal the National Assembly is urged to replace the impugned part of section 6 of the Kenyan Act with the provision of Article 8 (1) of the UNCITRAL MAL thus:

*A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*

With such a provision, the deadline for making an application for stay will be when the applicant submits their first statement on the substance of the dispute such as a defence and not by acknowledging a claim (entering appearance) as has been the case. Also with such a provision, it will be mandatory on the Court to stay proceedings even when the applicant has entered appearance and failed to file the application for stay simultaneously with entering appearance.

Moreover, such a provision will not only uphold the freedom of contract but also harmonize the section with the spirit of the Kenyan Act, with the spirit of the Constitution and international commercial arbitration best practice.<sup>188</sup>

### **5.3 THE COURTS' ROLE**

An arbitration agreement<sup>189</sup> is 'a contract, set out in mandatory rather than permissive terms, that captures the mutual consent of the parties'<sup>190</sup>. The presence of an arbitration agreement means

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<sup>188</sup>K Francis 'Redefining "Arbitrability": Assessment of Articles 159 & 189 (A) of the Constitution of Kenya' (2013) 1 (1) Alternative Disputes Resolution CiArb-Kenya Journal, 175-188, 188.

<sup>189</sup>The term 'arbitration agreement' is used in instances where the arbitration agreement is separate from the main contract. Where the 'arbitration agreement' is within the main contract it is known as 'the arbitration clause'.

<sup>190</sup>Mustill and Boyd's Companion Volume on Commercial Arbitration 2001, 2013.

that disputes contemplated by the parties should be settled through arbitration.<sup>191</sup> An arbitration agreement is binding and enforceable by Courts.<sup>192</sup>

The principle to refer parties to arbitration based on their agreements has its origin in the case of *Scott v Avery*<sup>193</sup>. This principle to refer parties to arbitration has also been entrenched in national laws of some jurisdictions such as the UK<sup>194</sup>, international law such as the UNCITRAL MAL, the New York Convention and international best practices.<sup>195</sup> The Courts are the key stakeholders to help parties enjoy the benefits of this principle. The Courts may intervene as discussed below.

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<sup>191</sup>J Tackaberry, Q.C. L Anglade and V Bui, note 65 *op.cit.*, 257- 259 quoting *The Rena K* [1979] Q.B. 377; Justice Muga Apondi in *Pangaea Development Holdings Limited v Hacienda Development Limited & 3 Others* [2011] eKLR Nairobi HCCC 800 of 2009; Justice Richard Mwongo in *Maison 425 v Kenya Ports Authority* [2012] eKLR, Mombasa HCCC 43 of 2009.

<sup>192</sup>*Mara Conservancy v County Council of Transmara* HCCC No. 110 of 2009; *Oyugi v Law Society of Kenya & Another* (2005) 1 KLR 463; *Pollock House v Nairobi Wholesalers* (1974) EA 152; J Tackaberry, Q.C. L Anglade and V Bui, note 65 *op.cit.*, 135 analyzing *Halki Shipping Corp v Sopex Oils Limited (the Halki)* [1998] 2 All E.R. 23.

<sup>193</sup>(1856) HL Cas 811.

<sup>194</sup>As discussed in Chapter 3.

<sup>195</sup>L Mistelis 'Applicable Laws and Procedures in International Commercial Arbitration: Jurisdictional Issues in Arbitration' <[http://www.londoninternational.ac.uk/sites/default/files/applicable\\_laws\\_procedures.pdf](http://www.londoninternational.ac.uk/sites/default/files/applicable_laws_procedures.pdf)>, 17-24, 20 (21 June 2014); KI Laibuta, note 5 *op.cit.*, 418.

### 5.3.1 Uphold the Constitution

The Constitution is the supreme law of Kenya.<sup>196</sup> Further, any law that is inconsistent with the Constitution is null and void to the extent of the inconsistency.<sup>197</sup> Kenyan Courts have upheld these principles. The researcher urges the Courts that are faced with applications under section 6 to declare the preamble of the section null and void *suo moto*.

Also, the Constitution provides that any treaty or convention that Kenya has ratified shall form part of the laws of Kenya.<sup>198</sup> Kenya has ratified the UNCITRAL MAL and the New York Convention. It is therefore difficult to fathom how Kenyan Courts, post - 2010, have overlooked these conventions as far as stay of legal proceedings under the section is concerned. The researcher, therefore, urges the Courts to interpret the preamble to section 6 in accordance with Article 8 of the UNCITRAL MAL.

Further, the Constitution states that the general rules of international law shall form part of the laws of Kenya.<sup>199</sup> In international commercial arbitration party autonomy and minimal court intervention are key principles.<sup>200</sup> The principles have also been entrenched in the Kenyan Act: minimal court intervention at section 10 and party autonomy implied in various sections such as

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<sup>196</sup>Article 2 (1) of the Constitution; see also *International Legal Consultancy Group v Senate & Another* [2014] eKLR; *Rose Wangui Mambo & 2 Others v Limuru Country Club & 17 Others* [2014] eKLR.

<sup>197</sup>Article 2 (4) of the Constitution; see also *Bashir Haji Abdullahi v Adan Mohamed Nooru & 3 Others* [2014] eKLR; *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 Others* [2014] eKLR; *Kenya Magistrates & Judges Association v Judges & Magistrates Vetting Board & Another* [2014] eKLR.

<sup>198</sup>Article 2 (6) of the Constitution.

<sup>199</sup>Article 2 (5) of the Constitution.

<sup>200</sup>P Capper, note 4 *op.cit*, 6.

section 3 (5). In that regard, the researcher recommends that the Kenyan Courts uphold these principles in disregarding technicalities for the sake of promoting arbitration.

Article 159 (2) (c) calls on courts to uphold justice without undue regard to technicalities. It is arguable whether we may forgive decisions made pre - 2010. However, with the current dispensation decisions such as *Zaid Iqbal Dean v Samuel Gakiria Kingori & Another*<sup>201</sup> and *Peter Mwema Kahoro & Another v Benson Maina Githethuki*<sup>202</sup> are misplaced. Consequently, the rest of the Courts should follow progressive decisions such as that of Justice Mabeya in *China Young Engineering Company v L.G. Mwacharo T/A Mwacharo Associates & Another*<sup>203</sup> and Justice D S Majanja in *Kenya Planters' Cooperative Union v Kenya Commercial Bank Limited & 3 Others*<sup>204</sup>. Also Kenyan Courts should borrow a leaf from the UK precedent setting decisions such as *Patel v Patel*<sup>205</sup> and *Eagle Star Insurance Company Limited v Yuval Insurance Company Limited*.<sup>206</sup>

The researcher urges judges to invoke these constitutional provisions in upholding arbitration agreements even where 'impugned steps' have been taken by the applicant.<sup>207</sup>

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<sup>201</sup>[2014] eKLR; HCCC (Nairobi) No. 116 of 2013.

<sup>202</sup>Note 117, *op.cit.*

<sup>203</sup>[2013] eKLR, HCCC (Nairobi) No. 81 of 2011.

<sup>204</sup>[2014]eKLR.

<sup>205</sup>[1998] 3 WLR 322.

<sup>206</sup>[1978] Lloyds Rep. 357.

<sup>207</sup>Justice C Kajimanga 'Enhancing Access to Justice Through ADR: the Zambian Experience' (2013) 1 (1) *Alternative Disputes Resolution CiArb-Kenya Journal*, 1-5, 5.

### **5.3.2 Support; Do Not Supervise**

The Kenyan Act limits intervention by Courts unless the intervention is allowed by the Kenyan Act.<sup>208</sup> Interventions by the Court are allowed in such matters as taking evidence<sup>209</sup> and recognition and enforcement of arbitral awards<sup>210</sup>. Matters of taking evidence and recognition and enforcement of arbitral awards are supportive not supervisory.

Courts should intervene in rare cases such as to enforce the arbitral award or to remove an arbitrator for serious irregularities.<sup>211</sup> The researcher, therefore, calls on the Courts to support and not to choke arbitration through upholding technicalities.

### **5.3.3. Focus on the Arbitration Agreement**

The Court's focus should be on the arbitration agreement looking at whether the arbitration agreement is null and void, inoperative or incapable of being performed.<sup>212</sup> If the arbitration agreement has these characteristics the Court should allow the application without belabouring technicalities.<sup>213</sup> It is however arguable whether the Court should dismiss an application for stay where the arbitration agreement does not meet these characteristics considering the constitutional dispensation that encourages settlement of disputes through Alternative Dispute Resolution

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<sup>208</sup>Section 10 of the Kenyan Act.

<sup>209</sup>As per section 28 of the Kenyan Act.

<sup>210</sup>As per section 36 of the Kenyan Act.

<sup>211</sup>KI Laibuta, note 5 *op.cit*, 419.

<sup>212</sup>E A Marshall, note 1 *op.cit*, 8.

<sup>213</sup>*ibid*.

Mechanisms.<sup>214</sup> It has been held that even when non-arbitrable matters arise in a case the Court is mandated by Article 159 (2) (c) to promote alternative dispute resolution mechanisms.<sup>215</sup>

### **5.3.4 Utilize the Inherent Jurisdiction**

One of the tools that the Courts can use to circumvent adverse effects of upholding technicalities is the inherent jurisdiction.<sup>216</sup> In the UK, Courts have exercised inherent jurisdiction to refer matters to arbitration. For instance in *Cott UK Limited v FE Barber Limited*<sup>217</sup> and *Lombard North Central PLC & Another v GATX Corporation*<sup>218</sup> the Court, using its inherent jurisdiction, stayed proceedings for the parties to honour a dispute resolution clause where impugned 'steps' had been taken.

The CPA provides for the inherent jurisdiction of the Courts.<sup>219</sup> Judges are therefore encouraged to invoke such statutory provisions to uphold freedom of contract.<sup>220</sup> Judges can use this inherent jurisdiction variously. First, judges can encourage arbitration as long as the parties had agreed to settle their disputes by arbitration in the first instance.<sup>221</sup> Second, judges can encourage litigants

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<sup>214</sup>As per Articles 159 (2) (c) and 189 (4) of the Constitution.

<sup>215</sup>Justice D S Majanja in *Kenya Planters' Cooperative Union v Kenya Commercial Bank Limited & 3 Others* [2014] eKLR.

<sup>216</sup>*Golden Forest Holdings Limited v Bank of Nova Scotia*, note 180 *op.cit.*

<sup>217</sup>[1997] 3 All E.R. 664, HL as quoted by J Tackaberry Q.C. and A Marriott Q.C, note 61 *op.cit.*, 61.

<sup>218</sup>[2012] EWHC 1067 (Comm) as quoted by G Born *et al* 'Interpreting Section 9 (1) of the Arbitration Act 1996: *Lombard v GATX*' <<http://kluwerarbitrationblog.com/blog/2012/05/24/interpreting-section-91-of-the-arbitration-act-1996-lombard-v-gatx/>> (21 June 2014).

<sup>219</sup>Section 3A of the CPA.

<sup>220</sup>Justice C Kajimanga, note 207 *op.cit.*, 5.

<sup>221</sup>KI Laibuta, note 5 *op.cit.*, 423.



to exhaust all avenues before coming to Court.<sup>222</sup> Third, judges can use the inherent jurisdiction to deviate from the unfavourable jurisprudence set by their predecessors. Justice Mabeya and Justice Majanja have done this and the researcher invites their brothers and sisters on the bench to follow this line of thinking.

### **5.3.5 Award Costs Instead**

It has been argued that costs can compensate any inadvertence by a party to a suit. We have experienced Kenyan Courts dismissing applications for stay that have been made some days after entering appearance. The researcher encourages Courts to be inclined to granting the application for stay made beyond the time of entering appearance and punish any defendant who has taken a step with costs.<sup>223</sup>

## **5.4 AWARENESS**

### **5.4.1 Judges**

Some of the judgments criticized in Chapter two, especially those made post - 2010, may have been made out of ignorance of the effectiveness of arbitration. There is therefore a need to increase awareness of judicial officers on effective use of arbitration.<sup>224</sup> This task falls on the Judiciary Training Institute which is mandated to ensure the knowledge of the judicial officers increases by the day.<sup>225</sup>

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<sup>222</sup>K Muigua, note 1 *op.cit*, 64.

<sup>223</sup>*O'Flynn v Bord Gais Eireann* [1983] 1 I.L.R.M 324 quoted in R Breen & G James note 133 *op.cit*, 3.

<sup>224</sup>K Muigua, note 1 *op.cit*, 64; M Wambua, note 15 *op.cit*, 34.

<sup>225</sup><<http://www.judiciary.go.ke/portal/judiciary-training-institute.html>> (29 June 2014).

#### **5.4.2 Other Stakeholders**

There are other stakeholders in promoting arbitration. They include the public, law students, and Advocates. It is arguable that the reason why people want to go back on their contracts is that they do not appreciate the advantages that come with settling disputes through arbitration. In that regard, there is need to train these stakeholders on the importance of arbitration.<sup>226</sup> The mandate of training can be undertaken by various law schools, the Chartered Institute of Arbitrators – Kenya Branch and the Law Society of Kenya.

#### **5.5 CONCLUSION**

This research is based on the following schools of thought: positivism; the natural school of law; and freedom of contract theory. Positivism is the view that the validity of law depends on its sources and natural law scholars argue that the law should reflect reason otherwise it will be considered a bad law. On the other hand, freedom of contract theory advances the argument that parties are free to decide what rights and obligations come with contracts they enter into without the government interfering. These theories have aided the research in proposing repeal of section 6. Further, the freedom of contract theory has been the basis for proposing progressive interpretation of section 6.

This research has analyzed and critiqued section 6 of the Kenyan Arbitration Act No. 5 of 1995 (as amended in 2009) (the Kenyan Act) in the context of the constitutional dispensation, the spirit of the Kenyan Act, UNCITRAL MAL, and the law and practice in the UK.

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<sup>226</sup>M Wambua, note 15 *op.cit*, 34.

In analyzing and critiquing section 6 of the Kenyan Act this research identifies several gaps. Firstly, the section is contrary to the spirit of minimal court intervention of the Kenyan Act. Second, the section is against the express provisions of the constitution such as Article 159 (2) (c) which calls on courts to promote ADR *inter alia* arbitration. Third, section 6 runs in the face of international commercial arbitration laws such as UNCITRAL MAL. This gap is very huge considering that Article 2 (5) as read with Article 2 (6) allows international law to form part of the laws of Kenya. Fourth, the section is against international commercial arbitration best practice such as adopted in the UK. Fifth, Kenyan Courts have given a limiting interpretation to section 6 with a result that nearly all the applicants that have taken the impugned steps have been denied their right to arbitration.

Kenya cannot become an international commercial arbitration hub as the UK with a backward provision such as section 6. In that regard, the researcher proposes various measures to mitigate the adverse effects of section 6. In the short - term, the judiciary bears the great responsibility to adopt a progressive interpretation of section 6. In the mid - term the legislature in conjunction with the Kenya Law Reform Commission (KLRC) and the honorable Attorney General, is urged to give Kenyans a provision that is in line with the Constitution, the spirit of the Kenyan Act, international commercial arbitration law and international commercial arbitration best practices. In the long - term, the other stakeholders are called upon to aid in promoting arbitration through awareness and practice. These stakeholders include the Chartered Institute of Arbitrators – Kenya Branch, the Law Society of Kenya, law schools and the Kenyan public.

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