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**IMPACT OF COURT INTERVENTION ON ARBITRATION IN KENYA**

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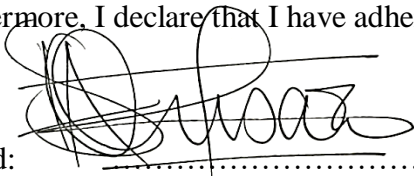
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I confirm that all referenced or quoted materials are properly cited, ensuring complete and accurate attribution.

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Date: 10/10/2023

## SUPERVISOR

I, DR. KARIUKI MUIGUA, certify that I have supervised the preparation of this thesis. The research and manuscript conform to accepted standards in terms of originality, quality and scholarly rigor.

Moreover, the research activities have been conducted in compliance with the ethical standards relevant to the field of study. The opinions and conclusions expressed in this thesis are exclusively those of the author. They do not necessarily reflect my personal views or those of The University of Nairobi.

Signed: \_\_\_\_\_



Date: 09/10/2023

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I recognize the collective effort that has culminated in this thesis. It is my hope that this work will serve as a luminary of intellectual depth, a beacon that heralds the pursuit of excellence in the Kenyan Arbitration landscape and beyond.

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## **LIST OF ABBREVIATION**

ADR - Alternative Dispute Resolution

AL - Arbitration Law of the People's Republic of China

CIArb - Chartered Institute of Arbitrators

CIETAC - China International Economic and Trade Arbitration Commission

FAA - Federal Arbitration Act

NCIA - Nairobi Centre for International Arbitration

SCIA - Shenzhen Court of International Arbitration

UNCITRAL - United Nations Commission on International Trade Law

UK - United Kingdom

US - United States

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## CHAPTER ONE

### 1.0 Background/Introduction

Arbitration acts as an alternative method for resolving disputes, it entails the designation of a neutral, independent entity to adjudicate disagreements among two or more parties.<sup>1</sup> In Kenya, the Arbitration Act governs the process, including domestic and international arbitral awards.<sup>2</sup> Although arbitration has many advantages, it is not always a smooth process. Parties may attempt to contest the scope of authority vested in the arbitral tribunal, along with the legitimacy of an award. Furthermore, they can seek to have the award enforced in courts.<sup>3</sup> The role of the courts is intricate and contentious. This is because the parties generally anticipate their dispute to be settled by the arbitral tribunal without interference.<sup>4</sup>

The impact of court intervention on arbitration in Kenya is an important topic of study, as it has significant implications for its effectiveness and efficiency in resolution of disputes. Court intervention may be necessary to guarantee that the rights of all involved parties are safeguarded and the arbitration impartial.<sup>5</sup> Excessive judicial intervention may undermine the autonomy and finality of arbitration, leading to delays and increased costs for the parties. This study will explore how the courts in Kenya intervene in arbitration<sup>6</sup> and how the intervention affects parties and the process itself. This study will examine the legal structure for court intervention, including the clauses outlined in the Arbitration Act and relevant case law. It will also consider the role of the courts in enforcing and challenging awards.

The employment of arbitration holds numerous benefits when compared to conventional litigation. It is usually swifter and more cost-efficient in contrast to litigation, as the parties dictate the procedures and laws to be utilized, and the process is characteristically less formal and more

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<sup>1</sup> Dr. Kariuki Muigua, 'Heralding a New Dawn: Achieving Justice through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya' [2013] ALTERNATIVE DISPUTE RESOLUTION 40.

<sup>2</sup> Arbitration Act 1995.

<sup>3</sup> Claire Mwangi, 'The Role Of Kenyan Courts In Arbitration, Enabling Or Constraining?' (PhD Thesis, University Of Nairobi 2015).

<sup>4</sup> Amoko, 'Arbitration: A Time to Rethink? – Oraro & Company Advocates' (2018) <<https://www.oraro.co.ke/2018/09/12/arbitration-a-time-to-rethink/>> accessed 17 January 2023.

<sup>5</sup> Dr. Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers, Nairobi 2012).

<sup>6</sup> Dr. Kariuki Muigua, 'Role of the Court under Arbitration Act 1995: Court Intervention Before, Pending and After Arbitration in Kenya' [2009]

adaptable than court proceedings.<sup>7</sup> In addition, arbitration allows the parties to choose an arbitrator with specific expertise or experience relevant to the dispute, which can be particularly useful in complex or specialized cases.

Court intervention is a subject of much debate and discussion as it raises questions about the autonomy and finality of the arbitral process. Some contend that judicial intervention is essential in safeguarding the rights of the parties, ensuring that the process remains equitable and impartial.<sup>8</sup> Others reason that excessive judicial involvement undermines the autonomy of arbitration and may lead to delays and increased costs for the parties.<sup>9</sup> In Kenya, the Judiciary has been instrumental in shaping the development of arbitration, both via their decisions in specific cases and through their overarching supervision of arbitration. The courts are obliged to enforce arbitral awards, and they have interpreted and applied the rules within the Arbitration Act and relevant laws.<sup>10</sup>

In addition to analyzing the legal basis for court intervention in arbitration in Kenya, this thesis will also consider the practical implications of such intervention. We will scrutinize the extent of judicial engagement and its impact in propelling arbitration forward in Kenya, along with its influence on how arbitration is perceived in terms of equity and effectiveness in resolving disputes. This thesis examines the potential effect of court intervention on the parties, including the costs and delays that may be incurred as a result of judicial involvement.

Overall, this thesis will offer a thorough investigation into the impact of judicial involvement on the arbitration landscape in Kenya. By analyzing the regulatory structure and practical implications of court intervention, this thesis aims to elucidate the complex and often controversial relationship between arbitration and the courts in Kenya.

### **1.1 Statement of the Problem**

In Kenya, arbitration is increasingly recognized as a preferred method for resolving disputes outside traditional court settings, especially for commercial disputes. However, recent statistics indicate that court intervention in arbitration has been steadily rising over the past 5 years. This

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<sup>7</sup> Michael A Helfand, 'Arbitration's Counter-Narrative: The Religious Arbitration Paradigm' (2014) 124 Yale LJ 2994.

<sup>8</sup> Muigua, *Settling Disputes through Arbitration in Kenya* (n 5).

<sup>9</sup> John Lurie, 'Court Intervention in Arbitration: Support or Interference?' (2010) 76 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*.

<sup>10</sup> Mwangi (n 3).

frequent judicial intervention has raised concerns regarding the delays, escalating costs and erosion of autonomy associated with the excessive court engagement in the arbitration process.

While limited court oversight is important to ensure impartiality and fairness, excessive intervention defeats the purpose of arbitration as an expedient, cost-effective method chosen by parties. Moreover, inconsistent rulings arising from varying judicial approaches have undermined the credibility of arbitration as providing definitive case closure.

However, contemporary research examining the specific effects of court intervention on arbitration procedures and efficacy in the Kenyan context remains scarce. There is a noticeable absence of systematic research examining the effects of recent judicial involvement in arbitration in shaping parties' experience with arbitration. Therefore, this study aims to bridge this knowledge gap by providing an empirical investigation of recent court intervention trends and patterns in Kenya. By analyzing cases of court involvement in arbitration and its implications on the effectiveness, fairness and credibility pertaining to arbitration within the framework of Kenya's legal system specifically. The findings will provide an evidence-based perspective to inform policy and practice.

## **1.2 Significance & Justification of the Study**

Arbitration is popular and offers numerous advantages over litigation. However, the rising instances of court intervention have elicited apprehension regarding the autonomy and effectiveness of arbitration. Court intervention can induce delays, incur expenses, and engender uncertainty in the process. This compromises the perceived fairness and efficiency of arbitration. Moreover, there have been instances where the courts' involvement has resulted in inconsistent rulings, further eroding the credibility of arbitration. Despite the growing concern surrounding court intervention in arbitration, there is a lack of comprehensive research on its impact on the arbitration process and parties involved in Kenya.

This study endeavors to bridge the information lacuna by probing the repercussions of court intervention on the arbitration process, scrutinizing the legal system in place and judicial practices governing court intervention and evaluating the practical ramifications for the parties involved. The research will contribute to the understanding of court intervention's effects on arbitration in

Kenya, providing guidance for subsequent scholarly inquiry and practical advancements in this area.

### **1.3 Statement of Objective (s)**

This study aims to determine if judicial involvement in arbitration constitutes assistance or constitutes an obstruction and the attendant effect of the intervention of the arbitral process as a whole.

The study will focus these objectives:

- i. Evaluate the influence of court intervention on arbitration, particularly concerning the effectiveness.
  
- ii. To scrutinize the legal foundation for court involvement, encompassing the Arbitration Act and pertinent case law.
  
- iii. To investigate the practical implications of court intervention on the parties involved in arbitration, including the costs and delays that may be incurred as a result of judicial involvement.
  
- iv. To investigate the function of the seat of arbitration and its implications on the conduct of the arbitration proceedings.
  
- v. To provide recommendations for future research and professional engagement in the domain of court intervention in arbitration.

### **1.4 Research Questions**

- i. What is the legal framework governing court intervention in arbitration in Kenya, and how does it compare to frameworks in other jurisdictions?
  
- ii. What are the statutory grounds for court intervention in arbitration under Kenyan law, and how are these applied through judicial interpretation?



iii. What challenges and barriers exist in the effective use of arbitration in Kenya, and what reforms can address these?

iv. How does court intervention impact the perceived reliability and credibility of arbitration as an substitute dispute resolution mechanism in Kenya?

v. What are the practical implications of court intervention in arbitration, in terms of costs, benefits, efficiency and efficacy?

vi. What strategies can be implemented to enhance the credibility and autonomy of arbitration while allowing for necessary court intervention?

## **1.5 Hypotheses**

The first hypothesis of this research is that court involvement in arbitration has negatively affected the efficacy of arbitration.<sup>11</sup> The second hypothesis is that the level of court intervention is higher than other countries or legal systems, leading to a perceived lack of autonomy or independence in the arbitration process. The third hypothesis is that court intervention has negatively impacted the perceived fairness and integrity of arbitration. The final hypothesis is that the legal framework and judicial practices that govern court intervention in arbitration in Kenya are unclear and inconsistent, leading to uncertainty and potential delays in the resolution of disputes through arbitration.

## **1.6 Theoretical Framework**

This research is guided by the foregoing hypotheses that gravitate towards a group of theories. The theoretical framework is a set of concepts and ideas that will be used to guide and inform this research. This framework will provide a scaffold for understanding and interpreting the data and findings of the research, and help place the study in line with existing knowledge and theories. It will employ the comparative law theory, autonomous theory, seat theory and jurisdictional theory.

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<sup>11</sup> Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration—A Case for an Efficient System of Judicial Review' (2011) 28 *Journal of International Arbitration*.

### **1.6.1 Comparative Law Theory**

The theoretical framework of this thesis also incorporates the comparative law theory. Comparative law is an academic discipline concerned with examining the analogies and disparities discernible within the legal frameworks of diverse nations or legal jurisdictions.<sup>12</sup> This theory will be used to compare the laws and practices related to court intervention with those of other countries or legal systems.

The comparative law theory will be used to identify any best practices or successful models of court intervention in arbitration that could be relevant to Kenya's context. It will also be useful to understand how Kenya's laws and practices are different from other jurisdictions and to understand the reasons behind such differences.

This theory will help answer research questions related to the legal frameworks and judicial practices that govern court intervention in arbitration in Kenya, and how they impact the perceived reliability and credibility of arbitration in Kenya.

The comparative law theory will allow this thesis to have a broader perspective on court intervention in arbitration by comparing Kenya's laws and practices with those of other countries, and identify potential areas for reform. This can be done by researching other jurisdictions' laws and case law, as well as by conducting interviews with legal practitioners and experts from other countries.

By using the comparative law theory along with the jurisdictional and seat theories, this thesis will be able to provide a comprehensive and international perspective on court intervention and the assessment of its influence on the overarching efficacy and dependability of arbitration.

### **1.6.2 Autonomous theory**

The theoretical framework of this thesis also incorporates the concept of autonomy. Autonomy pertains to capacity of the involved entities to mutually determine the regulations and protocols

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<sup>12</sup> Uwe Kischel, 'Introduction: What Is Comparative Law?' (2019).

governing their arbitration, as well as to designate the arbitrator(s).<sup>13</sup> This concept assumes significance as it grants the parties the prerogative to customize the procedures according to their unique requisites, thereby assuring a fair and efficient process.

The autonomous theory will be used to analyze the degree of autonomy in Kenya's arbitration proceedings and how it has been affected by court intervention. It will also be employed to scrutinize the ramifications of court intervention on the parties' capability to opt for arbitration and the impact on the parties' selection of arbitration rules, procedures, and arbitrators. In addition, it will be used to examine how the legal framework and judicial practices in Kenya shape or limit the parties' autonomy and the level of judicial review in the arbitration process. This theory will answer research questions related to the implications of court intervention for the parties involved in arbitration, the possible obstacles or hindrances impacting the successful implementation of arbitration in Kenya, and how the legal framework and judicial practices that govern court intervention in arbitration in Kenya impact the perceived reliability and credibility of arbitration.

The autonomy theory will provide a perspective on how court involvement may be impacting the parties' ability to choose the best ADR and to tailor it to their needs, and to understand the effects of court intervention on the parties' autonomy and the arbitration process. This can be done by researching laws, regulations and case law, as well as conducting interviews and surveys with parties and practitioners.

### **1.6.3 Seat theory**

The theoretical framework of this thesis also includes the concept of "seat" of arbitration. This term designates the legal jurisdiction wherein the arbitration is scheduled to be conducted, and where laws and regulations govern arbitration proceedings of that particular jurisdiction. This concept is particularly important because it determines which laws and it signifies the locus where legal principles are to be employed throughout the arbitration as well the extent of judicial power in enforcing arbitral awards.

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<sup>13</sup> Julian DM Lew, 'Does National Court Involvement Undermine the International Arbitration Processes?' (2009) 24 American University International Law Review 3.

This theory will be used to analyze the role of the seat of arbitration and its repercussions on the conduct of arbitration. This necessitates an investigation into the seat's influence on the extent of court involvement and selection of the seat influences the parties' autonomy in opting for their preferred ADR. More so, the theory will provide a framework for assessing the implications of the seat on the enforceability of arbitration awards in Kenya.

This theory will help address research questions related to the legal frameworks and judicial practices that govern court intervention in arbitration in Kenya and how they impact the perceived reliability and credibility of arbitration, particularly the choice of seat. Data can be collected via legal analysis, interviews, or case studies.

Among the theoretical frameworks deliberated, there exists no universal strategy that caters to all scenarios. Each theory has its own strengths and limitations, and their usefulness depends on the research question being addressed. However, the autonomous theory is the most preferable theory for this study due to its focus on autonomy and how courts affect this autonomy. By using the autonomous theory, the study can provide insights into the extent to which court intervention impacts the parties' power to pick arbitration, and effects on their autonomy.

### **1.7 Research Methodology**

The study design will be qualitative; it will focus on collecting qualitative data through questionnaires to legal professionals. The selection of participants will be based on their knowledge, expertise, and involvement in arbitration in Kenya.

The data analysis will aim to identify common themes, patterns, and perspectives that emerge from the questionnaires. These findings will be critically analyzed and interpreted to draw meaningful conclusions about the factors influencing the perception of arbitration in Kenya.

The study's findings will provide valuable insights into the impact of legal frameworks, judicial practices, transparency and accountability, accessibility and affordability, and cultural and societal factors on the perception of arbitration in Kenya. These conclusions will contribute to the existing knowledge on arbitration and inform policymakers, practitioners, and stakeholders about potential areas for improvement and reform in the arbitration system. The qualitative data, collected will be

analyzed thematically, and the data will be systematically organized and coded, identifying common themes and patterns that emerge.

## **1.8 Literature Review**

### **1.8.1 Introduction**

In the complex interplay of arbitration and judicial intervention, the Kenyan legal landscape presents a unique milieu for scholarly inquiry. The history of arbitration in Kenya, steeped in the common law tradition and increasingly influenced by global arbitration practices, sets a fascinating stage for analyzing the judiciary's function within arbitral processes. The enactment of the Arbitration Act 1995 marked a significant shift towards modernizing arbitration in Kenya, yet the extent and nature of court intervention remain subjects of rigorous debate.

This study embarks upon a thorough exploration of the existing scholarly discourse, meticulously analyzing seminal works, incisive articles and pivotal reports that delve into the arbitration realm. By establishing a well-defined scope, the review judiciously selects sources that illuminate aspects of the nuances of court intervention and its implications for the sanctity of arbitration.

The aim of this study is twofold: to dissect the intricate layers of legal frameworks governing arbitration and to illuminate the practical ramifications of court interventions in arbitration. The ensuing discourse will unearth the academic endeavours that have hitherto shaped the understanding of arbitration law in Kenya, assess the robustness of these scholarly contributions and identify the lacunae within the expanse of legal literature.

This literature review, therefore, sets out to accomplish a comprehensive synthesis of the current state of knowledge, while concurrently paving the way for this study to inject fresh perspectives and empirical insights into the ongoing dialogue.

### **1.8.2 Legal frameworks and judicial practices**

The legal structure overseeing court intervention is principally directed by the Arbitration Act.<sup>14</sup> It stipulates the ensuring compliance with arbitral decisions, whether domestic or international and lays down the framework for the appointment of arbitrators, the orchestration of arbitration and

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<sup>14</sup> Arbitration Act 1995.

the rights of the parties involved. Relevant case law has significantly shaped the legal framework for involvement of courts in arbitration.<sup>15</sup>

While the legal structure for involvement of courts in arbitration in Kenya is generally considered to be well-established, there have been concerns raised about the consistency and clarity of the court's approach to certain issues. These include the standard of review applied in challenges to an award and the timing of challenges to jurisdiction.<sup>16</sup> Additionally, recent literature suggests that judicial practices regarding arbitration and involvement of courts can be inconsistent, raising questions about the effectiveness of arbitration.<sup>17</sup> The literature in this domain present an opportunity for this study to bridge the void and furnish a more thorough comprehension of the impact of court involvement on arbitration.

Section 10 of the Arbitration Act 1995 stands as a bulwark against unwarranted judicial interference, embodying the ethos of the UNCITRAL Model Law 1985.<sup>18</sup> It is this section that expressly limits the scope of court intervention in arbitral processes, delineating a clear boundary between judicial review and arbitration autonomy.<sup>19</sup> The provisions within the Act regarding judicial engagement, particularly in appointment of arbitral tribunals, suggest a nuanced approach that balances the need for a judicial safety net with respect for the arbitration process.<sup>20</sup>

The scholarly critique by Dr. Kariuki Muigua provides a pointed analysis of the Act, emphasizing the necessity for reforms aimed at refining court interventions to better reflect international standards.<sup>21</sup> Such scholarly discourse underscores the ongoing dialogue about the effectiveness of the current legislative framework in safeguarding arbitration from excessive judicial intervention. Case law further elucidates the practical application of the Act. Guided by the seminal authority of *Nyutu Agrovat Ltd v. Airtel Networks Kenya Ltd*, the Supreme Court's interpretation of Section 35 permitted appeals emanating from decisions of the High Court decisions overturning arbitral

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<sup>15</sup> Muigua, 'Role of the Court under Arbitration Act 1995' (n 6).

<sup>16</sup> Muigua, 'Heralding a New Dawn' (n 1).

<sup>17</sup> Lurie (n 9).

<sup>18</sup> N Desai and EK Muthoka, 'Arbitration Procedures and Practice in Kenya: Overview' J Miles & Co <[https://uk.practicallaw.thomsonreuters.com/5-633-8955?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/5-633-8955?contextData=(sc.Default)&transitionType=Default&firstPage=true)> accessed 8 November 2023

<sup>19</sup> G Kashindi et al, 'KENYA: An Introduction to Dispute Resolution' <<https://chambers.com/content/item/4370>> accessed 8 November 2023

<sup>20</sup> Madhani Advocates, 'Arbitration: Alternative Dispute Resolution Mechanisms' (Madhani Law, 13 October 2022) <<https://madhanilaw.com/arbitration/>> accessed 8 November 2023

<sup>21</sup> K Muigua, *Settling Disputes Through Arbitration in Kenya* (4th edn, 2022)

awards.<sup>22</sup> This interpretation has sparked considerable debate, as it appears to deviate from the principle of finality that is fundamental to arbitration proceedings<sup>23</sup>. Court of Appeal's stance in the same case reflects a contrasting judicial philosophy, emphasizing the conclusiveness of decisions rendered by the High Court and the principles of party autonomy.<sup>24</sup>

This dichotomy in judicial approach reveals the intrinsic tension within Kenyan arbitration law: the aspiration for arbitration to function as a swift and final mechanism for dispute resolution, and the judiciary's duty to provide oversight to prevent miscarriages of justice.<sup>25</sup> The Nyutu case serves as a prime example of the friction between these two objectives and has been instrumental in shaping contemporary discourse on the proper extent of court intervention.<sup>26</sup>

That said, while the Arbitration Act 1995 was designed to minimize judicial intervention in arbitration, its interpretation by Kenyan courts has introduced a level of judicial engagement that some argue may compromise the efficiency and finality that arbitration seeks to provide. The Act, alongside case law such as the Nyutu Agrovat decision, presents a compelling narrative on the evolving landscape of arbitration law in Kenya, calling for a re-examination of the balance between arbitration autonomy and judicial intervention.

### **1.8.3 Implications of court intervention on the arbitration process and parties involved**

The literature reflects varied perspectives on the implications of excessive court intervention in the arbitral process. Some argue that while the courts' oversight is necessary to ensure fairness and adherence to the law, there is a thin line between oversight and interference, which, when crossed,

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<sup>22</sup> V Sebayiga, 'The Right of Appeal under Section 35 of the Arbitration Act of Kenya: A Critique of the Supreme Court Decision in Nyutu Agrovat v Airtel Networks Limited (2019) eKLR' (2021) 6(1) SLR 137-166 <<https://doi.org/10.52907/slr.v6i1.165>> accessed 8 November 2023

<sup>23</sup> V Sebayiga and N Dominic, 'The Nyutu Case: The Supreme Court of Kenya Learnt Nothing and Forgot Nothing from Arbitral Litigation Pre-1995' (1 June 2020) SSRN <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4317908](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4317908)> accessed 8 November 2023

<sup>24</sup> MMAN, 'The Right of Appeal in Arbitration Matters: The Supreme Court settles the law in a precedent setting decision' (19 December 2019) <<https://mman.co.ke/content/right-appeal-arbitration-matters-supreme-court-settles-law-precedent-setting-decision-0>> accessed 8 November 2023

<sup>25</sup> Ezra Ondi Opar v Insurance Company of East Africa Limited KSC CA Civil Appeal No 98 of 2016 [2020] eKLR

<sup>26</sup> P M Muriithi, 'Ramifications of the Decision of the Supreme Court in the case of; Nyutu Agrovat Limited (Petition No. 12 of 2016)' (2020) 8(1) Alternative Dispute Resolution Journal, Chartered Institute of Arbitrators-Kenya Branch (CIArb-K) 1

could undermine the efficacy and autonomy of arbitration.<sup>27</sup> The Kenyan context, much like many other jurisdictions, grapples with this delicate balance, where excessive intervention may lead to protracted disputes, negating the very essence of arbitration.<sup>28</sup>

One critical gap in the literature is the dearth of recent, empirical, Kenya-specific data on the consequences of judicial intervention. This paucity limits the capability to fully understand and evaluate the implications of such interventions in the local context. The need for empirical research is evident to provide a more nuanced and contemporaneous analysis of the Kenyan situation.<sup>29</sup>

Accordingly, the proposed empirical study aims to offer fresh perspectives by examining recent cases and developments. The study will assess whether the courts have maintained a supportive rather than an obstructive role in arbitration, in line with the objectives of the Arbitration Act, 1995.<sup>30</sup> It is anticipated that the findings will contribute significantly to the existing body of knowledge and inform the implementation and development of arbitration in Kenya.

## **1.9 Chapter Breakdown**

### **1.9.1 Chapter 1 – Introduction: A General overview and outline**

This chapter addresses arbitration in Kenya and why this research is needed. It discusses related research or literature on the topic, and explains how the current research aims to fill any gaps in existing knowledge.

The chapter identifies the problem statement and research objectives: by clearly defining the research problem and objectives, explaining what the research aims to accomplish. The chapter also lists and briefly explain the specific research questions it aims to answer.

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<sup>27</sup> 'COURT INTERVENTION IN ARBITRATION PROCEEDINGS' (Kazi Advocates LLP, 11 October) <<https://kaziadvocatesllp.com/news-and-insights/court-intervention-in-arbitration-proceedings>> accessed 8 November 2023

<sup>28</sup> E Torgbor, 'Courts and the effectiveness of arbitration in Africa' (2017) 33(3) *Arbitration International* 379–394 <<https://doi.org/10.1093/arbint/aix015>> accessed 8 November 2023

<sup>29</sup> I Bantekas, 'An Introduction to International Arbitration' in *An Introduction to International Arbitration* (Cambridge University Press 2015) 1-35 <<https://doi.org/10.1017/CBO9781316275696.003>> accessed 8 November 2023

<sup>30</sup> L Trakman and H Montgomery, 'The 'Judicialization' of International Commercial Arbitration: Pitfall or Virtue?' (2017) 30 *Leiden Journal of International Law* 405-434 <<https://doi.org/10.1017/S0922156517000024>> accessed 8 November 2023



### **1.9.2 Chapter 2 - Legal Framework for Court Intervention in Arbitration in Kenya**

This section examines the regulatory structure that oversees judicial involvement in arbitration processes within Kenya. It examines the relevant provisions within the Arbitration Act 1995 and other pertinent laws. The analysis also covers how the judiciary interprets and implements the established legal guidelines through case law. The chapter seeks to offer an exhaustive understanding of the laws regulating court involvement in arbitration.

### **1.9.3 Chapter 3 – Critique of the Legal Framework and Jurisprudence on Court Intervention**

This part offers a critical evaluation of the legal structure and jurisprudence on court intervention. It identifies gaps, inconsistencies, challenges and barriers within the laws, regulations and judicial practices that may hinder arbitration efficacy. The analysis evaluates the grounds for court intervention, relevant case law and procedural, institutional and socio-cultural factors influencing arbitration and court involvement.

### **1.9.4 Chapter 4 – Comparative Analysis and Basis for Reform**

This chapter conducts a comparative analysis between the legal framework in Kenya and other jurisdictions regarding court intervention in arbitration. It examines the differences and similarities in laws, practices and outcomes of court intervention. The analysis aims to identify best practices, lessons for Kenya and potential areas of reform to enhance arbitration efficacy.

### **1.9.5 Chapter 5 - Methodology and Data Analysis**

This part outlines the approach and methods used in the research. It details the sampling, data collection and analysis implemented to investigate the factors that influence the perception of arbitration within the Kenya context.

The qualitative research design utilizes questionnaires as the primary data collection method. Through the questionnaires, insights are gathered from legal practitioners and experts, selected based on their knowledge and experience in Kenyan arbitration. These questionnaires will provide in-depth perspectives and experiences related to arbitration in Kenya.

The collected qualitative data is subject to thematic analysis, aiming to identify recurring themes, patterns, and perspectives that emerge. This analysis enables the extraction of meaningful conclusions and insights regarding the factors impacting the perception of arbitration.

The chapter also highlights the integration of qualitative data obtained from questionnaires with the overall research findings. By comparing and interpreting the qualitative data, a comprehensive understanding of the factors influencing the perception of arbitration in Kenya is developed.

### **1.9.6 Chapter 6 – Conclusions and Recommendations**

This covers the findings highlighting the key conclusions. This may include a summary of the research questions and how they were answered.

In this chapter, recommendations are proffered for future research endeavors in the realm of court intervention within the Kenyan arbitration landscape. This may include suggestions for future studies that would help to fill any remaining gaps in knowledge or identify areas where additional research is needed to improve understanding of the topic. It also provides practical recommendations for how the study's results are applicable in practice. This may include recommendations for changes to laws, regulations, or practices that would help to improve the effectiveness.

## CHAPTER TWO

### LEGAL FRAMEWORK FOR COURT INTERVENTION IN ARBITRATION IN KENYA

#### 2.1 Introduction

This chapter aims to explore and analyze the laws and regulations governing court intervention in arbitration proceedings in Kenya. Understanding the legal guidelines is crucial to examining the impact of court intervention as it provides the foundation for assessing how court involvement affects the efficiency, effectiveness and credibility of arbitration. The Arbitration Act 1995, will be examined in detail, with a particular focus on the provisions related to court intervention.

Additionally, this chapter will discuss how the Arbitration Act interacts with other laws including the Constitution, the Civil Procedure Act and the Evidence Act, providing a comprehensive picture of the legal environment for court intervention in arbitration in Kenya. The chapter further delves into the court's interpretation and application of these legal provisions by examining relevant case law. In a comprehensive examination of the laws and regulations governing court intervention, this study endeavors to elucidate the extent to which the current legal provisions either facilitate or curtail court involvement in arbitration proceedings. This comprehension will make a substantial contribution to the comprehensive evaluation of the ramifications of court intervention and facilitate the identification of areas within the legal framework that may necessitate reform to bolster the promotion of arbitration.

#### 2.2. The Arbitration Act, 1995

##### 2.2.1. Overview of the Arbitration Act, 1995

This Act is a comprehensive piece of legislation that governing arbitration in Kenya It furnishes a legal framework meticulously crafted to guarantee that the arbitration process transpires in an equitable, expeditious, and economically prudent manner. It covers both domestic and international arbitrations, drafted against the UNCITRAL Model Law.<sup>31</sup>

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<sup>31</sup> Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL])

A key feature of the statute is its focus on the independence of the participants.<sup>32</sup> It enables parties to tailor the arbitration process based on individual preferences, promoting independent dispute resolution with minimal court intervention. However, the Act recognizes that there may be instances where court intervention is effective for proper functioning and integrity.

Within its provisions, it incorporates specific clauses delineating the parameters for court intervention in various aspects of arbitration. These aspects encompass the appointment of arbitrators, procedures for challenging arbitrators, their termination, and the recognition and enforcement of arbitral awards. These provisions balance autonomy and preservation courts' authority to ensure that the process is fair.

Understanding the Arbitration Act of 1995, particularly its provisions related to court intervention, is essential for both practitioners and academics. It establishes a robust foundation for comprehending the intricate legal landscape of arbitration in Kenya and how it intersects with the judicial system. By examining the Act's provisions on court intervention, one can gain insights into the mechanisms available for protection of rights, as well as the factors that may trigger judicial involvement. This understanding is crucial for developing strategies to minimize court intervention in arbitration, thereby fostering a more efficient and effective dispute-resolution process.

### **2.2.2. Provisions on Court Intervention in Arbitration in Kenya**

The Arbitration Act contains specific provisions for limited court intervention in certain circumstances. The provisions for court intervention are designed to provide a safety net for parties involved in arbitration proceedings while preserving the independent nature of the arbitration process. The following provisions are particularly relevant to court intervention:

#### **2.2.2.1 Extent of Court intervention**

Section 10 underscores the paramount principle of non-interference, emphasizing party autonomy. It expressly stipulates that courts are to refrain from intruding into arbitration matters, except as expressly delineated within the Act. This underscores the parties' prerogative to delineate the

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<sup>32</sup> Vianney Sebayiga, 'The Arbitrability of Family Disputes in Kenya: A Case Study of the Court of Appeal Decision in *TSJ v SHSR* (2019) eKLR' (5 February 2022) <<https://papers.ssrn.com/abstract=4136412>> accessed 22 April 2023.

dispute resolution process, with courts refraining from interference unless a specific provision within the Act explicitly authorizes such involvement.<sup>33</sup> This principle of non-intervention is important because it ensures that parties have control over the resolution of their disputes and that arbitration remains an effective alternative to litigation.

#### **2.2.2.2. Stay of Legal Proceedings**

Section 6 delineates the provision wherein a party possesses the authority to petition the court for a stay of any ongoing legal proceedings initiated by another party pertaining to a matter encompassed in the arbitration contract. The court, in its discretion, may withhold the stay order if it determines that the arbitration agreement lacks legal validity, is unenforceable, or proves impractical to implement. The overarching aim of granting such a stay order is to uphold the parties' mutual dedication to resolving their disputes through the arbitration process.

#### **2.2.2.3. Interim Measure of Protection**

Section 7 preserves a party's entitlement to petition the Court for interim protective measure/s, whether before or during proceedings. The High Court may grant such a measure upon a determination that the party has demonstrated a prima facie case that the equilibrium of convenience favors granting the measure, and that damages alone would prove inadequate as a remedy. The primary aim of this clause is to protect the existing condition and avert irreversible damage during the pendency of the final outcome of the arbitration.

#### **2.2.2.4. Appointment of Arbitrators**

Section 12 governs the procedure for appointing arbitrators. In cases if parties cannot reach a consensus on the appointment of an arbitrator, they have the option to petition the Court for the appointment. The underlying objective of these provisions pertaining to arbitrator appointment is to guaranteeing fairness and impartiality.

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<sup>33</sup> Dr. Kariuki Muigua, 'Arbitration Law and the Right of Appeal in Kenya' <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3953985](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3953985)>.

#### **2.2.2.5. Challenge Procedure**

Section 14 affirms parties' right to challenge an arbitrator should circumstances arise that raise concerns about neutrality or independence, or if they lack the credentials specified. In the event that the challenge proves unsuccessful, the challenging party retains the option to seek intervention from the High Court. The primary aim of this challenge procedure is to ensure the impartiality and independence and their adherence to the qualifications outlined in the agreement.

#### **2.2.2.6. Failure or Impossibility to Act**

Section 15 stipulates that if an arbitrator is unable to fulfill their duties or causes undue delays, their appointment may be terminated through consent of the parties or, if necessary, by recourse to the High Court. This provision serves to guarantee the seamless and efficient progression of arbitration proceedings.

#### **2.2.2.7. Competence of Arbitral Tribunal to Rule on its Jurisdiction**

Section 17 establishes that arbitral tribunals are vested with the power to rule on their jurisdiction, encompassing any disputes regarding the legitimacy of an arbitration contract. Furthermore, the tribunal can make determinations concerning the admissibility, pertinence, or importance of the evidence presented. The fundamental objective of this provision is to confer upon the tribunal the capacity to ascertain its jurisdiction.

#### **2.2.2.8. Court Assistance in Taking Evidence**

Section 28 grants parties the prerogative to petition the High Court for assistance in the process of collecting evidence. The Court possesses the authority to issue orders for the appearance of witnesses and the production of evidentiary materials. This provision is designed to guarantee that parties have access to the requisite evidence essential for presenting their case, including considerations of evidence admissibility.

#### **2.2.2.9. Setting Aside of Awards**

Under Section 35(2), the High Court has the power to set aside an arbitral award, but only in specific and narrowly defined circumstances. These encompass situations where a party lacks the

capacity, the agreement is invalid according to the applicable laws agreed upon, there was improper notice provided regarding proceedings and arbitrator appointment, or the arbitral award goes beyond the boundaries set by the prescribed process. However, in cases where an arbitral award incorporates decisions that extend beyond its mandate, only the portion relating to matters beyond the boundaries of the arbitration is invalidated.

Additionally, grounds for annulling an arbitral award also encompass scenarios where the composition of the arbitral tribunal and proceedings diverges from the parties' agreement or statutory provisions, or when the award is tainted by corruption or impartiality. This provision serves as a safeguard to ensure that arbitral awards adhere to legal requirements and uphold the principles of equity and impartiality within the arbitration process.

#### **2.2.2.10. Recognition and Enforcement of Awards**

Section 36 stipulates that a domestic arbitral award holds binding authority and becomes enforceable in accordance with Section 37 upon application to the High Court. In contrast, a foreign arbitration award is enforceable and binding in line with the global treaty ratified by Kenya. The overarching purpose of this provision is to ensure the implementation and legal recognition of arbitral awards and to encourage parties to reap the benefits of arbitration.

#### **2.2.2.11. Grounds for Refusal of Recognition or Enforcement**

Section 37 of the Act empowers the High Court to exercise discretion in recognizing or enforcing an arbitral award. Grounds for refusal encompass various scenarios:

**Incapacity:** When a party was incapacitated when entering into the arbitration contract or if the agreement is invalid or unenforceable according to the applicable laws.

**Procedural Irregularity:** If the individual against whom the arbitral award is enforced was not notified regarding the arbitrator's appointment or the arbitration, or cannot present their arguments effectively.

**Excess of Authority:** When the award includes a matter not submitted to arbitration or goes beyond the arbitrator's designated authority.

Violation of Agreement or Laws: If the arbitration tribunal or procedure violated the parties' agreement on the procedures or infringed upon the law within its jurisdiction.

Non-Finality or Suspension: If the award lacks finality or is suspended in a court of competent jurisdiction.

These grounds are meticulously designed to ensure that arbitral awards are recognizable and enforceable only if they adhere to legal principles and uphold fairness and justice. The scope of court intervention under these provisions is deliberately limited to specific situations where it is essential to protect the integrity of the process, protect the rights of the parties or ensure the proper application of the law. By clearly defining these circumstances and limitations, the Act aims to balance autonomy of the parties and preservation of the rule of law within the arbitration framework.

### **2.2.3 Enforcement of Arbitral Awards and Court Involvement**

The execution of arbitral awards is crucial in arbitration, ensuring that parties can fully realize the benefits of their agreement to resolve disputes through this method. This section focuses on the examination of the procedures regulating the enforcement of arbitration awards in Kenya, encompassing both domestic and international aspects.

#### **2.2.3.1. Domestic Arbitral Awards**

According to Section 36 of the Arbitration Act, a domestic arbitration decision attains legal bindingness and is enforceable upon submission of a written request to the High Court, as per this section and Section 37. To effectuate the enforcement of a domestic arbitration decision, one must initiate an application with the Court, together with by the award or a certified copy, and the arbitration contract.

Grounds for declining the recognition or enforcement of a domestic arbitration decision are delineated under in Section 37 of the Act. The High Court can decline to recognize or enforce an arbitral decision if the individual against whom the decision is being enforced can establish that:

(a) A party lacked the capacity to enter into the contract, or the agreement is invalid as per the law.



- (b) The entity subject to the enforcement of the decision did not receive adequate notification about the arbitrator's appointment or the process, or they were unable to present their case effectively.
- (c) The decision addresses a dispute that was not initially considered for arbitration or goes beyond the scope of the mentioned matters.
- (d) The arbitral tribunal or the process deviated from the agreement and the relevant state laws.
- (e) The decision is not binding, or it has been invalidated or temporarily suspended by the competent authority within the applicable jurisdiction and its legal framework.

#### **2.2.3.2. International Arbitral Awards**

In Kenya, the recognition and enforcement of international awards are under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Pursuant to Section 36 of the Arbitration Act, these arbitral awards are regarded as binding and executed according to the guidelines set forth in the mentioned New York Convention.

The process of enforcing an international arbitral award closely mirrors that of domestic awards. Furthermore, the criteria for non-recognition of an international award align with those applied to domestic awards. This consistent approach ensures that both domestic and international awards are subject to similar legal standards within the Kenyan legal system.

#### **2.2.3.3. Role of Kenyan Courts in Enforcing or Refusing to Enforce Arbitral Awards**

The function of Kenyan courts in enforcement or non-enforcement of arbitration awards is circumscribed, in line with the principles in the Arbitration Act. This legislation places significant emphasis on party autonomy and the notion of autonomous dispute resolution, with a deliberate aim to minimize judicial interference. The Act incorporates specific provisions that outline instances where court intervention is limited, strategically crafted to balance between preserving the autonomy of arbitration while also upholding the courts' authority to ensure that the process unfolds in an equitable and just manner.

Under Section 37, the High Court is vested with the authority to decline recognition or enforcement of an award if the party against whom the award is being invoked can substantiate specific grounds

for refusal. These grounds are deliberately narrow in scope, meticulously designed to justify recognition and enforcement of arbitral awards only when they are in strict accordance with the law.

In scenarios that necessitate judicial intervention for functionality and integrity of arbitration, the Act permits limited court involvement. For instance, the court may withhold enforcement of an award if it can be established that the composition of the tribunal or the procedure deviated from the parties' agreement or did not conform to applicable legal standards. This careful delineation of circumstances for court intervention underscores the Act's commitment to safeguarding the integrity of the arbitration while respecting the independence of the parties involved.

#### **2.2.4 Interaction between the Arbitration Act and Other Laws**

In Kenya, arbitration operates in conjunction with an array of statutes, encompassing the Constitution of Kenya, the Civil Procedures Act, Civil Procedure Rules and the Evidence Act, along with other pertinent legal provisions.<sup>34</sup>

There is always a question of constitutional supremacy over arbitration.<sup>35</sup> The Constitution of Kenya offers a Bill of Rights. Arbitration has faced challenges regarding its constitutionality due to claims of violating the rules of natural justice. An example is the case of *Epcu Builders Limited v Adam S. Marjan-Arbitrator & Another* (2005).<sup>36</sup> In the matter, the Appellant argued that the arbitrator's preliminary ruling had encroached upon their constitutional right to a fair arbitration process. Specifically, the contention was that the arbitrator's decision to withhold summonses for certain witnesses could potentially result in an unfair and incomplete resolution of the dispute. The Chartered Institute of Arbitrators (CI Arb) acknowledged the application without opposition but stressed the importance of adhering to the procedures delineated in the Arbitration Act before entertaining such an application.

The consideration of natural justice is a crucial aspect when evaluating the viability of arbitration in Kenya. Arbitration grants parties a significant degree of control over the proceedings, which

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<sup>34</sup> Civil Procedure Rules 2010; Civil Procedure Act 2010 Cap. 21; Arbitration Act 1995; Evidence Act 2014 Cap. 80.

<sup>35</sup> Dr. Kariuki Muigua, 'Constitutional Supremacy over Arbitration in Kenya' (2016) <<https://www.semanticscholar.org/paper/Constitutional-supremacy-over-arbitration-in-Kenya-Kariuki/847c5cfdc701df31dcb70b663670efa61c57b2bc>> accessed 22 April 2023.

<sup>36</sup> *Epcu Builders Limited V Adams Marjan Arbitrator & Another*, Civil Appeal No 248 of 2005.

can sometimes lead to a perceived lack of transparency and exposure. Arbitration is inherently private and consensual, allowing for the resolution of disputes without the necessity of disclosing sensitive information to the public. Additionally, the parties involved have the authority to manage diverse elements of the proceedings, including the selection of arbitrators and specific procedural matters.

However, it is imperative to emphasize that despite the autonomy afforded to parties in arbitration, the resulting awards must be final and binding, subject to statutory limitations as outlined, for instance, in Section 10 of the Arbitration Act. The principles of natural justice are underscored by Articles 47, 38, and 48 of the Constitution. These constitutional provisions underscore the importance of ensuring that arbitration, despite its consensual and private nature, adheres to fundamental principles of fairness and justice in line with the Constitution of Kenya.<sup>37</sup>

The legal framework governing arbitration in Kenya encompasses two key pieces of legislation: the Arbitration Act and the Civil Procedure Act. The Civil Procedure Act addresses arbitration in the context of court-ordered referrals and subsequent proceedings. It mandates that any referrals to arbitration through a court order in a lawsuit must adhere to established rules and regulations. Additionally, Order 46 of the Civil Procedure Rules gives the parties with vested interests in a lawsuit the opportunity to petition the Court for an arbitration reference order at any point before a final judgment is rendered.

While the Evidence Act is generally applicable to arbitration proceedings, its use is subject to the consent of the parties. Furthermore, Section 12 of the Arbitration Act grants arbitrator the power to administer oaths to witnesses and compel the production of documents and other evidentiary materials. Additionally, Section 35 of the Arbitration Act specifies that arbitrators may consider any relevant and material evidence in the dispute, regardless of its admissibility in a court of law. However, when there is divergence between the clauses of the two statutes, the Arbitration Act takes precedence over the Evidence Act.

Regarding court intervention in arbitration, the Arbitration Act is designed to limit such interference. Although Section 10 clearly restricts court involvement, Section 35 acknowledges

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<sup>37</sup> Constitution of Kenya, 2010, as revised and amended.

the court's authority to annul an award under specific conditions. These conditions include situations where the award was obtained fraudulently or when there is a violation of the principles of natural justice. Additionally, Section 36 outlines the court's power to refer an award back to the arbitrator for reconsideration in certain circumstances, such as when the award contains errors of law or fact. This careful balance between limited court intervention and safeguarding the integrity of arbitration is a key feature of Kenya's arbitration legal framework.

### **2.2.5. Judicial Interpretation and Application of the Legal Framework**

Indeed, various cases in Kenya have grappled with the interpretation and application of the Arbitration Act and related laws regarding court intervention in arbitration. A notable trend in these cases has been the examination of Sections 10 and 35, focusing on the balance between court involvement and the finality of awards.

One landmark case in this context is the *Nyutu Agrovet Limited v. Airtel Networks Limited (2015)*. This case underscored the right to appeal in arbitration matters but also emphasized the overarching principle of finality concerning arbitration awards. It highlighted the importance of minimizing court involvement in arbitration to preserve its efficiency and autonomy. This case, among others, has contributed to shaping the jurisprudence surrounding arbitration in Kenya, emphasizing the limited role of the courts while respecting the finality of arbitral awards.<sup>38</sup> Section 35 unequivocally establishes that an arbitral award carries ultimate and binding authority over the parties involved. It can be enforced in a manner similar to a court judgment. Consequently, when parties opt for arbitration, they willingly commit to abide by the arbitrator's decision and have limited grounds for appeal, as specified in Section 35.

However, it is important to note that there are circumstances in which the court may intervene in the arbitration. Section 10 of the Arbitration Act grants the court the power to annul an arbitral award under specific conditions. These conditions encompass situations where the award was obtained through fraudulent or corrupt practices, in instances of violating the principles of natural justice, or where the arbitration award contradicts public policy. This implies that a party can

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<sup>38</sup> *Nyutu Agrovet Limited V Airtel Networks Limited [2015] eKLR, Civil Appeal (Application) No 61 of 2012.*

initiate court proceedings to challenge an award if they assert that it was secured through improper means or violates fundamental legal principles.

Furthermore, a notable trend arising from the judicial interpretation and application of the legal framework is the significance of upholding the principles of natural justice throughout the arbitration process. This underscores the importance of ensuring that parties are afforded a fair and impartial procedure, even within the context of arbitration, to maintain the integrity of the dispute resolution mechanism. Case in point *EpcO Builders Limited v Adam S. Marjan-Arbitrator & Another* (2005).<sup>39</sup> The constitutionality of arbitration outcomes and their alignment with the Bill of Rights has been a significant aspect of legal scrutiny in Kenya. Courts have consistently upheld the principle that parties involved in arbitration must be given a fair hearing, and arbitrators must abide by the principles of natural justice. This underscores the importance of ensuring that the arbitration is executed in a fashion that respects fundamental rights and due process, as enshrined in the Bill of Rights.

Additionally, Kenyan courts have recognized the paramount importance of the finality and enforceability of arbitration awards. This recognition serves to promote the efficiency and effectiveness of arbitration.

However, inconsistencies and challenges have arisen in the interpretation and application of the legal framework, particularly concerning court intervention in arbitration matters. Some parties may attempt to challenge arbitral awards in court, even when the grounds for doing so are limited under the law. Furthermore, there have been instances where courts have adopted different approaches to similar cases, potentially leading to uncertainty and confusion for parties engaged in arbitration proceedings. These challenges highlight the ongoing need for jurisprudential clarity and harmonization of legal principles to ensure a more predictable and effective arbitration process in Kenya.

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<sup>39</sup> *EpcO Builders Limited V Adams Marjan Arbitrator & Another*, Civil Appeal No 248 of 2005 (n 26).

## **CHAPTER THREE**

### **CRITIQUE ON THE LEGAL FRAMEWORK AND JURISPRUDENCE ON COURT INTERVENTION**

#### **3.1 Introduction**

This chapter offers a detailed examination of the legal framework and jurisprudence that govern court intervention in arbitration in Kenya. It identifies gaps, inconsistencies, challenges and limitations within the current laws, regulations and judicial practices that may hinder the efficacy of arbitration.

The analysis covers weaknesses within the Arbitration Act 1995, procedural issues in arbitration, institutional capacity concerns and socio-cultural factors that influence the acceptance of arbitration. Relevant case law is reviewed to understand judicial approaches and interpretations of the legal provisions for court intervention. The grounds for court intervention are also critiqued regarding their scope, application and implications.

This critique aims to highlight areas in need of reform to promote clarity, consistency and harmonization with international best practices. The analysis provides a basis for evaluating the impact of court intervention and informing policy recommendations to address the identified challenges. It ultimately seeks to strengthen the legal scaffolding for arbitration to enhance its effectiveness in resolving disputes in Kenya.

#### **3.2. Legal Challenges and Barriers**

##### **3.2.1 Gaps and Ambiguities in the Legal Framework**

The Arbitration Act, 1995 defines arbitration as "any arbitration whether or not it is administered by a permanent arbitral institution". The amendments to the Act have been orchestrated to encapsulate the requisite components of a robust national arbitration law, as delineated by the 2010 United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. This restructuring aims to align the nation's arbitration framework more closely with internationally recognized standards, thereby fostering an environment conducive for both domestic and international arbitration engagements. However, there may be legal weaknesses in the Act, such

as the frequent interventions of courts in arbitral proceedings. The courts' involvement may bring to question the cost-effectiveness of the intervention process.

Other gaps in Kenyan arbitration encompass tribunals' hesitance to impose penalties for deadline non-adherence and the duration spanning the initiation of arbitration to the delivery of the final award.<sup>40</sup> Although the Arbitration Act encapsulates swift procedures to tackle various matters like the designation of arbitrators and the arbitration's conduct, there have been instances recorded of tribunals neglecting to dispense sanctions for deadline non-adherence. This can result in delays, which may increase the time it takes for the arbitration to be completed and for the final award to be issued.

Additionally, some stakeholders have raised concerns about the uncertainty regarding the enforceability of interim measures and the costs associated with the arbitration process, which may discourage parties from pursuing arbitration for dispute resolution.

The Act is ambitious but does not factor in technology in arbitration proceedings.<sup>41</sup> The Arbitration Act does not explicitly prohibit or permit the utilization of new technology in arbitration proceedings. However, the decision to engage in arbitration and its procedural execution are determined by the involved parties in the agreement and the arbitrator, bestowing upon them substantial autonomy in the management of the process. It would be beneficial for the Arbitration Act to acknowledge and promote the use of technology in arbitration proceedings, as some regions have done, as it can enhance efficiency and reduce expenses by saving time.

### **3.2.2 Inconsistencies in Judicial Interpretations**

The Constitution of Kenya provides a consistency clause under Article 159 to guarantee that the arbitration is conducted in line with the expectations of the Constitution. This constitutional principle was reaffirmed in cases such as *Albert Ruturi & Others vs A.G & The Central Bank of*

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<sup>40</sup> Edward Nii Adja Torgbor, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya' (PhD Thesis, Stellenbosch: Stellenbosch University 2013).

<sup>41</sup> Isolina K Kinyua, 'Online Arbitration: The Scope for Its Development in Kenya' (PhD Thesis, University of Nairobi 2012).

*Kenya* (2001), where the High Court stated that laws inconsistent with the constitution are void.<sup>42</sup> Although the courts have generally been consistent in their approach to arbitration proceedings and the level of court interventions, there are inconsistencies with judicial interpretations. In Kenya, the judiciary has predominantly upheld the doctrine of party autonomy in arbitration, showcasing a preference for minimal court encroachment in the arbitral procedure. However, there have been instances where there have been inconsistencies in judicial interpretations, leading to confusion and uncertainty for parties involved in arbitration proceedings.

In the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*, the Supreme Court articulated the perspective that an appeal to the Court of Appeal could be lodged in line with section 35 of the Arbitration Act under exceptional circumstances, dependent on the authorization being granted.<sup>43</sup> Nonetheless, this constrained jurisdiction ought to be exercised prudently, and the party aspiring for an appeal must demonstrate that the High Court surpassed the boundaries delineated under section 35 of the Act whilst intervening in the Award. Before this adjudication, the matter of the right to appeal under section 35 of the Arbitration Act had lingered unresolved.

### **3.2.3 Lack of Harmonization with International Standards**

The UNCITRAL Model Law is adopted in jurisdictions around the world ensuring harmonization of arbitration procedures. However, Muigua and Maina observe that a significant challenge in international arbitration arises from the insensitivity of international arbitration laws to the anticipations of the parties involved, as well as their legal and national contexts.<sup>44</sup> However, the authors note that international arbitration laws are more flexible in commercial cross-border disputes, but there should be the establishment of supporting institutions. Specifically, the author notes that the establishment of the Nairobi Centre for International Arbitration (NCIA) is beneficial in addressing and harmonizing arbitration in the East African region. The author cites some successful institutions such as the Cairo Regional Centre for International Commercial Arbitration (CRCICA), the American Arbitration Association (AAA), and the International Chamber of Commerce (ICC).

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<sup>42</sup> Albert Ruturi & JK Wanywela on behalf of Kenya Bankers Association & The Minister For Finance & The Attorney-General & The Central Bank of Kenya (Interested Party) Civil Application No908 of 2001.

<sup>43</sup> *Nyutu Agrovet Limited V Airtel Networks Limited* [2015] eKLR, Civil Appeal (Application) No 61 of 2012 (n 28).

<sup>44</sup> Dr. Kariuki Muigua and Ngararu Maina, 'Effective Management of Commercial Disputes: Opportunities for the Nairobi Centre for International Arbitration' (2017) 1 International Arbitration.



On the flip side, the Arbitration Act initially mirrored the 1985 version of the UNCITRAL Model Law. Nonetheless, it encountered subsequent modifications to harmonize with the evolving terrain of both domestic and international arbitration within Kenya.<sup>45</sup> In Kenya, there aren't mandatory rules overseeing international arbitration proceedings; they fall under the purview of the Act and the New York Convention. A reevaluation of the core facets of law of arbitration and practice in Kenya might be essential to ensure compliance with international norms and standards. Kenyan courts typically uphold arbitration agreements barring circumstances delineated under Section 6 of the Act. The Kenyan Constitution ensures courts and arbitration tribunals to adhere to alternative dispute resolution principles. Embracing a UNCITRAL model for arbitration laws led to a decreased frequency of court intercessions in Kenyan arbitration proceedings.

The alignment of Kenyan arbitration laws with international standards has ignited discussions regarding potential hurdles stemming from any divergences. For instance, unlike courts in the UK and the USA, which issue anti-suit injunctions (judicial mandates prohibiting a party from advancing legal actions in a different jurisdiction) to thwart parties from breaching arbitration agreements through the initiation of legal proceedings in overseas courts, Kenyan courts have yet to offer such redress.<sup>46</sup> Despite the presence of comprehensive arbitration laws in Kenya, the effective practice of arbitration has faced challenges due to the absence of clarity regarding whether certain disputes are amenable to arbitration and the existing issue of court backlogs.

### **3.3 Procedural Challenges and Barriers**

#### **3.3.1 Appointment of Arbitrators**

Muigua and Maina (2017), note that the main challenge in the appointment of arbitrators in Kenya is the appointment of foreigners when solving local disputes.<sup>47</sup> They note that there is a major focus on the nationalities of arbitrators than their competency and experience, this puts the process in jeopardy. Significantly, it should be recognized that the appointment of arbitrators should be based on their qualifications, expertise, and impartiality.

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<sup>45</sup> Butler and Prasad (n 51).

<sup>46</sup> David Ndolo, 'Arbitration Law and Practice in Kenya as Compared to the UK and US, with Specific Focus on Anti-Suit Injunctions and Arbitrability of Disputes' (PhD Thesis, Coventry University 2020).

<sup>47</sup> Muigua and Maina (n 60).

Corruption is also a significant challenge in Kenya that affects the appointment of arbitrators. In some instances, the government might attempt to sway the decision, particularly in cases where its own interests are at stake, by invoking public policy. This could adversely affect the confidence of investors and disputants in employing international commercial arbitration for resolving their disputes in Kenya.

Furthermore, arbitrability is a major challenge to the arbitration process. It is difficult to decide which disputes can be decided in national courts or referred to arbitration. There is no clear framework in this aspect.

### **3.3.2 Conduct of Arbitration Proceedings**

Although specific regulations for international arbitration in Kenya are not compulsory, the Arbitration Act establishes guidelines for upholding both local and international agreements. Generally, Kenyan courts have honoured arbitration agreements, unless they fall within the exceptions specified in Section 6 of the Act.

Timeline-related challenges may arise about the contestation of an arbitrator's appointment. Parties are mandated to launch such challenges within a 15-day timeframe from either the establishment of the tribunal or from the instance when the challenging party becomes cognizant of the circumstances necessitating the challenge. Non-compliance with these stipulated timelines can engender complications within the arbitration proceedings.

Pertaining to evidence, it's noteworthy that the Arbitration Act bestows upon the arbitrator authority over matters of fact and law, signifying that the arbitrator bears the responsibility for overseeing the evidence presented throughout the proceedings.<sup>48</sup>

While Kenya boasts a robust legal scaffold for arbitration, challenges still linger around international commercial arbitration within its domain, particularly due to an insufficient legal and institutional framework. Such inadequacies may usher in hurdles in the enforcement of arbitration contracts and awards, alongside difficulties in the overall orchestration of the arbitral proceedings.

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<sup>48</sup> Sebayiga, 'The Arbitrability of Family Disputes in Kenya' (n 20).

### **3.3.3 Enforcement of Arbitral Awards**

Kenyan courts are obliged to enforce foreign arbitral awards, yet this mandate is bounded by select exceptions as stipulated under the New York Convention and the Arbitration Act. However, the umbrella of public policy considerations may cast a shadow on the recognition of such awards. A case in point is *Tanzania National Roads Agency v Kundan Singh Construction Limited* (2013), where the Kenyan High Court declined to implement the award on the grounds that the tribunal opted for English law over Tanzanian law, which was the stipulated applicable law of the agreement in question.<sup>49</sup>

The avenues for contesting or setting aside an award are delineated under Section 35 of the Arbitration Act, encompassing a scenario where the High Court discerns the award as running counter to Kenyan public policy. Albeit the limited grounds for contesting an award might be construed as favorable, it could also erect hurdles for parties bearing legitimate grounds for challenge.

When a party ventures to secure recognition and enforcement of an international award, the recourse is to approach the High Court of Kenya, under the aegis of sections 2 and 36 of the Arbitration Act. Kenyan courts, broadly speaking, harbor a progressive stance towards the recognition and enforcement of international arbitral awards. Yet, they exercise stringent scrutiny over the awards, especially with regard to ensuring the respondent's entitlement to a fair hearing and fair administrative action is upheld.

## **3.4 Institutional Challenges and Barriers**

### **3.4.1 Capacity and Resources of Arbitral Institutions**

Arbitral establishments within Kenya, epitomized by the Nairobi Centre for International Arbitration (NCIA), are pivotal in propelling international commercial arbitration alongside alternative dispute resolution methodologies within the Kenyan legal landscape. The NCIA acts as a neutral platform for orchestrating international arbitration proceedings, offering institutional

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<sup>49</sup> *Tanzania National Roads Agency v Kundan Singh Construction Limited* (Civil Application 52 of 2014) [2022] KECA 773 (KLR) (10 June 2022) (n 50).

support throughout the arbitration trajectory. Furthermore, it embraces domestic arbitration instances and aids in the facilitation of other Alternative Dispute Resolution (ADR) mechanisms.

The capacity and resources of arbitral institutions in Kenya impact the efficiency and effectiveness of arbitration. The NCIA maintains a reputable list of arbitrators, mediators, and other alternative dispute resolution specialists.<sup>50</sup> It also offers services such as the appointment of arbitrators and mediators in non-NCIA Rules, including the UNCITRAL Arbitration Rules.<sup>51</sup>

Nonetheless, international commercial arbitration within Kenya faces hurdles from an inadequate legal and institutional framework. Such hurdles could precipitate complications concerning the enforcement of arbitration contracts and awards and the general management of arbitration. Moreover, the absence of a robust legal framework might obstruct the evolution of arbitration institutions within the nation.

### **3.4.2 Quality and Availability of Arbitrators**

The calibre and accessibility of arbitrators within Kenya significantly impact the efficacy of arbitration. Studies suggest that arbitration is progressively earning recognition, in tandem with other alternative dispute resolution (ADR) methodologies.

The quality of arbitrators in Kenya can be inferred from a 2020 Arbitration in Africa survey report, which asked respondents to rate the quality of staff support available at various arbitral institutions.<sup>52</sup> Although the report does not provide specific data on Kenya, it suggests that the quality of arbitrators in Africa is generally improving.

However, a limited pool of qualified professionals may pose challenges to the arbitration process in Kenya. A smaller pool of arbitrators may lead to a lack of diversity and representation in international arbitration, as well as potential biases and conflicts of interest. Additionally, a limited

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<sup>50</sup> James K Kituku, 'Facilitating International Arbitration in Kenya: A General Analysis of Arbitration in the Country and International Arbitration in Other Selected Countries' (PhD Thesis, University of Nairobi 2018).

<sup>51</sup> NCIA, 'Our Services – Nairobi Centre for International Arbitration' <<https://ncia.or.ke/our-services/>> accessed 28 April 2023.

<sup>52</sup> Emilia Onyema, '2020 Arbitration in Africa Survey Report' (SOAS University of London 2020) <<https://eprints.soas.ac.uk/33162/1/2020%20Arbitration%20in%20Africa%20Survey%20Report%2030.06.2020.pdf>>.

pool of qualified professionals leads to increased costs and delays in arbitration, as parties may need to seek arbitrators from other jurisdictions.

### **3.4.3 Expertise and Experience among Practitioners**

The level of expertise and experience among arbitration practitioners in Kenya has a significant impact on the overall efficiency of arbitration. The Nairobi Centre for International Arbitration (NCIA) plays a crucial role in promoting arbitration in Kenya and offers institutional support to the arbitral process. The NCIA maintains a reputable list of arbitrators, mediators, and other alternative dispute resolution specialists, which suggests a certain level of expertise and experience among practitioners in the country.

Nonetheless, hurdles confronting international commercial arbitration in Kenya encompass an insufficient legislative and administrative scaffold, which may affect the development of expertise among arbitration practitioners. Additionally, there is a limited number of skilled and competent arbitration practitioners in Kenya, which may indicate a limited pool of professionals.<sup>53</sup>

The expertise and experience of arbitration practitioners in Kenya can be enhanced through capacity-building initiatives, such as training programs offered by the NCIA. These programs aim to improve the skills and knowledge of professionals in arbitration.

## **3.5 Socio-Cultural Challenges and Barriers**

### **3.5.1 Cultural Attitudes Towards Dispute Resolution**

Cultural attitudes towards dispute resolution in Kenya have an impact on the acceptance and use of arbitration. Litigation has historically held the mantle as the primary mode of settling disputes in Kenya. Yet, a gradual shift towards alternative dispute resolution (ADR) methods is observable. This transformation can be traced back to the Constitution and the Civil Procedure Act, both of which extend encouragement towards the utilization of ADR methods.

The Nairobi Centre for International Arbitration (NCIA) stands as a pivotal entity in fostering the culture of arbitration within Kenya, by offering a neutral arena for both international and domestic

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<sup>53</sup> Dr. Kariuki Muigua, 'Effectiveness of Arbitration Institutions in East Africa'.

arbitration. Kenyan courts, in general practice, have shown deference towards arbitration agreements, except in situations where they coincide with the exceptions detailed in Section 6 of the Arbitration Act.

While the tide of acceptance for arbitration is on a gradual ascent, international commercial arbitration in Kenya is not without its set of hurdles. A noticeable lack in legal and institutional backing poses as a significant challenge. This shortfall may potentially stunt the growth and acceptance of arbitration as a favored method under the broader umbrella of ADR.

### **3.5.2 Awareness and Understanding of Arbitration**

Arbitration awareness among Kenyans is on an upward trend, with the mechanism progressively being embraced as a feasible avenue for resolving disputes. The Constitution of Kenya stands as a pillar of support for alternative dispute resolution methods, including arbitration. A significant milestone in this arena was the Nairobi Centre for International Arbitration (NCIA) operational commencement in December 2015, marked by the unveiling of its Rules on Mediation and Arbitration. The NCIA has been instrumental in elevating the awareness and comprehension of arbitration within Kenya, offering indispensable institutional backing to the arbitral process.

The burgeoning awareness and understanding of arbitration are poised to have a positive ripple effect on its prevalence and efficacy within the country. As the curtain of awareness unveils the benefits of arbitration to a broader demographic, its acceptance and utilization are bound to gain traction. Institutions like the NCIA are at the helm of this enlightenment voyage, steering the narrative towards the broader acceptance of arbitration, thereby educating the populace of Kenya on this alternative dispute resolution mechanism.

### **3.5.3 Role of Traditional Dispute Resolution Mechanisms**

Traditional dispute resolution mechanisms have long been the cornerstone in mediating conflicts within the Kenyan landscape. These indigenous frameworks draw upon the wisdom of community elders, religious figureheads, and other local authorities who employ customary laws and traditions in navigating disputes. The Kenyan Constitution casts a spotlight on the value of these traditional avenues of dispute resolution, propelling their use in harmony with contemporary Alternative Dispute Resolution (ADR) methods. Through such constitutional endorsement, a bridge is built

between age-old customary practices and modern arbitration techniques, fostering a diverse toolkit for dispute resolution that resonates with the cultural and legal fabric of Kenya.<sup>54</sup> The entrenched traditional dispute resolution mechanisms within certain communities in Kenya may influence the acceptance of modern methods like arbitration. In communities valuing traditional mechanisms, there may be resistance to arbitration. This resistance often stems from cultural values and the informal, communal nature of traditional methods, which sharply contrast with the formalized process of arbitration. Bridging this gap may require educational efforts to elucidate the merits of arbitration while respecting traditional practices.

The rising awareness of arbitration in Kenya may lead individuals to prefer it over traditional dispute resolution methods, reflecting a shift towards more formalized dispute resolution mechanisms.

### **3.6 Relevant Case Law on Court Intervention in Arbitration**

#### **3.6.1 Introduction**

Indeed, landmark cases play a pivotal role in shaping the legal landscape and providing valuable insights into the understanding of court intervention in arbitration. The *Nyutu Agrovet Limited v. Airtel Networks Kenya Limited* (2015) case is a noteworthy example. This case underscored the finality of awards in Kenya and emphasized the integral role of courts in arbitration. Such cases not only influence legal practitioners but also contribute to the jurisprudence surrounding arbitration in Kenya. They provide valuable precedents and guidance for future arbitration proceedings and help in clarifying the boundaries of court intervention. As such, the study of landmark cases is crucial for a comprehensive understanding of the legal scaffold regulating arbitration in Kenya.<sup>55</sup>

The case of *Easy Properties Limited & another v Express Connections Limited & another* (2019) is indeed another significant landmark case in the context of arbitration in Kenya. In this case, the court clarified that the Arbitration Act grants exclusive authority upon the arbitrator over matters

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<sup>54</sup> Dr. Kariuki Muigua, 'Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya 2010' [2014] Retrieved 16th August.

<sup>55</sup> *Nyutu Agrovet Limited V Airtel Networks Limited* [2015] eKLR, Civil Appeal (Application) No 61 of 2012 (n 28).

of both fact and law. This exclusivity extends to the extent that it precludes both appeals and judicial review.

This ruling has important implications for arbitration proceedings in Kenya as it reinforces the principle of finality and limited court intervention. It underscores the parties' commitment to abide by the arbitrator's decisions and the significance of preserving the efficiency of arbitration. The case serves as a notable precedent that helps delineate the boundaries of court involvement and contributes to the overall understanding of law of arbitration in Kenya.<sup>56</sup>

The pro-arbitration stance demonstrated by the Kenyan judiciary in court intervention matters is noteworthy. The judiciary's commitment to upholding the principle of finality reflects an understanding of the importance of preserving the efficacy of arbitration. At the same time, the courts recognize the need for appropriate intervention when justice demands it.

One key aspect of this pro-arbitration approach is the respect for party autonomy in the appointment of arbitrators. The courts generally refrain from intervening unless there is concrete evidence of bias or a lack of neutrality on the part of the arbitrators. This approach aligns with international best practices and contributes to the promotion of arbitration within Kenya.

Overall, the judiciary's stance on court intervention in arbitration matters plays a crucial role in fostering confidence in the arbitration process and maintaining Kenya's status as an arbitration-friendly jurisdiction for international commercial disputes.

### **3.6.2 Landmark Cases**

There are several case laws that have characterized Court intervention in Kenya. One of them being the *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) (2019)*.<sup>57</sup> In this case, the Supreme Court addressed itself on the finality of an arbitral award in Kenya. The Supreme Court's focus on addressing the constitutionality of Sections 10 and 35 of the Arbitration Act, along with the right of appeal to the Court of Appeal, appropriate reliefs and costs, underscores the importance of clarity and predictability in arbitration. The Arbitration Act was introduced with the aim of expediting and

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<sup>56</sup> *Easy Properties Limited v Express Connections Limited* [2019] eKLR (Kenya) Civil Cause No E 094 of 2018.

<sup>57</sup> *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR.



enhancing the efficiency of arbitration compared to court proceedings. However, it's important to note that arbitration is not entirely divorced from the judicial system.

The Model Law advocates for limiting court involvement in arbitration to ensure predictability and certainty. The decision in the Nyutu case reinforces the finality of arbitral decisions in Kenya and highlights the significance of clearly defining the extent of court intervention. The Supreme Court's reasoning suggests that parties to an arbitration contract deliberately exclude the jurisdiction of the Court in favor of finality of arbitration.

The earlier case of *Nyutu Agrovets Limited v. Airtel Networks Limited* (2015) was pivotal in the development of arbitration in Kenya. It clarified the right of a party involved in arbitration to appeal when there is no express provision for appeal in the arbitration agreement. This decision underscored that the right to appeal must be explicitly permitted by law and not implied. It also emphasized that arbitration is based on voluntary agreement of parties to use it outside of the court system through an arbitrator, with the resulting award being final.

The decision to annul or uphold an arbitral award should respect the parties' deliberate choice to limit judicial intervention in their affairs. This approach reinforces party autonomy and the sanctity of arbitration contracts. Despite potential consequences for a party, the decision to annul an award must be upheld in accordance with the parties' preference for arbitration, and the Court of Appeal should respect and uphold this choice. This legal framework helps preserve the efficiency and effectiveness of in Kenya.

Another landmark case is *Easy Properties Limited & another v Express Connections Limited & another* (2020), Arbitration Act grants exclusive jurisdiction to arbitrators over both fact and law, resulting in the exclusion of appeals and judicial review.<sup>58</sup> This case underscores party autonomy and the conclusive nature of arbitration awards.

Another case is *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* (2021). In this case, the High Court upheld the constitutionality of the UNCITRAL Model

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<sup>58</sup> *Easy Properties Limited & another v Express Connections Limited & another* (Civil Miscellaneous E007 & E003 (Consolidated) of 2020) KEHC 39 (KLR) (Commercial and Tax) (7 September 2021).

Law and its adoption in Kenya.<sup>59</sup> This case affirmed the importance of the Model Law in promoting arbitration in resolution of international commercial disputes.<sup>60</sup> These cases have exerted a notable influence on both the arbitration procedure and the legal framework governing court intervention in Kenya. They have promoted the use of arbitration by limiting the instances in which judicial interference is allowed.

### **3.6.3 Judicial Approach to Court Intervention**

The Kenyan judiciary has demonstrated a pro-arbitration approach to court intervention, as evidenced by case law. There is a general trend towards upholding the sanctity of arbitration and respecting the parties' autonomy in choosing arbitration.

The Kenyan courts' approach to court intervention in arbitration reflects a balanced stance. While they generally uphold the finality of arbitral awards, they also acknowledge the need for appropriate court intervention when justice demands it. Furthermore, the consistent enforcement of the Kompetenz-Kompetenz principle is notable. This principle empowers arbitrators to decide on their own jurisdiction. In cases where a party disputes the arbitrator's jurisdiction, the arbitrators possess the power to ascertain their own jurisdiction. This principle is particularly relevant to addressing corruption in international arbitration because it allows arbitrators to assess whether allegations of corruption impact their jurisdiction to hear a case. Overall, this approach demonstrates the Kenyan courts' commitment to maintaining a fair and effective arbitration process while addressing issues such as corruption that may arise during international arbitration proceedings.<sup>61</sup> Kenyan courts have predominantly upheld the principle and have rarely intervened, doing so only in exceptional instances where arbitrators have unmistakably exceeded their jurisdiction.

The Kenyan courts have shown support for party autonomy in arbitrator appointments, as acknowledged in a paper by F. Kariuki and R. Ngetich, emphasizing the willingness to uphold

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<sup>59</sup> *Euromec International Limited v Shandong Taikai Power Engineering Company Limited* [2021] KEHC 93 (KLR) Civil Case E527 of 2020.

<sup>60</sup> Model Law on International Commercial Arbitration 1985 (United Nations Commission on International Trade Law [UNCITRAL]) UN Doc A/40/17, Annex I.

<sup>61</sup> Alhassan Salifu Bawah, 'The Doctrine of Kompetenz-Kompetenz: An Instrument of Fraud or Justice? The Case of *Dallah Real Estate and Tourism Holding Company (Appellant)(Dallah) v the Ministry of Religious Affairs (Government of Pakistan)*' (2019) 7 *Open Journal of Social Sciences* 168.

agreements between parties to select their preferred arbitrators.<sup>62</sup> The Kenyan courts generally refrain from intervening in arbitrator appointments unless there is evidence of bias or partiality, yet there has been inconsistency in their handling of arbitrator challenges, with some courts taking a more lenient stance and others adopting a stricter approach.

Kenyan courts have exercised prudence in their authority to annul awards. Such intervention has been limited to extraordinary circumstances, where the award violates public policy or exhibits a glaring error evident on its surface. The courts, as a general practice, have upheld finality of awards and have displayed a hesitance to meddle with the arbitrator's determination.

The Arbitration Act acknowledges and enforces foreign arbitral awards in Kenya, with the courts generally upholding this provision. Nonetheless, there have been occurrences where the courts have refrained from enforcing awards, especially where there are apprehensions regarding the impartiality of the arbitrators or where the award contradicts public policy, exemplified by the case of *Christ for All Nations v. Apollo Insurance Company Limited* (2002).<sup>63</sup> AA Abwunza, TK Peter, and K Muigua delve into the significance of impartiality and independence of arbitrators within the realm of construction arbitration.<sup>64</sup> The authors argue that the selection of arbitrators is crucial to ensure fairness and justice in the arbitration process. They also suggest that parties should consider the qualifications and experience of arbitrators before selecting them. The article emphasizes that arbitrators must be impartial and independent to ensure fairness and justice. Lack of impartiality can lead to increased court intervention.

### **3.6.4 Public Policy and Court Intervention**

Public policy considerations hold substantial weight in court intervention within the arbitration landscape in Kenya. The Arbitration Act empowers courts to set aside awards that are in

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<sup>62</sup> F. Kariuki and R. Ng'etich, 'The Promotion of Alternative Dispute Resolution Mechanisms by the Judiciary in Kenya and Its Impact on Party Autonomy' (2018) 6 *Alternative Dispute Resolution*.

<sup>63</sup> *Christ for all Nations vs Apollo Insurance Company Limited* (2002) 2 EA 366; Allan A Abwunza, Titus K Peter and Dr. Kariuki Muigua, 'Explaining Delays in Construction Arbitration: A Process-Control Model Approach' (2020) 12 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 04520003.

<sup>64</sup> Allan A Abwunza, Titus K Peter and Dr. Kariuki Muigua, 'Explaining the Effectiveness of Construction Arbitration: An Organizational Justice Perspective' (2021) 13 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 04521017.

divergence with public policy. Such intervention is necessary to ensure that arbitration awards do not contravene the laws of Kenya or are against the national interests of Kenya

The case *Christ for All Nations v. Apollo Insurance Company Limited* (2002), stands as a landmark case in courts' determination of arbitral awards on the grounds of public policy. In this case, the court set aside the award since it was in divergence with the public policy of Kenya. The court found that the plaintiff had not obtained the necessary permits and therefore had acted unlawfully. As such, the court posited that the award would contravene public policy if it allowed the plaintiff to recover damages for an event that was held unlawfully. However, AA Abwunza, TK Peter, and K Muigua argue that courts' determination of arbitral awards on public policy grounds in Kenya can create conflict between procedural efficiency and quality of the award.<sup>65</sup> They point out that the Arbitration Act of Kenya gives courts broad discretion to set aside awards that are "contrary to public policy." This discretion can be used to set aside awards that are procedurally flawed, even if the award is otherwise sound. This can lead to delays and uncertainty in the arbitral process, as parties may have to go to court to challenge an award that they believe is flawed. The courts should strike a balance between procedural efficiency and award quality in determining whether to interfere with an award on public policy grounds.

### **3.6.5 Impact of Case Law on Arbitration Practice**

The analyzed cases have significantly impacted arbitration practice in Kenya, particularly in relation to court intervention. One notable impact is the increased certainty and predictability in the court's approach towards setting aside awards.<sup>66</sup> The courts have limited their review to procedural irregularities and violations of due process, rather than revisiting the award's merits or expanding the scale of judicial review. The cases have provided guidance on the interpretation and application of the grounds for court intervention, which has reduced uncertainty and helped to establish a more stable structure for arbitration in Kenya.

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<sup>65</sup> Allan A Abwunza, Titus K Peter and Dr. Kariuki Muigua, 'Effectiveness of Arbitration in Contractual Disputes: Tension between Procedural Efficiency and Award Quality' (2019) 11 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 04519003.

<sup>66</sup> Vianney Sebayiga, 'Right of Appeal under Section 35 of the Arbitration Act of Kenya: A Critique of the Supreme Court Decision in *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR' (2021) 6 *Strathmore Law Review* 137.

Additionally, the cases have highlighted the import of public policy considerations in court intervention. This has encouraged parties to pay greater attention to ensuring that their arbitration agreements and awards comply with public policy principles, which has helped to promote the integrity of arbitration. However, public policy is still contentious and subject to subjective interpretation, which can vary by jurisdiction and court.<sup>67</sup> This means that some disputes may not be amenable to settlement by arbitration due on public policy considerations.

The cases have also contributed to the advancement of arbitration practice in Kenya by creating precedents and standards for the conduct of arbitrations. This has aided in fostering consistency in arbitration practice and has assisted in ensuring that the process is fair and transparent.

### **3.7 Grounds for Court Intervention in Arbitration in Kenya**

#### **3.7.1 Introduction**

This section examines the statutory grounds for court intervention in arbitration in Kenya, as well as the judicial interpretation of these grounds. It highlights the importance of understanding these grounds for court intervention in relation to the study's main focus. The practical implications of court intervention in arbitration are also discussed, including delays and increased costs for parties. The section also covers public policy considerations and the broad interpretation of this term by the courts. A comparative examination of court intervention in arbitration in Kenya and other jurisdictions is also provided. Overall, understanding the grounds for court intervention is crucial for parties to make informed decisions when choosing arbitration.

#### **3.7.2 Statutory Grounds for Court Intervention**

The conditions for court intervention are delineated in Section 35 of the Arbitration Act. These encompass scenarios where the subject matter is not amenable to resolution by arbitration, where the arbitration agreement is invalid or has ceased to exist, where a party was incapacitated or the agreement is invalid under the law, where a party was not accorded proper notice, where the award addresses a dispute that is not resolvable under the laws of Kenya (*Macco Systems India PVT Limited-v-Kenya Finance Bank Limited (1999)*), in cases where the tribunal's composition or

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<sup>67</sup> Lorraine J Adhiambo, 'Non-Arbitrability of Disputes By: Lorraine J. Adhiambo' [2022] ALTERNATIVE DISPUTE RESOLUTION 258.

procedural steps deviated from the agreed terms or the provisions of the Arbitration Act or when the award has not yet achieved binding status or has been invalidated or put on hold by a court.<sup>68</sup> Section 10 of the Arbitration Act, 1995 allows for court intervention where the arbitrators fail to act or proceed within the specified timeframe or when a dispute falls beyond the scope of the arbitration contract.

Courts may step in on the premise of public interest if there is a likely occurrence of substantial injustice. The courts have the power to set aside an arbitral award if it contravenes public policy, is at odds with the law of the land, or if the subject matter is not amenable to resolution under the Kenyan arbitration law.

The practical ramifications of the grounds for court intervention in arbitration are extensive. For instance, challenges to the validity of the arbitration contract can protract the arbitration process and augment costs for the parties.<sup>69</sup> The setting aside of an award can lead to delays and additional costs and may erode the autonomy of the parties in choosing arbitration. However, initiatives aimed at enhancing the efficiency of arbitration can help recapture many of the advantages of arbitration.

### **3.7.3 Judicial Interpretation of Grounds for Court Intervention**

A trend that has surfaced is the courts' hesitancy to intercede in arbitration proceedings, as they endeavor to uphold party autonomy and advocate for arbitration as a viable alternative to litigation. This trend is seen in the landmark Nyutu case.<sup>70</sup> However, the courts have also demonstrated a willingness to intervene where necessary to ensure fairness and justice in the arbitration process.

The courts have mostly been consistent in their rulings on arbitral awards and the provisions for their intervention. Courts have intervened when needed and according to the constitutional provision and considerations such as public policies as in the *Christ for All Nations v. Apollo Insurance Company Limited* (2002).<sup>71</sup> However, this consistent involvement of courts has made

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<sup>68</sup> Macco Systems India PVT Limited-v-Kenya Finance Bank Limited Civil Case No 173 of 1999.

<sup>69</sup> Abwunza, Peter and Muigua, 'Explaining Delays in Construction Arbitration' (n 39).

<sup>70</sup> Nyutu Agrovet Limited V Airtel Networks Limited [2015] eKLR, Civil Appeal (Application) No 61 of 2012 (n 28).

<sup>71</sup> Christ for all Nations vs. Apollo Insurance Company Limited (2002) 2 EA 366. (n 39).

the arbitration process more formal against the objectives of the foundations for the establishment of the Arbitration Act.

### 3.7.4 Public Policy Considerations

The Kenyan courts possess the authority to set aside an award if it contradicts public policy, clashes with Kenyan law, or if the subject matter is not amenable to resolution by arbitration. The term "public policy" is not elucidated in the Kenyan Arbitration Act, but the courts have construed it broadly to cover an extensive array of issues. The expansive interpretation of public policy has led to uncertainty and unpredictability in arbitration proceedings in Kenya. A more narrow and precise definition of public policy would furnish greater clarity and consistency in arbitration decisions.<sup>72</sup> Generally, the courts will only set aside an award on public policy grounds if it is evident that the award is contrary to core legal principles or values.

Public policy and national interest have been applied in different cases such as mainly the landmark *Christ for All Nations v. Apollo Insurance Company Limited* (2002) and others such as *Kenyan Sugar Research Foundation v Kenchuan Architects Ltd* (2013).<sup>73</sup> The Applicant in the case argued that the arbitral award violates public policy. The court evaluated the issue and declared that the arbitral award was final and binding on the parties, and it could only be annulled on limited grounds. In another case, *Tanzania National Roads Agency v Kundan Singh Construction Limited* (2022), the court refused to recognize and enforce the arbitral award, citing public policy considerations.<sup>74</sup> It underscores the significance of public policy considerations in arbitration. The case also illuminates the importance of the principle of Kompetenz-Kompetenz in arbitration, as the tribunal possesses the power to rule its jurisdiction.<sup>75</sup>

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<sup>72</sup> Akinwumi Ogunranti, 'Separating the Wheat from the Chaff: Delimiting Public Policy Influence on the Arbitrability of Disputes in Africa' (2019) 10 *Journal of Sustainable Development Law and Policy* (The) 104.

<sup>73</sup> *Christ for all Nations vs. Apollo Insurance Company Limited* (2002) 2 EA 366. (n 39); *KENYA SUGAR RESEARCH FOUNDATION V KENCHUAN ARCHITECTS LTD*[2013]eKLR (Civil Case 695 of 2012); (23 April 2013).

<sup>74</sup> *Tanzania National Roads Agency v Kundan Singh Construction Limited* (Civil Application 52 of 2014) [2022] KECA 773 (KLR) (10 June 2022).

<sup>75</sup> Petra Butler and Dharshini Prasad, 'A Study of International Commercial Arbitration in the Commonwealth' (Commonwealth Secretariat 2020) <[https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/key\\_reform\\_pdfs/A%2Bstudy%2Bof%2BInternational%2BCommercial%2BArbitration\\_PDF\\_-compressed.pdf](https://production-new-commonwealth-files.s3.eu-west-2.amazonaws.com/migrated/key_reform_pdfs/A%2Bstudy%2Bof%2BInternational%2BCommercial%2BArbitration_PDF_-compressed.pdf)>.

### **3.7.5 Comparative Analysis**

The grounds for court intervention include the preservation of the status quo concerning the subject matter of the arbitration. The Arbitration Act, 1995 bestows jurisdiction over questions of fact and law to the arbitrator, which precludes appeals and judicial review. In other jurisdictions, the grounds for court intervention may include a breach of natural justice, public policy, and fraud or corruption. The UNCITRAL Model Law provides a framework for court intervention, including the appointment of arbitrators, the setting aside and enforcement of arbitral awards. By adopting the Model Law, Kenya has aligned its arbitration laws and procedures with international best practices, which may contribute to the effectiveness and efficiency of court intervention in the Kenyan context.



## CHAPTER FOUR

### COMPARATIVE ANALYSIS AND BASIS FOR REFORM

#### 4.1 Introduction

This chapter undertakes a meticulous comparative analysis, focusing on the scope and nature of court intervention in arbitration, with an emphasis on the Kenyan legal system. The study methodically contrasts the Kenyan approach with the frameworks adopted in Singapore, South Africa, USA and China as well as the UNCITRAL Model Law. The aim is to identify and evaluate the congruences and divergences among these jurisdictions, thereby extracting insights pertinent to best practices and potential reformative strategies. This analysis is predicated on the globalization of arbitration practices and the consequent necessity for Kenya to align its arbitration mechanisms with international norms. The chapter will scrutinize how various jurisdictions have managed the equilibrium between judicial intervention and the preservation of arbitral autonomy, providing a comprehensive evaluation of possible improvements to Kenya's arbitration framework in the context of global standards.

#### 4.2 Comparison with Other Jurisdictions

##### 4.2.1 Introduction

This part focuses on the selection of comparative jurisdictions to examine the legal framework for court intervention. The importance of this section is to identify similarities, differences, and optimal approaches in other jurisdictions that could be germane to the Kenyan context. The section highlights Singapore as a relevant jurisdiction due to its adoption of the Model Law and its reputation for an effective and efficient arbitration system. It provides an overview of legal frameworks in selected jurisdictions, that is, South Africa and Singapore. Although the specific provisions of the legal frameworks vary, there are similarities and differences in terms of the grounds for court intervention, public policy considerations, and the scope of intervention.

The section further identifies best practices and successful models in arbitration law, with the UNCITRAL Model Law being a widely recognized and respected model for arbitration law. Singapore is cited as a jurisdiction that has effectively implemented the Model Law and has established itself as a leading arbitration center in Asia.

It concludes by suggesting that Kenya should adhere to best practices and lessons learned from other jurisdictions, ensure its courts have a good understanding of the Model Law and carefully consider the founding principles of party autonomy, state sovereignty, strong tribunals, and limited court interference. This will help to ensure that the Kenyan legal framework for court intervention in arbitration is effective and efficient.

#### **4.2.2 Selection of Comparative Jurisdictions**

The selection of the specific jurisdiction is based on the common model of law. Singapore's model is varied from other versions in its specificity. Singapore has adopted the Model Law which is a widely recognized and respected model for arbitration law. It is also known for its effective and efficient arbitration system. Therefore, comparing the grounds for court intervention in Kenya with those in Singapore and the UNCITRAL Model Law may provide insights into best practices or successful models that could be relevant to Kenya's context. Additionally, the Model Law is widely adopted by various jurisdictions around the world, which may make it a relevant model for comparison in the Kenyan context of its arbitration system.

In Africa, South Africa is among the countries with the best arbitration and the country. This country is relevant to this analysis since it will provide insights into the African context.

#### **4.2.3 Overview of Legal Frameworks in Selected Jurisdictions**

Singapore law adheres to a policy of minimal court intervention and the courts respect the parties' choice to resolve their disputes in arbitration.<sup>76</sup> In Singapore, court intervention is limited to instances specifically provided by law and the court does not have general supervisory jurisdiction over the arbitral process. Their courts offer maximum support and minimum intervention in arbitration proceedings and are inclined to uphold arbitral awards. If mediation is unsuccessful, it would then be referred to arbitration according to the Singapore International Arbitration Centre rules, and the extent of court intervention is limited. The court will only step in to the extent that the tribunal lacks the authority or is incapable of performing its functions. The Singapore courts

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<sup>76</sup> Gary F Bell, 'Singapore: Singapore's Implementation of the Model Law: If at First You Don't Succeed ...' in Gary F Bell (ed), *The UNCITRAL Model Law and Asian Arbitration Laws: Implementation and Comparisons* (Cambridge University Press 2018) <<https://www.cambridge.org/core/books/uncitral-model-law-and-asian-arbitration-laws/singapore/4D01DFB542814B98D73F1810D5B0907D>> accessed 22 April 2023.

will not meddle with an award on an allegation by a party that the tribunal has violated the rules of natural justice.

In South Africa, the Arbitration Act stipulates that courts shall not intercede except where provisioned in the law. South African courts acknowledge a party may elect arbitration as a form of dispute resolution, and accordingly, the courts are generally supportive of arbitration.<sup>77</sup> Both tribunal and court-ordered interim measures are overseen by Article 17 of Schedule 1 to the New Act and the courts can intervene in the appointment of arbitrators under particular circumstances. However, the degree of court intervention in arbitration proceedings is restricted, and the courts will only intervene under exceptional circumstances.

The legal framework governing court intervention in arbitration in the United States is set out in the Federal Arbitration Act (FAA).<sup>78</sup> The FAA provides for a more limited role for courts in arbitration proceedings than the Kenyan Arbitration Act. The FAA only allows courts to intervene in arbitration in limited circumstances. The US courts have been reluctant to intervene in arbitration proceedings. This is due in part to strong public policy in the United States in favor of arbitration. The US courts have also recognized that arbitration is a private concession that should be free from judicial interference.<sup>79</sup> In the United States, the Federal Arbitration Act creates a strong federal policy in favour of enforcing arbitration agreements and limits the scope of judicial review of awards. This approach is similar to Kenya's where the courts have espoused a minimalistic approach.

The legal framework governing court intervention in arbitration in China is set out in the Arbitration Law of the People's Republic of China (AL).<sup>80</sup> The AL provides for a more extensive role for courts in arbitration proceedings than the Kenyan Arbitration Act or the FAA. The AL allows courts to intervene in arbitration in a number of circumstances. Chinese law provides a differential treatment to international arbitration cases compared to domestic ones, allowing parties in international arbitration more autonomy and lesser government intervention. This distinction

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<sup>77</sup> Rashri Baboolal-Frank, 'A Review of Judicial Enforcement of Arbitral Awards in South Africa' (2022) 40 Conflict Resolution Quarterly 271.

<sup>78</sup> Federal Arbitration Act of 1925 ("FAA").

<sup>79</sup> Choong-Lyong Ha, 'The Finality of Arbitral Awards: The US Practices' (2020) 30 J. Arb. Stud. 3.

<sup>80</sup> Arbitration Law of the People's Republic of China (Adopted at the Ninth Meeting of the Standing Committee of the Eighth National People's Congress on August 31, 1994 and promulgated by Order No.31 of the President of the People's Republic of China on August 31, 1994).

aims at fostering a favorable environment for foreign investors and aligning with global arbitration standards. It has established arbitration institutions such as the China International Economic and Trade Arbitration Commission (CIETAC) and the Shenzhen Court of International Arbitration (SCIA). These institutions have helped to raise the profile of arbitration in China and have made it more accessible to businesses.

#### **4.2.4 Similarities and Differences with Kenyan Legal Framework**

Arbitration in Kenya is modeled by the UNCITRAL Model Law. This model is widely used in other jurisdictions. In Africa, the model was adopted in Africa, such as Rwanda, Tanzania, Uganda, and Zambia. Other jurisdictions include Australia, Canada, China and Singapore. Although the specific provisions vary from jurisdiction to jurisdiction. There are similarities in the legal frameworks governing arbitration across jurisdictions that have adopted the Model Law, there are also variances in terms of the specific provisions, grounds for court intervention, and scope of public policy considerations.

Generally, the model offers strict terms for setting aside an award. In Kenya, this model allows for court intervention if substantial injustice is likely to occur due to public interest considerations. This aids in ensuring that arbitrations are orchestrated in alignment with the fundamental principles of justice and fairness. Other jurisdictions like Singapore have a limited scope of public policy considerations. The Singapore International Arbitration Act stipulates that an award may be set aside if it contradicts the public policy of Singapore, but also specifies that public policy solely encompasses principles of law and morality. For example, in Singapore, there are limited grounds that a court can set aside an award including under public policy consideration. The law is strict on the finality of an award. In *CEF and CEG v CEH* (2022) shows that Singapore's pro-arbitration approach involves not only limiting judicial intervention but also ensuring the fairness and reliability of arbitration.<sup>81</sup>

The broader scope of public policy considerations in Kenya may provide greater flexibility for courts to intervene in cases where fundamental principles of justice and fairness are at stake.

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<sup>81</sup> *CEF and CEG v CEH* [2022] SGCA 54.

The pivotal provisions, principles and rules orchestrating court intervention in arbitration in South Africa, Kenya, and Singapore bear similarity in that the courts' intervention is circumscribed to instances explicitly provided by law. In South Africa, the Arbitration Act bestows broad and discretionary power of intervention upon their courts. Their courts hold the authority to intervene in arbitral proceedings upon application. In Kenya, the span of courts' intervention is restricted, with no court permitted to intervene except where provided in law for such intervention. In Singapore, the scope of court's intervention in arbitration is restrained, and the court lacks any residual power to grant an application for where the law does not explicitly provide. Additionally, the provision of court-ordered interim measures is crucial, yet the scope of court intervention, supervision, or control often sparks debate. Overall, the courts in these jurisdictions are supportive of arbitration and will only step in under exceptional circumstances.

#### **4.2.5 Best Practices and Successful Models**

The UNCITRAL Model Law a widely recognized and respected model for arbitration law. It is based on party autonomy, state sovereignty, strong tribunals, and limited court interference. The Model Law has contributed to the efficacy of court intervention in various jurisdictions. While it is difficult to determine which country best applies the Model Law, Singapore is often cited as a jurisdiction that has effectively implemented the Model Law. It has adopted the Model Law and has established itself as a leading arbitration center in Asia.

#### **4.2.6 Lessons for Kenya**

These best practices should be adhered to in the Kenyan context. Kenya should ensure that its courts have a good understanding of the Model Law so that they can effectively apply it and provide appropriate court intervention in arbitration only when necessary. There should be careful consideration of the founding principles of the Model law, party autonomy, state sovereignty, strong tribunals, and limited court interference

## **4.3 Recent Developments and Reforms**

### **4.3.1 Introduction**

This section delineates the recent advancements and reforms within the legal framework for court intervention in arbitration in Kenya. Post Kenya's adoption of the Model Law via the Arbitration Act, there have been several developments aimed at curtailing the instances of court intervention. The section accentuates government initiatives to fortify institutions in arbitration, for instance the inauguration of the Nairobi Centre for International Arbitration and the establishment of its rules and regulations, inclusive of provisions for the appointment of an emergency arbitrator. It also scrutinizes the potential repercussions of these developments or reforms on the arbitration process in the country, encompassing the promotion of enhanced efficiency and effectiveness of arbitration, greater predictability and consistency in arbitration, and the allure of more international parties to utilize arbitration. The section culminates by outlining some challenges and opportunities emanating from these reforms and proffering recommendations for further reforms, such as training and education programs, the promotion of alternative dispute resolution mechanisms and the review of the Arbitration Act.

### **4.3.2 Overview of Recent Developments and Reforms**

Since Kenya adopted the Model Law in 1995 through the Arbitration Act there have been several developments.<sup>82</sup> Recent adjustments and reforms in the legal framework for court intervention in arbitration in Kenya have been tailored towards reducing instances of court intervention in arbitration. The courts in Kenya have embraced a minimalistic approach towards court intervention in arbitration, aligning with the principles of the UNCITRAL Model Law.

Lately, government initiatives have emerged to bolster institutions in arbitration. A notable instance is the inauguration of the Nairobi Centre for International Arbitration in 2013. Subsequently, the centre established its own rules and regulations, assimilating various developments including the provision for the appointment of emergency arbitrators.

With respect to legal precedent, the case of *Easy Properties Limited v. Express Connections Limited* (2019) witnessed the High Court delineating the circumstances under which it could

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<sup>82</sup> Butler and Prasad (n 51).

intervene in an arbitral decision. It adjudicated that the arbitrator holds absolute jurisdiction over questions of fact and law, which precludes appeals and judicial review.

#### **4.3.3 Analysis of the Potential**

The recent developments are likely to have a positive impact on arbitration in the country. These developments are aimed at limiting the instances of court intervention which is expected to lead to greater efficiency of arbitration.

By adopting a minimalistic approach to court intervention, the courts in Kenya are promoting the principles of the Model Law, which is expected to lead to greater predictability and consistency in arbitration. This is particularly pivotal for international parties endeavoring to resolve their disputes through arbitration, as they will possess greater certainty regarding the legal framework governing the process in Kenya.

The government initiatives to fortify institutions in arbitration, are anticipated to enhance the effectiveness and efficiency of the arbitration process. These initiatives will foster the evolution of a more sophisticated and professional arbitration industry in Kenya, which will entice more international parties to consider Kenya as an arbitration hub.

The High Court's ruling in the *Easy Properties Limited v. Express Connections Limited* (2019) case clarified the circumstances under which it could intervene in an arbitral decision, is also expected to promote greater efficacy of arbitration. By affirming the exclusive jurisdiction of the arbitrator over questions of fact and law, the High Court has reduced the likelihood of appeals and judicial review, which can cause delays and increase costs in the arbitration process.

#### **4.3.4 Challenges and Opportunities**

One of the challenges arising from the recent developments and reforms in the legal framework for court intervention is the need for a clear understanding of the circumstances under which court intervention is allowed. Although the courts have espoused a minimalistic approach there is still a need for clarity on the scope and extent of court intervention. This could lead to confusion and uncertainty in the arbitration process and could impact the efficacy of arbitration.

Another challenge is the need for capacity building in the arbitration industry in Kenya. Although there have been government initiatives to strengthen institutions in arbitration, more must be done to enhance the capacity of arbitrators and legal practitioners in the country. This could affect the quality of arbitration and its perception as a reliable and effective dispute-resolution mechanism.

Conversely, the recent developments and reforms in the legal framework for court intervention in arbitration in Kenya unveil opportunities for development of arbitration in the country. The government's dedication to strengthening institutions in arbitration, coupled with the adoption of a minimalistic approach to court intervention, could amplify the allure of Kenya as a seat for international arbitration. This could catalyze an upsurge in investment within the country and the burgeoning of the arbitration industry.

#### **4.3.5 Recommendations for Further Reforms**

**Training and education:** It is recommended that training and education programs be developed to enhance the capacity of legal practitioners and other stakeholders in the arbitration process. This will foster a better comprehension of the principles of arbitration and diminish the likelihood of unwarranted court intervention.

**Promotion of alternative dispute resolution mechanisms:** While arbitration stands as an effective dispute resolution mechanism, there prevails a need to promote other dispute resolution mechanisms. This will give parties more options for resolving disputes and alleviate the burden on the courts.

**Review of the Arbitration Act:** The Arbitration Act was adopted in 1995 and may require revision to reflect the current developments in the arbitration landscape. It is recommended that a review of the Act be conducted to address any gaps or limitations that may hinder the effective administration of arbitration in Kenya.



## CHAPTER FIVE

### METHODOLOGY AND DATA ANALYSIS

#### 5.1 Introduction

This chapter presents the methodology and data analysis approach employed to examine the factors that impact the perception of arbitration in Kenya, with a focus on court intervention. The research aims to gain comprehensive discernments into the experiences and perspectives of legal professionals and stakeholders involved in arbitration cases in Kenya. Understanding these perspectives is crucial for enhancing the efficacy of arbitration.

The chapter addresses the research design, which justifies the adoption of a qualitative approach to explore the complex and subjective nature of factors influencing arbitration perceptions. The sampling strategy outlines the selection criteria used to identify relevant participants and the rationale behind the sample size determination. Data collection methods are also described, focusing on interviews as the primary data collection technique. The structure and type of questions included in the interview guide are detailed, providing participants with a comprehensive scope to share their insights on court intervention in arbitration. Ethical considerations, including confidentiality, informed consent, and data handling, were strictly adhered to throughout the research.

Finally, the chapter acknowledges the limitations and delimitations of the research, recognizing potential biases and constraints that may impact the generalizability of the findings to other contexts.

#### 5.2 Research Design

##### 5.2.1 Justification of Qualitative Approach

In this research, a qualitative methodology is selected as the most suitable approach for exploring the factors that shape the perception of arbitration in Kenya. This section discusses the rationale behind this choice, highlighting the benefits and limitations of the qualitative approach in the context of the research topic.

The qualitative methodology is aptly suited for this investigation as it facilitates a thorough examination of the participants' viewpoints and encounters pertaining to arbitration. By utilizing interviews and open-ended questionnaires, the qualitative approach facilitates a comprehensive understanding of the complex and subjective nature of the factors influencing the perception of arbitration.<sup>83</sup>

One of the primary benefits of the qualitative approach is its ability to capture rich and nuanced data. Through interviews, researchers can delve into the thoughts, emotions, and beliefs of participants, providing detailed insights into their experiences with arbitration.<sup>84</sup> This depth of understanding is crucial for comprehending the underlying reasons behind individuals' perceptions and attitudes towards arbitration in Kenya.

Furthermore, the qualitative approach will enable the exploration of diverse perspectives. By interviewing various stakeholders, including arbitrators, legal professionals, parties involved in arbitration cases, and members of the public, a wide range of viewpoints can be gathered. This allows for a comprehensive examination of the multifaceted factors that shape the perception of arbitration.

Nonetheless, acknowledging the limitations of the qualitative approach is crucial. One limitation entails the potential subjectivity in data interpretation. Since qualitative data analysis involves subjective judgments and interpretations, researchers must employ rigorous analytical techniques. They should maintain transparency in decision-making to ensure the reliability and validity of the findings.

### **5.2.2 Research Paradigm**

The research paradigm guiding this study is constructivism. Constructivism is a philosophical perspective that emphasizes the socially constructed nature of knowledge and the importance of understanding multiple perspectives in interpreting and understanding phenomena. In the context

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<sup>83</sup> Kathryn Hendren and others, 'How Qualitative Research Methods Can Be Leveraged to Strengthen Mixed Methods Research in Public Policy and Public Administration?' (2023) 83 *Public Administration Review* 468.

<sup>84</sup> Agus Budianto, 'Legal Research Methodology Reposition in Research on Social Science' (2020) 9 *International Journal of Criminology and Sociology* 1339.

of this study on court intervention in arbitration, adopting a constructivist paradigm helps to explore and comprehend the diverse viewpoints and interpretations surrounding this topic.

A constructivist paradigm acknowledges that individuals construct their own realities based on their subjective experiences, beliefs, and social contexts. In the context of court intervention in arbitration, different stakeholders may have varying perceptions, attitudes, and understandings of the role and impact of courts in the arbitration process.<sup>85</sup> By embracing a constructivist paradigm, this study recognizes and values the multiple perspectives that exist regarding court intervention in arbitration.

The constructivist paradigm harmonizes with the qualitative research methodology employed in this inquiry. Qualitative research endeavors to delve into and comprehend the subjective experiences and perspectives of participants, rendering it apt for encapsulating the varied viewpoints regarding court intervention in arbitration. Through interviews with legal practitioners and experts, the constructivist paradigm allows for the exploration of the factors that influence their understanding and perception of court intervention.

### **5.3 Sampling Strategy**

#### **5.3.1 Selection Criteria and process**

Purposive sampling was used to select information-rich participants based on their expertise and experience with arbitration in Kenya. The criteria for selection included legal practitioners, arbitrators, and professionals with substantial knowledge of arbitration proceedings gained through direct involvement in arbitration cases within Kenya in the past 5 years. Geographic representation was also considered, with participants selected from Nairobi, Mombasa, Eldoret and Kisumu. This approach aimed to capture diverse and relevant perspectives from key arbitration stakeholders across major regions where arbitration is prevalent.

Potential participants were identified through referrals from arbitration associations, professional networks and recommendations from experts. They were contacted by email to assess their

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<sup>85</sup> Devajit Mohajan and Haradhan Kumar Mohajan, 'Constructivist Grounded Theory: A New Research Approach in Social Science' (2022) 1 Research and Advances in Education 8.

suitability based on the criteria and request voluntary participation. The final sample consisted of those who met the criteria and agreed to participate in the written interviews.

### **5.3.2 Sample Size**

In the context of this study, the sample size for qualitative research will be determined by the concept of data saturation. Data saturation is the point at which including additional participants or collecting more data does not lead to the discovery of new or significant insights.<sup>86</sup>

Data saturation allows for a thorough exploration of the perspectives and experiences of participants regarding the factors influencing the perception of arbitration in Kenya. It ensures that the researcher can capture a diverse range of viewpoints and gather in-depth insights into the complexities of the topic within the selected sample.

The sample size in qualitative research is traditionally more compact compared to quantitative investigations. This is because qualitative research aims to delve deeply into the data collected from participants, emphasizing the richness and depth of their insights rather than statistical representativeness.<sup>87</sup>

The sample size was determined using the concept of data saturation, with new participants added until responses yielded no significant new information. The final sample consisted of 9 participants - 3 arbitrators, 3 commercial lawyers specialized in arbitration and 3 legal academics with arbitration expertise. The data obtained provided in-depth insights into the factors influencing arbitration perceptions based on the participants' extensive domain knowledge and experience.

### **5.3.3 Timeframe and geographical scope**

The data was collected over a 2-month period from June to July 2023. This allowed for capturing recent perspectives and experiences within a compact timeframe. The participants were based in

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<sup>86</sup> Virginia Braun and Victoria Clarke, 'To Saturate or Not to Saturate? Questioning Data Saturation as a Useful Concept for Thematic Analysis and Sample-Size Rationales' (2021) 13 *Qualitative research in sport, exercise and health* 201.

<sup>87</sup> Anna-Marie Ortloff and others, 'Different Researchers, Different Results? Analyzing the Influence of Researcher Experience and Data Type During Qualitative Analysis of an Interview and Survey Study on Security Advice', *Proceedings of the 2023 CHI Conference on Human Factors in Computing Systems* (2023).

major urban centers in Kenya - Nairobi, Mombasa, Eldoret and Kisumu - which are hubs for arbitration activity.

## **5.4 Data Collection Methods**

### **5.4.1 Interviews**

#### **5.4.1.1 Interview Design**

The interviews in this study were conducted to gather comprehensive and in-depth insights into the participants' perspectives and experiences related to court intervention in Kenya. The interview guide consisted of structured and open-ended questions crafted to get comprehensive feedback from the participants. The questions concentrated on various aspects of court intervention and its impact on the perception of arbitration.

Structured and open-ended written interviews were chosen as the most suitable method to systematically gather insights from a larger sample of participants on key issues aligned to the research aims.

The type of questions included in the interview consisted of ten questions that covered various aspects.

*Perception of Arbitration:* Participants were asked to describe their perception of the prevailing state of arbitration in Kenya with a specific focus on court intervention.

*Impact of Court Intervention:* Participants were requested to provide a detailed example of a case they are familiar with, where court intervention had a significant impact on the arbitration process. They were encouraged to elaborate on the specific circumstances and outcomes of the case.

*Credibility and Reliability:* Participants were asked to share their observations and experiences regarding how court intervention has affected the credibility and reliability of arbitration.

*Legal or Procedural Challenges:* Participants were prompted to identify and elaborate on the main legal or procedural challenges that arise when dealing with arbitration cases involving court intervention.

*Legal Framework Improvement:* Participants were invited to offer their opinions on how the legal framework guiding court intervention in arbitration in Kenya could be improved. Further, suggest specific areas of the law and provide possible recommendations for improvement.

*Provisions of the Arbitration Act:* Participants would identify specific sections of the Arbitration Act and other related laws that they believe require modification to limit excessive court intervention in arbitration.

*Changes in Arbitration Practices:* Participants were given the opportunity to share their perspectives on what changes could be made in arbitration practices to reduce unnecessary court interventions.

*Stakeholder Perceptions:* Participants were to provide insights into how different stakeholders, including arbitrators, lawyers and litigants perceive the issue of court intervention in arbitration.

*Successful Models:* Participants would share any successful models from other jurisdictions that they believe Kenya could emulate to limit excessive court intervention in arbitration. They will be asked to describe these models and explain why they think they could work in the Kenyan context.

*Reform Recommendation:* Participants to provide their recommendations for reforms to enhance the efficacy of arbitration in Kenya. And offer specific and actionable recommendations based on their experience and knowledge.

#### **5.4.1.2 Interview Process**

Participants consisting of arbitrators, legal professionals and experts based in Mombasa, Nairobi, Eldoret and Kisumu were recruited for the study through referrals. The lead researcher contacted the participants via email to invite them to take part in the study.

Once the participants agreed to take part, their informed consent was obtained. The purpose and objectives of the research were clearly communicated to ensure voluntary participation. Participants were also assured of confidentiality and that their identities would remain anonymous. The structured written interviews were administered electronically via email. The lead researcher sent each participant the standard interview guide containing 10 preset questions designed to gather insights on various aspects of court intervention in arbitration.

The questions were presented clearly and concisely to elicit focused responses. Participants were encouraged to enrich their responses with relevant examples and case studies. The written format allowed participants flexibility to complete the interviews remotely at their convenience.

On average, participants dedicated 30 minutes to thoughtfully responding to all the questions in the guide. This written process allowed for their perspectives and experiences to be captured comprehensively.

The interviews were conducted virtually, with participants emailing their written responses back to the lead researcher. This remote process allowed for data collection from a geographically dispersed sample.

## **5.4.2 Document Analysis**

### **5.4.2.1 Selection of Documents**

The selection of documents for analysis in this research followed specific criteria to ensure relevance and reliability.

Relevant documents were identified by conducting searches of legal databases, including Kenya Law Reports, HeinOnline and LexisNexis, using keywords and filters aligned to the research aims. Documents were identified by reviewing bibliographies and reference lists from previously identified literature. Access to documents were facilitated through the university library system which enabled retrieval of articles from academic journals and arbitration databases based on the publication details.

*Relevance to the research topic:* Documents were chosen predicated on their direct relevance to the research topic concerning court intervention in arbitration within Kenya. This criterion ensured that the selected documents provided insights, information, or perspectives specifically related to the subject matter under investigation.

*Authority and credibility:* Emphasis was placed on selecting documents from authoritative and credible sources. This included documents published by reputable organizations, scholarly articles from peer-reviewed journals, reports from legal and arbitration bodies, official government

publications, and relevant legal texts and statutes. By selecting documents from reliable sources, the research aimed to ensure the accuracy of the information analyzed.

*Recency:* The documents selected were relatively recent, with a focus on including those published within the past decade. This criterion aimed to capture the most up-to-date information and reflect current practices and developments in court intervention in arbitration in Kenya.

*Diversity of perspectives:* Efforts were made to include documents representing a diverse range of perspectives. This included documents from different stakeholders involved in arbitration, such as legal practitioners, arbitrators, academics, policymakers, and professional associations. By considering a variety of perspectives, the research sought to gain a comprehensive comprehension of the various viewpoints and opinions related to court intervention in arbitration.

*Availability and accessibility:* The selected documents were readily available and accessible for analysis. This included documents that could be obtained through online databases, libraries, legal research platforms, and relevant websites. The aim was to ensure that the selected documents were easily accessible for the research process.

#### **5.4.2.2 Analysis Process**

The analysis of documents in this research followed a systematic process that involved coding and thematic analysis strategies. The analysis aimed to identify patterns, themes and key insights within the selected documents related to court intervention in arbitration in Kenya. Here is a description of the analysis process:

The researcher started by thoroughly reading and familiarizing themselves with the selected documents. This step helped gain a comprehensive understanding of the content, arguments, and perspectives presented in the documents. The researcher employed a coding strategy to categorize and organize the information contained in the documents. Initially, open coding was used, where concepts and ideas were identified and assigned descriptive codes. This process involved highlighting relevant passages, quotes, or sections of the documents that provided insights into court intervention in arbitration. The researcher created a coding framework or a set of initial codes that reflected the key themes and concepts relevant to the research topic.



Through a process of comparison and grouping, the researcher identified recurring patterns, themes, or topics within the coded data. This involved examining the coded data across different documents to identify similarities, differences, and overarching themes. The researcher looked for commonalities in perspectives, arguments, or issues related to court intervention in arbitration.

The identified themes were further analyzed and interpreted to generate meaningful insights. The researcher critically examined the relationships between themes, explored any contradictions or divergent viewpoints, and considered the effects of the findings within the context of the research topic. The thematic analysis helped identify key findings and contribute to a comprehensive understanding of court intervention in arbitration.

The findings from the document analysis were integrated with the qualitative data obtained from the interviews. This integration allowed for a comprehensive examination of the research topic, facilitating the comparison and synthesis of different data sources.

## **5.5 Data Analysis Techniques**

### **5.5.1 Transcription**

For the interviews that were conducted through a written format, there was no need for audio recording or transcription. Participants provided their responses directly in written form, ensuring accuracy and eliminating the need for transcription. Each written response was treated as a verbatim record of the participant's answers, maintaining the integrity of the data.

### **5.5.2 Coding Process**

The data obtained from the written interviews were analyzed using a systematic and iterative coding process. The analysis was conducted manually, without the use of specialized software. Initially, a preliminary coding framework was developed based on the interview questions and research objectives. The responses were read thoroughly, and initial codes were assigned to relevant parts of the text.

As the analysis progressed, new codes emerged from the data, and the coding framework was continuously revised and refined. The process involved categorizing responses into meaningful

and distinct codes that captured the key ideas, insights, and themes related to court intervention in arbitration in Kenya.

To ensure consistency and reliability in the coding process, the researcher cross-checked the codes assigned to different interview responses and discussed potential discrepancies with another researcher. This iterative approach to coding allowed for a comprehensive and nuanced understanding of the data, ensuring that no significant insights were overlooked.

### **5.5.3 Theme Identification**

Themes were identified from the codes through a systematic and iterative process of data analysis. The identified themes were then related to the research questions to gain a deeper understanding of court intervention in Kenya and its impact on the efficacy of arbitration. The themes aligned with the objectives and research questions outlined in the study are as follows:

*Objective i:* To assess the impact of court intervention on arbitration in Kenya, particularly on the efficacy of the arbitration process.

*Theme 1:* Effects of court intervention on the speed and timeliness of arbitration proceedings.

*Theme 2:* Impact of court intervention on the enforceability and finality of arbitration awards.

*Theme 3:* Influence of court intervention on the decision-making process and autonomy of the arbitrators.

*Objective ii:* To examine the legal framework for court intervention in arbitration in Kenya, including the provisions of the Arbitration Act of 1995 and relevant case law.

*Theme 4:* Analysis of the Arbitration Act, 1995 and its provisions relating to court intervention.

*Theme 5:* Examination of relevant case law and its interpretation of court intervention in arbitration.

*Objective iii:* To investigate the practical implications of court intervention on the parties involved in arbitration, including the costs and delays that may be incurred as a result of judicial involvement.

*Theme 6:* Financial implications of court intervention on the parties involved in the arbitration.

*Theme 7:* Assessment of the impact of court intervention on the efficacy and timeliness of the arbitration process.

*Objective iv:* To analyze the role of the seat of arbitration and how it affects the conduct of the arbitration proceedings.

*Theme 8:* Influence of the seat of arbitration on the level of court intervention and its impact on the arbitration process.

*Theme 9:* Comparison of the legal framework and practices related to court intervention in different seats of arbitration.

*Objective v:* To provide recommendations for future research and practice in the area of court intervention in arbitration in Kenya.

*Theme 10:* Identification of potential areas for reform in the legal framework and practices regarding court intervention.

*Theme 11:* Suggestions for enhancing the efficacy of arbitration in the presence of court intervention.

By identifying and analyzing these themes, the study aimed to gain a comprehensive understanding of court intervention in arbitration in Kenya and its implications for the efficiency, effectiveness, autonomy, and fairness of the arbitration process. The themes provided a framework for interpreting the data collected and addressing the research questions, contributing to the overall objectives of the research and offering valuable insights for future research and practice in the field of court intervention.

## **5.6 Validation and Trustworthiness**

### **5.6.1 Triangulation**

To confirm the findings, triangulation was used by collecting data from multiple sources, including interviews with legal professionals in Kenya, analysis of court cases involving arbitration, and

review of relevant literature on the topic. The use of multiple sources helped to ensure the validity and reliability of the findings by cross-checking and corroborating the data.

In this research, triangulation was achieved through the combination of qualitative data from interviews and analysis of documents. By utilizing both interview data and document analysis, the study aimed to provide a more comprehensive and holistic understanding of court.

The qualitative data obtained from interviews with legal practitioners and experts allowed for an in-depth exploration of their perspectives, experiences, and insights regarding court intervention in arbitration. These interviews provided rich and nuanced information that shed light on the various dimensions of the research topic.

### **5.6.2 Member Checking**

Member checking involved including participants in the research process by providing them with an opportunity to review and validate the collected data, analysis, and interpretations to ensure accuracy and alignment with their perspectives and experiences.<sup>88</sup> In this study, member checking was implemented by sharing the findings and analysis with the participants who were involved in the interviews. The participants were provided with summaries or excerpts of their interview responses, along with the corresponding themes or interpretations derived from their data. Few participants were invited to review the summaries or excerpts and provide feedback on the accuracy and representation of their views. They were encouraged to point out any discrepancies or offer additional insights that could contribute to a more comprehensive understanding of the research topic. The feedback received was carefully considered and integrated into the final analysis and interpretations.

### **5.6.3 Thick Descriptions**

In this study, the use of thick descriptions was employed to provide detailed and comprehensive accounts of the research findings. This was to ensure transferability.<sup>89</sup> To achieve thick descriptions, verbatim quotes from the interviews were included to highlight the participants'

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<sup>88</sup> Amber G Candela, 'Exploring the Function of Member Checking' (2019) 24 *The qualitative report* 619.

<sup>89</sup> Ahtisham Younas and others, 'Proposing the "MIRACLE" Narrative Framework for Providing Thick Description in Qualitative Research' (2023) 22 *International Journal of Qualitative Methods* 16094069221147162.

perspectives and experiences in their own words. These quotes were carefully selected to capture the diversity of views and ensure a representative portrayal of the participants' responses. Vivid descriptions helped contextualize the findings within the specific socio-cultural and legal landscape of Kenya. The socio-political factors, historical background, and legal framework governing arbitration in the country were elaborated upon to offer a comprehensive understanding of the research context.

Moreover, detailed narratives were constructed to illustrate specific examples, cases or scenarios that exemplified the impact of court intervention on the efficacy of arbitration. These narratives included relevant details such as the parties involved, the specific legal or procedural challenges encountered, and the outcomes of the court intervention.

## **5.7 Ethical Considerations**

### **5.7.1 Confidentiality**

In this study, strict measures were taken to guarantee the confidentiality and anonymity of the participants. Each participant was assigned a unique code or identifier, known only to the researcher. This coding system was used throughout the study to maintain anonymity and confidentiality. All personally identifiable information was removed and all data was securely stored.

### **5.7.2 Informed Consent**

In this study, securing informed consent from participants stood as a cardinal ethical prerequisite. Before their engagement in the study, participants were furnished with an exhaustive information document elucidating the aim of the research, the entailed procedures, the conceivable risks and advantages, alongside their rights as participants. This document also encapsulated contact details for the researcher should participants harbor any inquiries or concerns.

It was emphasized to the participants that their involvement in the study was entirely voluntary. Participants were apprised that they held the liberty to retract their participation from the study at any juncture, sans the necessity to furnish a rationale, and devoid of any repercussions.

Participants signed a consent form, indicating their voluntary participation and their understanding of the study's purpose and procedures. Participants were provided with an opportunity to ask any questions they had regarding the study, its purpose, or any other related aspects. The researcher addressed their questions and ensured that participants were fully informed before proceeding.

### **5.7.3 Data Handling**

All collected data, including interview transcripts, documents, and any other relevant materials, were stored securely. Digital data were stored on password-protected computers accessible only to the researcher. To protect participants' identities, any personally identifiable information was removed during the analysis process. This ensured that the findings and results could not be linked back to individual participants. Direct quotes or specific examples were only used with explicit consent from participants and with additional measures to protect their identities.

## **5.8 Limitations and Delimitations**

### **5.8.1 Research Limitations**

While this research study aimed to provide valuable insights into court intervention in arbitration in Kenya, it is important to acknowledge several limitations that may have influenced the findings and interpretations.

The sample size for qualitative data collection, including interviews and document analysis, was limited. The findings are based on a specific group of participants and may not represent the perspectives of all stakeholders. The small sample size may impact the extendability of the findings to a broader populace.

Also, there is a possibility of selection bias in participant recruitment. The participants were selected based on specific criteria, and their views may not fully capture the diversity of perspectives on court intervention in arbitration. As with any qualitative research, there is potential for subjectivity and bias in data collection and analysis. The interpretations of the data may be influenced by the researchers' preconceptions or prior knowledge, potentially impacting the objectivity of the findings.

The research was conducted within a specific timeframe, which limited the depth and breadth of data collection. It is possible that additional insights or perspectives were not captured due to time constraints. Also, the study focused specifically on court intervention in arbitration in Kenya and the findings may not be directly pertinent to other jurisdictions. The unique cultural, legal and institutional factors in Kenya may limit the transferability of the findings to other contexts.

### **5.8.2 Delimitations**

In this study on court intervention in arbitration in Kenya, certain delimitations were established to define the boundaries and scope of the research. The study focused exclusively on court intervention in arbitration within the context of Kenya. Other jurisdictions were included but not explicitly explored.

The study primarily examined court intervention within the scope of the Arbitration Act of 1995 and relevant case law in Kenya. While the legal framework was an essential aspect of the research, other aspects of the broader legal system or specific laws were not extensively explored. Also, the research primarily adopted a qualitative approach, focusing on interviews and document analysis. Quantitative data or statistical analysis were intentionally not included in this study.

## CHAPTER SIX

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1 Introduction

This chapter elucidates the deductions and suggestions inferred from the pivotal discoveries of the study. It commences by reiterating the research quandary and accentuating its importance in the domain of arbitration within Kenya. The research objectives are also reiterated, emphasizing their function in steering the research endeavor

A summary of the major findings from each chapter is provided, directly linking them to the research objectives. The interpretation of findings follows, offering a thorough analysis of the key findings and their implications. The study discusses how these findings answer the research questions and relate them to the broader context of arbitration in Kenya and the existing literature. Additionally, the theoretical implications of the research are explored, considering how the findings contribute to the theoretical foundations of arbitration and court intervention, potentially introducing new concepts to the field.

Moreover, the practical implications of the study's findings are examined, discussing how they can be implemented in practice. Changes to laws, regulations, or practices in Kenya are suggested based on the research findings, with the intention of enhancing the efficacy of the arbitration in the country.

Furthermore, the study provides recommendations for further research, identifying specific areas that future studies could explore to address gaps or unanswered questions. The importance of these future research directions is justified, as they can advance the understanding of court intervention in Kenya.

#### 6.2 Summary of Key Findings

The review of the literature and documentary analysis on court intervention in arbitration in Kenya shade light on the situation in Kenya. One of the key challenges is the limited grounds for court intervention, which may restrict parties' ability to seek redress in certain situations. The lack of clarity in the legal framework also leads to inconsistent application of the law by the courts.



Furthermore, court involvement in arbitration can lead to rigidity and formality, resulting in increased conflicts, delays, and costs. There is a need to expand the grounds for court intervention, clarify the legal framework, improve access to qualified arbitrators and legal counsel, promote alternative dispute resolution mechanisms, and strengthen institutional frameworks for arbitration. To enhance the future of arbitration in Kenya, there is a need for legal, procedural, institutional, and socio-cultural reforms. There should be a balance between court intervention and arbitration autonomy, implementing reforms to address challenges, and conducting further research to enhance the efficacy of arbitration in Kenya.

The key findings from the interview processes can be assessed according to the ten themes/questions:

***Perception of arbitration (court intervention)***

The perception of arbitration in Kenya is generally favorable. Arbitration has become widely used in the country, particularly in commercial and contract-related disputes. Parties prefer arbitration over the court system due to its confidential nature, greater flexibility, specialized expertise of arbitrators, and quicker resolution. The interviewees have varied perceptions regarding court intervention in arbitration. Some believe that court intervention is necessary and can be helpful in certain situations, such as determining the legality of arbitral awards. Others see arbitration as an elitist process and prefer litigation due to perceived complexities in arbitration.

Here is a sample of the responses,

*"In my view, the question has long lingered as to whether Court intervention amounts to interference or to assistance."*

*"The section [Section 10 of the Arbitration Act] gives life to Article 159 (3) of the Constitution. It limits the interference of the court and thus limit delays caused by litigation and thus afford fast, efficient resolution of disputes."*

### ***The impact of court intervention***

There were specific examples provided of cases where court intervention significantly impacted the arbitration process. This suggests that court intervention in arbitration is relatively common in the interviewees' experiences. One respondent notes,

*"In Chevron Kenya Limited-v-Tamoil Kenya Limited HCCC (Milimani) No. 155 of 2007, the Learned Azangalala found that the Defendant was not a party to the agreement enshrining the arbitration agreement on the basis the matter was sought to be stayed and referred to arbitration."*

### ***Court intervention and impact on the credibility and reliability of arbitration***

The general consensus among the respondents was that court involvement can lead to increased time and costs, complicating the arbitration process. One notes,

*"From my experience and observation court interventions have affected the reliability of Arbitration as a swift method of dispute resolution mechanism."*

However, one respondent notes that the involvement has been generally supportive citing Section 6(1) of the Arbitration Act noting jurisdictional considerations and the process of challenging arbitrator selection.

### ***Legal or procedural challenges***

The Arbitration Act in Kenya imposes restrictions on how far the courts can intervene in arbitration, which some interviewees feel complicates the process instead of making it more efficient than litigation.

### ***Possible legal framework improvements***

One suggested improvement is to amend Section 10 of the Arbitration Act to provide clearer guidance on court intervention in arbitration matters, allowing courts to intervene only in the interests of justice and prevent the abuse of arbitration.

Specific sections or provisions of the Arbitration Act or other related laws that may need improvement

Some specific recommendations include amendment of section 35 (2)(a) (i, ii, iii & vi) of the Arbitration Act.

*“I would recommend that the provisions for setting aside arbitration awards be limited to essential procedural concerns and the core substance of the arbitrator's decision, ensuring a more streamlined and cost-effective arbitration process. Thus, grounds for setting aside provided under section 35 (2)(a) (i, ii, iii & vi) of the Arbitration Act ought to be conclusively decided by the Arbitrator and not be a subject of appeal.”*

### ***Suggested changes to arbitration practices***

The respondents recommended a change to adopt a generally accepted approach that courts can intervene in the arbitration process as a guiding agent at any stage of the proceedings, which may help reduce unnecessary court interventions. Others suggested the employment of technology

*“The inclusion and adoption of a generally accepted approach that Courts are free to intervene in the arbitration process but only as a guiding agent at any stage of the arbitration proceedings.”*

*“It is desirable that the Arbitration Act 1995 should emphasize the use and role of technology.”*

### ***Stakeholder perceptions of court intervention***

Arbitrators generally view court intervention as facilitative, while lawyers prefer litigation due to perceived cost and court involvement, which may impact the arbitration process. Litigants also tend to prefer litigation over arbitration for similar reasons.

Some of the responses include:

*“From my experience, Arbitrators opine that the arbitration process is not utilized enough.”*

*“Arbitrators are of the view that the court’s role is facilitative.”*

*"Litigants prefer litigation to arbitration, the reason is because of the cost element and the court's involvement which ultimately defeats the arbitration process."*

### ***Successful models from other jurisdictions that Kenya could emulate***

Some of the interviewees provide examples of successful models from other jurisdictions that Kenya could emulate to limit excessive court intervention in arbitration. Some of the suggested models include England. Also, The Singaporean approach to arbitration is cited as a successful model to limit excessive court intervention. The pro-arbitration stance, limited grounds for challenge, and specialized arbitration court are aspects that could be beneficial in the Kenyan context.

*"The application of the law and procedure governing the role of the court in arbitration in England is largely similar to Kenya."*

*"Singapore is widely recognized for its pro-arbitration stance and has implemented several measures to minimize court intervention in arbitration."*

### ***Reform recommendations***

The interviewees suggested several reforms to enhance the efficacy of arbitration in Kenya, such as simplifying the appointment of arbitrators, integrating arbitration into the e-filing system, and providing more clarity on the qualifications and roles of arbitrators.

One respondent notes, *"The simplification of the appointment of an Arbitrator for starters."*

Another states, *"Arbitration is also a unit not offered at the university level and when it is offered, it is taught under the umbrella of alternative dispute resolution mechanisms alongside others, like mediation and conciliation, and not as a unit on its own."*

Generally, the findings from the interviews align with the literature review and documentary analysis from legal experts in the arbitration field in Kenya.

### 6.3 Interpretation of Findings

The key findings from the research provide valuable insights into the impact of court intervention on arbitration in Kenya. These findings shed light on various aspects of court intervention, including its frequency, implications for efficiency and effectiveness, impact on the credibility of arbitration, legal challenges, potential improvements to the legal framework, stakeholder perceptions, successful models from other jurisdictions, and reform recommendations. Let's interpret these findings in relation to the research questions and their broader implications for arbitration in Kenya:

***Research Question 1:*** What is the extent of court intervention in arbitration proceedings in Kenya, and how does this compare to other jurisdictions?

The research indicates that court intervention in arbitration is relatively common in Kenya, and it varies depending on the nature of the dispute and the specific case. Some respondents perceive court intervention as supportive and necessary, while others view it as interfering with the autonomy of arbitration. The research also highlights successful models from other jurisdictions, such as England and Singapore, which have implemented measures to limit excessive court intervention.

To interpret this, the extent of court intervention in arbitration suggests that there should be greater clarity and consistency in the legal framework governing court intervention. Comparing the Kenyan approach to successful models from other jurisdictions can provide valuable insights for enhancing the efficacy of arbitration in Kenya.

***Research Question 2:*** How does court intervention affect the efficacy of the arbitration process in Kenya, and what are the potential benefits and drawbacks of court intervention in arbitration?

The research findings indicate that court intervention can impact the efficacy of arbitration. Court involvement may lead to increased time and costs, which can undermine the perceived advantages of arbitration over litigation. However, some respondents also acknowledge that court intervention can be helpful in certain situations, such as resolving jurisdictional issues or enforcing arbitral awards.

These findings suggest that striking a balance between court intervention and the autonomy of arbitration is essential to maximize the benefits of ADR while addressing potential drawbacks. Ensuring greater predictability and consistency in court decisions related to arbitration can enhance the overall efficacy of the arbitration process.

**Research Question 3:** What are the implications of court intervention on the autonomy of the parties involved in arbitration, and how does this impact the perceived fairness and integrity of the arbitration process?

The research reveals that court intervention can impact the autonomy of the parties involved in arbitration. Some stakeholders perceive court involvement as facilitative, while others view it as detrimental to the parties' autonomy and independence in the arbitration process. Stakeholders' preferences for arbitration or litigation also appear to be influenced by perceptions of autonomy and fairness.

This shows the importance of preserving the autonomy of arbitration to maintain its integrity and perceived fairness. Addressing concerns related to court intervention can bolster the confidence of the parties in the arbitration process as a fair and effective method of dispute resolution.

**Research Question 4:** How does the legal framework for court intervention in arbitration in Kenya compare to other jurisdictions, and what are the potential areas for reform?

The research findings indicate that the legal framework for court intervention in Kenya may benefit from improvements. Limited grounds for court intervention, lack of clarity in the law, and potential inconsistencies in its application by the courts are identified as areas for reform. Successful models from other jurisdictions, such as England and Singapore, offer potential insights for reforming the Kenyan legal framework.

The comparison with other jurisdictions underscores the need for a comprehensive and clear legal framework that strikes a balance between court intervention and the autonomy of arbitration. Reforms should be considered to provide guidance for courts and parties, enhance the enforceability of arbitral awards, and reduce unnecessary delays and costs.

**Research Question 5:** What role does the seat of arbitration play in court intervention in Kenya, and how does this impact the conduct of the arbitration proceedings?

The research highlights the influence of the seat of arbitration on the level of court intervention and its impact on the arbitration process. Different seats of arbitration may have varying legal frameworks and practices regarding court intervention, which can affect the overall conduct of the arbitration proceedings.

Understanding the role of the seat of arbitration in court intervention is crucial for parties selecting a seat and arbitrators managing the proceedings. Harmonizing practices and legal frameworks among different seats can promote consistency and predictability in court intervention.

**Research Question 6:** What are the practical implications of court intervention in Kenya, including the costs and benefits of court intervention, and how does this affect the perceived efficacy of the arbitration process?

The research highlights the practical implications of court intervention in the arbitration process, including increased costs and potential delays. While court intervention can be beneficial in certain situations, stakeholders express concerns about its impact on the efficacy of the arbitration process.

The practical implications of court intervention underscore the need for careful consideration of the timing and necessity of court involvement. Balancing the benefits and drawbacks can help parties make informed decisions about pursuing arbitration as an effective dispute-resolution mechanism.

The findings from this research contribute to the broader understanding of arbitration in Kenya by highlighting the challenges and opportunities related to court intervention. The research complements existing literature on arbitration and provides empirical evidence from stakeholders directly involved in arbitration in Kenya. The research demonstrates the practical impact of court intervention on arbitration, which can be used as a basis for policy and legal reforms. The research findings have practical implications for policymakers, legislators, arbitrators, legal practitioners, and parties involved in arbitration in Kenya. The recommendations and potential areas for reform can inform efforts to fortify the frameworks governing arbitration and enhance its efficiency,

effectiveness, and credibility. By addressing concerns related to court intervention, the research contributes to the development and acceptance of arbitration in Kenya.

#### **6.4 Theoretical Implications**

The theoretical implications of this study's findings on arbitration and court intervention are noteworthy, as the research provides both valuable contributions and identifies promising areas to enrich arbitration theory.

In terms of contributions, the study underscores the importance of having a clear, coherent and predictable legal framework to govern court intervention. This enhances the theoretical understanding of how to optimally balance court oversight and arbitration autonomy. The comparative analysis furnishes new theoretical insights by contrasting different jurisdictions' approaches, highlighting varying philosophies underpinning court intervention. The research also solidifies scholarly perceptions of arbitration as an efficacious dispute resolution mechanism, buttressing arbitration theory.

Additionally, the study reveals new theoretical insights into the significance of harmonizing laws on court intervention with international standards, upholding party autonomy as a core tenet of arbitration theory, and the pivotal role of seat theory in shaping the legal framework for court involvement.

However, some limitations provide opportunities for refining theoretical perspectives. The research was confined to Kenya's context specifically, so expanding studies across jurisdictions could augment theoretical frameworks. More empirical research is needed to address gaps in understanding court intervention impacts. Incorporating additional theories from dispute resolution scholarship could offer new lenses for analysis.

In conclusion, this study makes notable contributions to arbitration theory, both reinforcing and enhancing key frameworks. The research provides comparative insights and reveals areas for additional inquiry to deepen the theoretical understanding of optimizing court intervention while preserving arbitration's autonomy, efficiency and integrity. Addressing the identified limitations through further empirical and multi-disciplinary research can enrich arbitration theory and support the evolution of effective policies and practices.



## 6.5 Practical Implications

The conclusions of this study have several practical consequences for the practice of arbitration in Kenya. The insights gained from the research can be utilized to implement changes in laws, regulations and practices to enhance the efficiency, effectiveness and credibility of arbitration.

One of the core principles of arbitration is its autonomy and independence from the court system. The findings of this study shed light on how court intervention can impact the autonomy of arbitration. The research reveals that court involvement can lead to increased time, costs and potential inconsistencies in decisions, which may undermine the perceived autonomy of arbitration. This suggests that preserving and strengthening the autonomy of arbitration is crucial for its effectiveness as an alternative dispute-resolution mechanism.

The research findings highlight how court intervention can affect the efficacy of arbitration in Kenya. While some court interventions may be necessary and helpful, excessive or unnecessary court involvement can lead to delays and increased costs, reducing the perceived advantages of arbitration over litigation. This emphasizes the importance of streamlining court intervention and ensuring that it complements, rather than hinders, the efficiency of arbitration. The current legal framework in Kenya limits the grounds for court intervention in arbitration. Based on the findings, some interviewees suggested expanding the grounds to include essential procedural concerns and the core substance of the arbitrator's decision. By broadening the grounds for court intervention, parties may have greater recourse in seeking redress for genuine concerns, thereby enhancing the perceived fairness of arbitration.

The study found that the inclusion of technology could improve the efficiency of arbitration in Kenya. Policymakers and arbitration institutions should promote the use of technology in arbitration processes, such as online filing, electronic evidence presentation and virtual hearings. This can reduce costs and streamline proceedings, making arbitration more accessible and attractive to parties.

Furthermore, the research highlighted the importance of qualified arbitrators in ensuring a robust and credible arbitration process. To enhance the quality of arbitrators, the relevant authorities could establish standardized qualifications, training programs and certification processes. Additionally,

promoting simplicity, diversity and inclusivity in arbitrator appointments can contribute to a more representative and inclusive arbitration system.

The study revealed that some litigants prefer litigation over arbitration due to perceived complexities and court involvement. To address this, policymakers and practitioners should promote mediation and settlement as a viable first step in dispute resolution. Offering incentives for parties to attempt mediation before arbitration or litigation can help decongest the court system and reduce the need for court intervention.

The research emphasized the need for stronger institutional frameworks for arbitration in Kenya. Enhancing the capacity and resources of arbitration institutions can facilitate smoother case administration, offer better support to arbitrators, and promote best practices in arbitration. This, in turn, can improve the overall efficacy of the arbitration process.

The study revealed that some stakeholders lack awareness of arbitration as being effective. To address this, efforts should be made to promote public awareness and education about arbitration's benefits and processes. Educational initiatives at the university level, professional training workshops, and public outreach programs can help build confidence in arbitration.

## **6.6 Recommendations for Further Research**

Future research could conduct a comparative analysis between court intervention in arbitration in Kenya and other jurisdictions with well-established arbitration systems. By examining the legal framework, judicial practices and outcomes of court intervention in different countries, researchers can identify best practices and areas for improvement. This research is essential for understanding the global context of court intervention in arbitration and adopting successful models to strengthen Kenya's arbitration system.

Further research could delve deeper into the perspectives of different stakeholders involved in arbitration, such as arbitrators, lawyers, litigants and arbitration institutions. Understanding their experiences, challenges, and expectations regarding court intervention in arbitration will provide a comprehensive view of the impact on each stakeholder group. Such research will enable policymakers and practitioners to tailor interventions that address specific stakeholder concerns and preferences.

Investigating the effectiveness of judicial training and education programs on arbitration for Judges in Kenya is crucial. This research can assess whether improved training and awareness of arbitration principles among judges lead to more consistent and informed court intervention decisions. Understanding the impact of judicial education on court intervention can provide valuable insights for designing effective training programs for the judiciary.

Further research could explore the role of technology in reducing court intervention and improving the efficiency of arbitration proceedings. This includes studying the use of online platforms for evidence presentation, virtual hearings, and electronic filing systems. By identifying successful technological interventions, researchers can offer practical recommendations to enhance the integration of technology in arbitration practice.

Research examining the impact of court intervention in arbitration on foreign direct investment and business operations in Kenya can be valuable. Understanding how court intervention affects investor confidence and perceptions of the business environment can help policymakers assess the overall impact of the legal framework on the country's competitiveness as an investment destination.

These future research directions are essential to fill existing gaps in knowledge, refine current practices, and inform evidence-based policy decisions. By addressing these areas, scholars and practitioners can contribute to the continued development of arbitration in Kenya, leading to a more robust, efficient, and effective dispute-resolution mechanism for the country.

## **6.7 Recommendations for Legal and Policy Reforms**

Based on the findings, the following recommendations for legal and policy reforms are suggested to improve arbitration in Kenya:

The Arbitration Act, 1995 should be amended to provide clearer guidance on court intervention in arbitration matters. The law should specify the limited grounds and circumstances under which courts can intervene to ensure consistency in judicial decisions and prevent excessive court involvement in the arbitration process.

While limiting court intervention is crucial, there is a need to expand the grounds for court intervention to address exceptional circumstances where intervention is necessary in the interest of justice. This expansion should be done judiciously to strike a balance between supporting arbitration's autonomy and ensuring parties have recourse to court assistance when essential.

Develop and implement specialized training programs for judges to enhance their understanding of arbitration principles and practices. This training will enable judges to make informed decisions on court intervention, interpret arbitration agreements correctly, and enforce awards consistently.

Encourage the integration of technology in arbitration proceedings to reduce the need for court intervention and enhance the efficiency of the arbitration process. This includes adopting electronic filing systems, online evidence presentation and virtual hearings to streamline the proceedings and minimize delays.

Support the development and strengthening of reputable arbitration institutions in Kenya. Robust institutions can provide necessary resources, qualified arbitrators, and administrative support, reducing the reliance on court intervention for procedural matters. There should be an establishment of a specialized arbitration court in Kenya to handle arbitration-related matters. A dedicated court can ensure consistent interpretation and application of the law fostering confidence in the process.

There should be a review of Section 35 of the Arbitration Act. Reevaluate the grounds for setting aside arbitral awards. Consider limiting the grounds to essential procedural concerns, reducing opportunities for excessive court intervention.

## **6.8 Limitations for Future Research**

While this study offers valuable insights, it is important to acknowledge its limitations. The research was confined to examining court intervention within the specific context of arbitration in Kenya. Further studies could build on these findings by investigating court intervention dynamics in other jurisdictions. The sample size and geographical scope were also limited, focused on urban arbitration hubs. Expanding data collection more broadly could augment understanding. Given arbitration's constantly evolving nature, more current empirical data could reveal new perspectives.

Additionally, as a qualitative study, subjectivity in interpretation of data may arise. Quantitative methods could complement the analysis and minimize biases. The timeframe posed constraints, so longitudinal observations could capture longer-term impacts. Court intervention has manifold dimensions, so exploring ancillary areas like appeals procedures could unveil additional insights. Enhancing theoretical frameworks through multi-disciplinary lenses would strengthen the analysis.

Future research directions, like cross-country comparisons, expanded sampling, quantitative modelling, longitudinal tracking and theoretical pluralism could address these limitations. With persistent research efforts, knowledge of optimizing court intervention to preserve arbitration's integrity will continue growing. While this study provides impactful insights, exploring uncharted dimensions through rigorous empirical work remains vital for generating practice-oriented solutions. The quest for balance endures, but with collaborative scholarship, equitable outcomes become steadily more attainable.

## **6.9 Conclusion**

This research aimed to examine the impact of court intervention on arbitration in Kenya and address the lack of comprehensive research on this important aspect of alternative dispute resolution. The research revealed that while some court oversight is necessary, excessive intervention can diminish arbitration's autonomy and undermine its effectiveness.

The study found that court intervention is relatively common in Kenya, often leading to delays, increased costs and potentially inconsistent rulings. These outcomes can reduce confidence in arbitration. However, the research also highlighted that appropriate court involvement can be beneficial in certain scenarios like enforcing awards or addressing serious procedural violations. Ultimately, striking an optimal balance is essential to maximize arbitration's advantages of flexibility, specialist expertise, and efficiency, while allowing necessary judicial supervision. The analysis of Kenya's legal framework showed some ambiguities and lack of harmonization with international standards. Comparative insights emphasized the value of clarity, consistency and boundaries for court intervention.

This study makes notable contributions by providing empirical evidence on stakeholders' experiences, illuminating court intervention's practical effects, and identifying areas for legal and policy improvements. The findings can inform reforms to strengthen arbitration practices in Kenya, and guide further research exploring unanswered questions regarding this complex dynamic.

With arbitration's expanding role, getting the balance right between judicial discretion and arbitration autonomy is crucial. Though challenges remain, this study helps establish an understanding of court intervention's impacts, positioning Kenya to refine its approach in shaping arbitration's future.

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