

**ARBITRATION IN KENYA: FACILITATING ACCESS TO JUSTICE BY
IDENTIFYING AND REDUCING CHALLENGES AFFECTING ARBITRATION**

NGUYO WACHIRA PATRICK

G62/70225/2013

Research project submitted in partial fulfillment of the requirements for the award of the degree
Master of Laws at the School of Law, University of Nairobi

DECLARATION

By submitting this dissertation I declare that the entire work contained herein is my own original work and I am the sole author thereof (save to where I have disclosed otherwise) and the same has never been submitted elsewhere for any qualification.

Student

.....

NGUYO WACHIRA PATRICK

.....

Date

Supervisor

.....

LEONARD OBURA ALOO

.....

Date

ACKNOWLEDGEMENTS

I would wish to thank the Kenyan Government through the Office of the Attorney General, for providing financial support towards this study. To my colleagues at the Office of the Attorney General and the head of department who made it possible for me to complete this study on time.

Appreciation to Mr. Leonard Obura Aloo my supervisor for his guidance and assistance all through my working on this paper. His invaluable support and stimulating discussions in this study was exemplary.

To Geoffrey Ngae, thank you for the support in the design, analysis and collation of data.

My sincere gratitude to my parents Nguyo and Muthoni, for the support and encouragement that they have given me through my academic sojourn and for their inspiration in this study and my education career.

Finally my thanks also to all others I have not mentioned especially the respondents without whose help, this work would not have been possible.

May the Lord bless you all abundantly.

DEDICATION

To my parents, Ian, Grace and Sarah may the Lord bless you

LIST OF ABBREVIATIONS

ADR - Alternative Dispute Resolution

TJS - Traditional Justice System

IJS - Informal Justice Systems

DRC - Kenya Dispute Resolution Centre

ICJ - International Commission of Jurists

UNCITRAL – The United Nations Commission on International Trade Law model law on arbitration

New York Convention - The Convention on the Recognition and Enforcement of Foreign Arbitral Awards OF 1958

ELR- Empirical Legal Research

HCCR – High Court Criminal Case

HCCC – High Court Civil Case

HC ELC -High Court Environment and Land Case

LIST OF STATUTES AND CONVENTIONS

The Constitution of Kenya 2010

The Arbitration Act (as amended in 2009) and the Arbitration Rules

The Civil Procedure Act and the Civil Procedure Rules

The Investment Disputes Convention Act

The Employment Act,

The Nairobi Centre for International Arbitration Act

The Evidence Act

New York Convention,

The United Nations Commission on International Trade Law Model law on arbitration

TABLE OF CASES

1. Republic Vs Mohamed Abdow MohamedHCCR Nairobi Case No 86 OF 2011
unreported eKlr
2. Christ for All Nations Vs Apollo Insurance Co. Ltd[2002] 2 E.A 366
3. Paul Oranga Muma Vs Dominic Muma Kworo HC ELCKisii Case No 5 “B” OF 2008
unreported eKlr
4. Midroc Water Drilling Ltd Vs Cabinet Secretary and two Others HC Nairobi Milimani
Commercial Courts case No 267 of 2013 eKlr
5. Nyameino Mageto Vs Simion Mageto Nyameino HC ELC Kisii Case No 168 of 2011
unreported eKlr

LIST OF TABLES AND FIGURES

Table 1: A comparison of the features in arbitration and litigation

Table 2: Table on data analysis

Table 3: Table on data analysis

Table 4: Table on data analysis

Table 5: Table on data analysis

Table 6: Table on data analysis

Table 7: Table on data analysis

Table 8: Table on data analysis

ABSTRACT

Solving Disputes at any level should be encouraged by creating mechanisms that resolve disputes fast and with least cost. The citizen should not be left to despair in the pursuit of justice but instead the legal institutions/facilitators should create an enabling environment that enhances the delivery of justice at any forum. It would be very noble if members of a society would take the responsibility of resolving their own disputes by creating a system of justice that fosters arbitration. This is a system that delivers justice outside the formal court justice framework. Arbitration removes the emphasis on procedure and legal technicalities. This is unlike the formal court justice framework which is time consuming and tedious to the masses where the middle and low income commercial and civil disputes are in plenty.

Access to dispute solving mechanisms should be simple and quick. An effective justice system is one that; is accessible, dispenses justice without delay and in accordance to law and equity. It acts as a tool that aids in the creation of a cohesive society. These can be provided with an effective arbitration system.

With the current economic growth and development in Nairobi, Nakuru and Kericho courts in these counties are struggling with case management. The challenges include; a case backlog, few judges and magistrates to hear cases, lack of judicial facilities and lack to access of those facilities where available. This then clogs access to the court justice system, increases legal costs and the citizen are left to despair and their hearts cringe when they have to go and seek justice in court.

This paper will discuss the removal of challenges in the arbitration process. The research seeks to unravel the challenges that hinder the society from using arbitration, or if they use arbitration where can we add emphasis (within the arbitration process) and enhance its access. The paper shall endeavour to ensure that arbitration can be accessible; disputes can be disposed of timely and without delay.

Courts are not a panacea to solving all the disputes in Kenya and specifically; Nairobi, Nakuru and Kericho. It is the responsibility of the legal actors to make either of the antagonistic parties to a matter access a solution in a timely manner and with least expenses and the arbitration process should thus be considered as an option better than the court justice system. In Nairobi, Nakuru and Kericho the arbitration framework is still developing. Institutional membership is increasing, the Nairobi Centre for International Arbitration has been created about an year ago, arbitration trainings and seminars are being organized frequently but is this being felt at the dispute solving level.

This paper will also involve the collection of data from Nairobi, Nakuru and Kericho counties to identify the challenges that face the litigants and legal professionals in the access to arbitration.

At the conclusion there will be an evaluation of the challenges identified as hindering the arbitration process and thereafter propose solutions to ameliorate the challenges identified. There will be proposals of ways that will lead to enhanced access of arbitration and methods that reduce the barriers to arbitration.

TABLE OF CONTENT

Contents

DECLARATION.....	ii
ACKNOWLEDGEMENTS.....	iii
DEDICATION.....	iv
LIST OF ABBREVIATIONS	v
LIST OF STATUTES AND CONVENTIONS.....	vi
TABLE OF CASES.....	vii
LIST OF TABLES AND FIGURES	viii
ABSTRACT	ix
TABLE OF CONTENT.....	xi
CHAPTER ONE.....	1
1.1 INTRODUCTION	1
1.2 PROBLEM STATEMENT.....	5
1.3 OBJECTIVES OF THE STUDY	7
1.3.1 Specific Objectives;.....	8
1.4 RESEARCH QUESTIONS	9
1.5 HYPOTHESES.....	9
1.6 LITERATURE REVIEW	10
1.6.1 ACCESS TO JUSTICE; CHALLENGES THAT LIMIT ACCESS TO JUSTICE;	20
1.7 THEORETICAL FRAMEWORK.....	25
1.8 RESEARCH METHODOLOGY	27
1.8.1 Research Sites and Fields	27
1.8.2 Population Sample.....	28
1.8.3 Validity and reliability of the data collected	28

1.8.4 Data Analysis Procedure and Presentation	29
1.9 LIMITATIONS	30
1.10 CHAPTER BREAKDOWN	31
1.10.1 Chapter one;.....	31
1.10.1.1 Literature Review:	32
1.10.2 Chapter two.....	32
1.10.3 Chapter three: Data Collection	33
1.10.4 Chapter four: Data Analysis	33
1.10.5 Chapter five: Conclusion and Recommendations	34
CHAPTER TWO.....	35
2.0 INTRODUCTION TO ARBITRATION.....	35
2.1 HISTORICAL BACK GROUND OF ARBITRATION IN KENYA.....	35
2.1.2 Definition of Arbitration.....	35
2.2 KENYAN LEGAL FRAME WORK OF ARBITRATION	37
2.2.1 The Constitution	37
2.2.2 The Arbitration Act of Kenya.....	38
2.2.3 The Civil Procedure Act and the Civil Procedure Rules	40
2.2.4 Labour Laws	40
2.2.5 The Evidence Act	41
2.2.6 The Nairobi Centre for International Arbitration	42
2.3 CHARACTERISTICS OF ARBITRATION.....	42
2.3.1 Advantages of arbitration	42
2.3.2 Disadvantages of arbitration.....	44
2.4 COMPARISON BETWEEN ARBITRATION AND LITIGATION	44
2.4.1 Features of arbitration.....	44

2.4.2 Features of Litigation.....	45
2.4.3 Advantages of arbitration over the Shortcomings in Litigation	46
2.4.3 The pre-trial conference.....	47
2.5 ARBITRATION AND ACCESS TO JUSTICE IN KENYA	48
2.6 INSTITUTIONAL ARBITRATION IN KENYA	50
2.7 CURRENT CHALLENGES TO THE ARBITRATION ACT	50
2.7.1 The interference by court.....	50
CHAPTER THREE	52
3.0 SAMPLE IDENTIFICATION, DESIGN AND DATA COLLECTION	52
3.1 Sample Identification.....	52
3.2 Data Collection	53
3.2.1 Trial questionnaire	53
3.2.2 Questionnaire administration sites.....	54
3.3.1 Conducting interviews	55
3.3.2 Telephone Interviews:	56
3.4 Application of Empirical Legal Research Methodology <i>vis a vis</i> the research topic	56
CHAPTER FOUR	58
4.0 DATA ANALYSIS AND OBSERVATIONS FROM THE FEEDBACK.....	58
4.1 Respondents Understanding of Arbitration	58
4.2 Effectiveness of Arbitration.....	59
4.3 Referral to arbitration	60
4.4 How often do judges and magistrates suggest the use arbitration to parties in court?	61
4.5 Case law interpretation of the section 59 Civil Procedure Act and of Order 46 Civil Procedure Rules	63
4.6 The role of judicial officers and clerks in arbitration	64

4.7 Does the judiciary encourage the use of arbitration?	66
4.8 Knowledge of arbitration forums and Institutions.....	67
4.9 Reference to arbitration through the arbitration clause in any agreement.....	68
CHAPTER FIVE	71
5.0 CONCLUSION AND RECOMMENDATIONS	71
5.1 Enhancing Training and Awareness in Arbitration	71
5.2 Recommendations to the Kenyan Judiciary	74
5.2.1 Including ADR in Performance measurement to judicial officers	75
5.2.2 Developing practice directions for magistrates regarding arbitration	75
5.2.3 Recommendations based on proceedings and conduct of the arbitration process.....	77
5.2.4 Publishing of more details to enhance institutional arbitration	77
5.2.5 A non-interference policy by judges	78
5.2.6 Timely delivery of rulings and awards concerning arbitrations	78
5.2.7 High arbitration fees	79
5.2.8 More resources should be invested in the field of arbitration by the justice sector players.....	80
5.2.9 Few advocates prefer arbitration	81
5.2.10 Training of Arbitrators with diverse educational and professional backgrounds.....	82
5.2.11 Further areas of Research	83
REFERENCES	84
APPENDIX 1	88
APPENDIX 1 – I QUESTIONNAIRE.....	89
APPENDIX 1 – II QUESTIONNAIRE	93
APPENDIX 1 – III QUESTIONNAIRE	98
APPENDIX 1 – IV QUESTIONNAIRE.....	101

APPENDIX 2	107
APPENDIX 3	108

CHAPTER ONE

1.1 INTRODUCTION

There has been a persistent call addressing practitioners in litigation and litigants to pursue other forms of dispute settlement away from litigation.¹ Arbitration is the most common branch of alternative dispute resolution mechanism that has been emphasized in our country and the most used in our three sample counties Nairobi, Nakuru and Kericho.² How parties settle their disputes has a co-relation with development in that society thus if this research can promote dispute settlement in Nairobi, Nakuru and Kericho especially in private contracts there will eventually be a promotion in the rule of law leading to enhanced access to justice.³ In Kenya Arbitration is anchored in the Constitution. Article 159 provides.⁴

159. (2)(c) In exercising judicial authority, the courts and tribunals shall be guided by the following principles.....

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted(emphasis mine)

This article in the Constitution proves that Kenyans have approved arbitration at all levels of dispute resolution. The fact that arbitration has been provided for in the Constitution will have a

¹ Dr. Willy Mutunga, Chief Justice and President of the Supreme Court while opening new Gatundu Law Courts, Kiambu County on 25th March 2014. “You can use elders, churches or mosques to settle disputes. I have even told the people of Kitui where I come from to turn to witch doctors to resolve some issues”. James Macharia, 25th March, 2014 2pm <http://www.reuter.com/article/idUSBREA201IU20140325> (Accessed on 12th July, 2014 at 1700hours)

² Kyalo Mbobu, ‘Efficacy of Court Annexed ADR: Accessing Justice through ADR’. (2014) ADR Journal ISBN 978-9966-046-02-4 at page 1.

³ Kariuki Muigua & Francis Kariuki, ‘ADR Access to justice and Development in Kenya’. Available at www.kmco.co.ke at Page 1, 2 and Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi. ‘Governance Matters III Governance Indicators for 1996-2002’. (2003) The World Bank.

⁴ Article 159 of the Kenyan Constitution 2010 emphasizes on the sources of judicial authority in the Kenyan legal system.

likelihood of increasing the number of disputes that will be settled via arbitration. The government has also been mandated by the Constitution to settle disputes between it and respective county governments via the use of alternative dispute resolution where arbitration is one of the options.⁵This shall have the effect of obtaining a speedy resolution of matters pertaining to devolution and thereafter a faster delivery of services to the citizens.

The Bible in Mathew chapter 5 verse 25 also underscores the need for settlement out of court. It provides;⁶

Settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way or he may hand you over to the judge

Similar words are also available in the Koran at 4: 35 where it also emphasizes the need for settlement via arbitration. It provides

And if you fear dissention between the two, send an arbitrator from his people and an arbitrator from her people. If they both require reconciliation, Allah will cause it between them. Indeed, Allah is ever knowing and acquainted with all things.

The practice of arbitration in Kenya is supported via The Arbitration Act.⁷The main framework for transferring cases from the court litigation process to an arbitration forum is laid down in Civil Procedure Act.⁸The Civil Procedure Act at Order 46 of the Civil Procedure Rules 1 and 2 they provide;⁹

⁵Constitution of Kenya, 2010, Article 189 (4)

⁶ The Holy Bible, The New International Version (NIV) © Bibilica.

⁷Cap 49 of the Laws of Kenya Act No. 4 of 1995,Date of commencement: 2ndJanuary, 1996

⁸ This process is commonly referred to as Court Annexed Arbitration, see; KyaloMbobu, 'Efficacy of Court Annexed ADR: Accessing Justice through ADR'.(2014) ADR Journal ISBN 978-9966-046-02-4

⁹Kenya Gazette Supplement No. 65 (10th September, 2010). Legislative Supplement No. 42 Legal Notice No 151

1. *Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.*
2. *The arbitrator shall be appointed in such manner as may be agreed upon between the parties.*

The Arbitration Act lays the Kenyan framework and principles that parties to domestic or international arbitration shall apply. Rules have also been enacted which parties follow in the process of arbitration in Kenya.

Despite the ideal arbitration legislation, legal practitioners and litigants in Nairobi, Nakuru and Kericho just like the rest of Africa have not fully embraced arbitration at the expected pace leading to few disputes being referred to arbitration.¹⁰ The rate at which court cases are being filed is increasing tremendously however the use of arbitration in the settlement of disputes in Nairobi, Nakuru and Kericho cannot be said to have increased in equal measure.¹¹

Justice delayed is justice denied; this saying has gained notoriety in our justice system because of the fact that it is usual to have a case determined after about four to six years from the date of institution/filing.¹² It is this puzzle that the paper shall seek to unravel by proposing how arbitration can be developed to solve disputes of a wide genre expeditiously in Kenya. There are several published judicial reports and other nongovernmental surveys on the topic Access to Justice in Kenya. These reports in their recommendations conclude that the actors in the justice

¹⁰ Paul Ngotho, 'Challenges Facing Arbitrators in Africa'. East Africa International Arbitration Conference Nairobi, page 8. The writer notes that arbitrators in Europe have 100-500 arbitrations under their belt each while their African counterparts with 10-20 are considered gurus.

¹¹ J K Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR', International Journal of Humanities and Social Sciences. 2011 Vol 1 No 6 June page 219

¹² Aisha Onsando, Is Arbitration of Disputes Better than Litigation? and Benson Wambugu, Arbitration Cuts on Backlog in Courts. Business journal, 23rd June, 2008 page 2 Nairobi. visited on 9th April, 2015

sector need to find other alternatives different from the court justice system to settle disputes.¹³ Among the main recommendations that have been made towards finding solutions leading to enhancing access to justice is the creation of ADR Mechanisms, Traditional Justice Systems and through the local administration especially Area Chiefs, see extract below.¹⁴

Many Kenyans pursue their grievances and conflicts through alternative justice systems. They include traditional systems, peace or reconciliation forums, Islamic courts and interventions of the local chiefs. The latter are part of the provincial administration and they are mandated to maintain law and order in their communities. They employ statutory as well as customary or informal conflict resolution methods to resolve conflicts. Kenyan law does not formally recognize the role played by non-state justice systems. In most of the rural parts of Kenya, justice is sought through the use of non-state justice systems such as a council of elders or extended family members and religious institutions. Cases which are most commonly brought to these institutions include matters to do with land disputes, livestock disputes, marital and domestic matters as well as domestic violence. Some crimes such as assault and sexual violence are also referred to the elders for resolution. The legal system acknowledges only Kadhi courts as the only religious courts in Kenya. Other examples of non-state justice systems include: Initiatives such as the 'peace elders initiative' in Laikipia district, which are working to make dispute resolution processes more inclusive, by bringing in youth and women as 'elders';⁶³⁹ and Chiefs and assistant chiefs who are appointed by government as local administrators. They take on a significant role in settling disputes in areas where access to police and courts is restricted. They preside over, and record proceedings of, cases in which elders chosen by the disputing parties make the final decision. Chiefs and their assistants

¹³Patricia KameriMbote and MigaiAkech, *Kenya Justice Sector and the Rule of Law. A review by AfriMAP and the Open Society Initiative for Eastern Africa* (March 2011) Page 174 – 176.

¹⁴ Ibid note 13 at page 173.

also hold positions of authority in their clans, sometimes on the basis of popular elections.

..... These non-state and traditional judicial systems apply some of the principles and guidelines on the right to a fair trial and legal assistance such as:

Generally, there is no effort to formalize these courts from the central government. As a result, there is no regulation to ensure that the proceedings before these courts conform to international law and constitutional standards of due process.

With the above extract it can be confirmed that there is need to facilitate ways to enhance access to justice irrespective of the forum but with the approval of the parties to the dispute.

1.2 PROBLEM STATEMENT

The purpose of this study is to identify the challenges that face litigants (including potential litigants) and legal practitioners seeking access to arbitration in the three Kenyan commercial towns; Nairobi, Nakuru and Kericho since they can serve as a good representative sample of other cities and towns. There has been a steady increment in the number of cases being filed thus increasing the number of days to have a matter heard in court which negatively affects citizens' access to justice.¹⁵ Among the notable measures of a civilized society is the manner in which the society solves its disputes and thus a slow dispute settlement system may lead to a conflict. This problem is related to Sander speech in 1976 which outlined the challenges of future litigation.¹⁶ He discussed that the number of cases will increase to millions and thus require thousands of judges, thousands of court staff and thousands of law report volumes. Nairobi,

¹⁵ Supra note 11 and 12 above and

The Judiciary, State of the Judiciary and the Administration of Justice, Annual Report 2012 – 2013. At part one www.judiciary.go.ke this report shows that there has been an increase in the cases filed at all levels in the Kenyan courts. At page 27 the reports notes “the most visible quantitative indicator of service delivery of justice is the numerical turnover of cases”

¹⁶ Frank Sander, ‘Varieties of Dispute Processing, The Pound Conference: Perspectives on Justice in the Future’ (1979) A. Levin & R. Wheeler eds, West. Page 65

Nakuru and Kericho are at this stage. These judicial Stations are currently receiving thousands of cases being filed annually.¹⁷ More court stations are also being opened in the country.¹⁸ The law has tried to sieve these many cases by including Order 11 in the Civil Procedure Rules.¹⁹ Order 11 has been framed as a route towards early settlement before the case hearing starts. Order 11 has had the effect of bringing the face of arbitration to courts through the pre-trial compliance and negotiations that help explore settlement.²⁰ In this paper the research is based on how to bring closer arbitration forums to the people who have predominantly been filing these cases. There is also an evaluation on how successful order 46 of the Civil Procedure Rules has been in the dispensation of justice in Kenya.

The problems that we are researching on in this paper can be discussed as:

Can we expeditiously settle our disputes preferably via arbitration? To what extent can access to arbitration be widened to accommodate as much as the court justice system? Why do we still continue to allow ourselves to spend years in the courts solving disputes while it would take a much shorter time if we chose to solve that dispute (via a private judge) in an arbitration forum?

The overriding objective in our court system is justice.²¹ If justice can be achieved via arbitration, then it would be ideal for the players in the legal sector to see what they can do to provide a faster dispute resolution to Kenyans. In concluding the problem question evaluation, the extract below lays bare the issues that are being experienced in our sample areas of Nairobi, Nakuru and Kericho.

“There seems to be little doubt that we are increasingly making greater and greater demands on the court to resolve disputes that used to be handled by other institutions of the society

¹⁷ Supra note 15 above pages 28 – 40.

¹⁸ The Kenya Gazette Vol. CXVI – No. 89 of (28th July, 2014) where the Chief Justice established the Naivasha, Migori, Marsabit, Nanyuki and other High Court Stations

¹⁹ Ibid. note 4 above

²⁰ See note 29 the USA comparison as discussed by KyaloMbobu.

²¹ See section 1A and 1B of the Civil Procedure Act Cap 21 and Sec 3 of the Appellate Jurisdiction Act.

Not only has there been a waning of traditional dispute resolution mechanisms, but with the complexity of modern society, many new potential sources of controversy have emerged as a result of the immense growth of government at all levels, and the rising expectations that have been created.

Quite obviously, the courts cannot continue to respond effectively to these accelerating demands. It becomes essential therefore to examine other alternatives',²²

The research problem of this paper is to ensure that an identification of what hinders the use of arbitration in dispute resolution in the commercial city and towns of Nairobi, Nakuru and Kericho. What are the issues that make people not pursue the available arbitration options? Key focus is if through this research there can be an identification of ways to opening up arbitration and thereafter enhance access to justice.

1.3 OBJECTIVES OF THE STUDY

This is a legal research premised on the fact that no field data has been collected to determine the challenges faced by those intending to use arbitration. The driving factor in this research is that no one can accurately say why Kenyans prefer court justice system to arbitration. However from the initial writings available there has been minimal use of arbitration.²³

This study is underpinned on the theoretical framework of Sociological Legal School.²⁴ The main issue is to address a problem in a sample society (Nairobi, Nakuru and Kericho) with a view of solving it with the available legal institutions for human development. In this Sociological school study there is the use of empirical research tools to identify how the society

²² Ibid, note 16 above at page 68.

²³ See the literature review

²⁴ See Pound, Roscoe. "Scope and Purpose of Sociological Jurisprudence." Harvard Law Review 24 (1910): 591 and Wilfrid E. Rumble, Jr., "Legal Realism, Sociological Jurisprudence and Mr. Justice Holmes," Journal of the History of Ideas (1965) 264 pp. 547-566 available at www.jstor.org

Also see page 36 – 38 the Theoretical Framework

can develop the dispute settlement systems. The focus is working on proposing ways of alleviating the challenges in the practice of arbitration thus enhancing its access. The proposed ways of alleviating the challenges will be helpful towards access to justice within societies in Kenya and specifically Nairobi, Nakuru and Kericho.

The general objective shall be to determine; what are the reasons that hinder access to arbitration in dispute settlement? If we open up arbitration to more people, shall we have developed access to justice in Kenya? How can this study eliminate the initial hurdles that a potential party to arbitration may encounter? Further this research shall gather information from Nairobi, Nakuru and Kericho as the sample sites. The data collected will be analyzed critically with a view to highlighting the identified challenges which hinder access in the sample sites as a representative of the whole country.

1.3.1 Specific Objectives;

1. To examine the challenges that exist in the access and practice of arbitration in Kenya and specifically at Nairobi, Nakuru and Kericho.²⁵
2. To identify what needs to be done to eliminate these challenges and enhance access to arbitration services in Kenya?

The research also reviews the developments and gains in the practice of arbitration in Kenya. What have been the developments in the post-colonial independent Kenya and the present achievements from the litigants and practitioners perspective? Some research in this field has been done by other organizations.²⁶ Via the findings in this research it can be seen that what has been covered in the field of access to justice via arbitration ought to have been greater and there is big room for improvement especially since Kenya is celebrating fifty years since independence and

²⁵ Refer to appendix 4; questionnaire on what information was sought from the interviewees.

²⁶ See the website of The Judiciary Kenya, International Commission of Jurists, The Open Society for East Africa, Kenya Human Rights Commission, The Kenya Law Reform Commission and The Kenya Dispute Resolution Centre (DRC) all discussed in the literature review.

practice of the rule of law.²⁷ The specific example is the link between the data available showing increased number of cases and longer periods of resolving them affecting the delivery of justice?²⁸ Finally very little empirical data has been collected linking arbitration *vis a vis* access to justice.

1.4 RESEARCH QUESTIONS

This study primarily focuses on identifying challenges facing the practice of arbitration.

1. What challenges are faced by those intending to settle a dispute via arbitration at Nairobi, Nakuru and Kericho?
2. What limits access to arbitration in Kenya?
3. What should be done to improve access to arbitration?

If the answer to the three questions are obtained in this paper then the impediments that hinder human development in the area of access to justice and the rule of law in Nairobi, Nakuru and Kericho would be significantly eliminated and higher levels of justice would emerge in Kenya.

1.5 HYPOTHESES

Once arbitration has been promoted and becomes widely used, there will be a tremendous access to justice in Kenya increasing the pace of dispute resolution. This can also be suggested that if the challenges to arbitration (are identified) and reduced justice will be enhanced in Kenya.

²⁷ Kenya has had arbitration laws prior to the independence in 1963. However the writer seeks to prove that the citizens have not enjoyed the full benefits of arbitration.

²⁸The Judiciary Kenya, *State of the Judiciary Report, 2012 - 2013. The Second Annual State of the Judiciary and Administration of Justice Report* (2015). www.judiciary.go.ke. This is an informative report on the delivery of justice in Kenya. Of specific importance is chapter two which show the figures of the cases filed and the courts where the cases were filed. It also points out the developments that have been noted in the administration of justice eg the pace of delivery of judgments and the concluded cases and within what period.

Alternatively, when there is a decrease in the use of arbitration injustice will be experienced in the society. Injustice will also be experienced if the challenges to arbitration continue to increase and more time is taken to resolve disputes.

Access to justice is not only by the litigating citizens of Kenya but also by the foreigners, investors and the business community.²⁹ Use of arbitration and enforcement of arbitration awards is a factor that foreign nationals and companies investing in any nation consider. If the settlement of disputes is promoted in Kenya, foreign direct investment may increase tremendously because the foreigners shall have confidence in the justice system in Kenya.³⁰ Access to arbitration and dispute settlement will also help in the achievement of democracy and governance.

This research will examine the following hypotheses and make a finding on:

1. If there a correlation between enhanced use of arbitration and access to justice in Kenya?
2. If an enhanced use of arbitration will facilitate access to justice in Kenya.
3. Litigants fail to pursue arbitration because they have not been exposed to arbitration by the justice sector players (example; advocates, judges and arbitrators).
4. Challenges that hinder access to pursue arbitration by litigants and advocates in Nairobi, Nakuru and Kericho, can their elimination enhance access to justice?

1.6 LITERATURE REVIEW

Both Primary and Secondary data are used in this study. An analysis and comparison of prior related studies done in this area has been conducted. Journals and scholarly articles have been written on the ways arbitration is conducted, how it is practiced world over, informative books for practitioners and law students which have also been evaluated. Conference papers presented on how to sharpen individual tools on arbitration have been of significant help since they have a practical experience and effect to the reader and colleagues. However very little exploratory

²⁹ See the paper Eric Opiyo, Examining the Viability of a Regional East African Arbitral Institution. 2012. <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/8391>. See the literature review.

³⁰ A perusal of our reported cases indicated that new foreign companies in Kenya are settling their disputes by filing suits in Kenya. This indicates a level of confidence and increase in investments by foreign companies.

studies and research have been done to identify and pinpoint what challenges(probable) parties to arbitration may encounter and ultimately swaying them to pursue litigation.

In the analysis of the available literature in this field within Kenya there is an initial finding that most of the writing available is aimed at promoting the various ADR branches; that is mediation, arbitration, negotiation and conciliation including med-arb. Very little studies have been done specifically on identifying challenges to arbitration with the specific focus on the intended parties. The initial literature review makes a finding that Kenya is at the verge of take-off in the platform of international arbitration and thus needs to create an enabling environment to facilitate the taking advantage arbitration opportunities available.³¹ Earlier writings in the immediate post independent Kenya are also available detailing how the traditional societies regarded arbitration.³² It is worth noting that the first part of the literature review contains the writings of some of the respected minds in the practice of law in Kenya and in the arbitration circles. This will make an inference that their contribution writings have a connotation towards the experiences they have encountered during the practice and teaching of arbitration in Kenya.

Among the recent prolific writers in the field of arbitration in Kenya is Kariuki Muigua.³³ Muigua's writings are focused on the promotion of the use Alternative Dispute Resolution and with a positive bias towards arbitration in Kenya.³⁴ He writes with a bigger picture on Alternative Dispute Resolution but also examines its various branches of; arbitration, mediation, conciliation and negotiation separately. He argues that the use of other forms of dispute resolution have existed for long and they have proved to be flexible, expeditious, they foster relations and are cost effective and thus facilitate access to justice by a larger part of the

³¹ Note the recent enactment of the Nairobi Centre for International Arbitration Act, No. 23 of 2013

³² Ojwang J B "Rural Dispute Settlement in Kenya" (1975) Zambia Law Journal. The article evaluates the interactions in rural Kenya processes of law and dispute settlement: Introductory - Conflict settlement in the traditional period - The colonial period: new developments in dispute settlement - Rural dispute settlement in independent Kenya traditional and state institutions.

³³ Chair, Chartered Institute of Arbitrators Kenya and lecturer, Faculty of Law and CASELAP University of Nairobi. See the website of his law firm and articles, <http://www.kmco.co.ke/index.php/publications>. Accessed severally between September 2014 and August 2015.

³⁴ Kariuki Muigua, 'Heralding a New Dawn: Achieving Justice Through Alternative Dispute Resolution Mechanisms in Kenya Journal of Alternative Dispute Resolution' (2013) 1 ISBN 978-9966-046-02-4 by page 43.

population. There is an observation that since courts can only deal with a fraction of all disputes; different fora ought to be created to avoid burdening the courts with all manner of disputes. He suggests that other actors in the field of dispute resolution (church and family) have reduced their outreach to solve disputes thus leaving the courts to settle all personal differences and anxieties in the society.

Muigua has also examined the recognition of Alternative Dispute Resolution in the Kenyan Constitution.³⁵ This elevation has led to practice of various forms of dispute resolution within the sole end of ensuring that comprehensive justice is achieved by the populace effectively. For the Constitutional right of access to justice to be achieved, the existence of the various facets of justice have to be included, that is; expedition, proportionality, equality of opportunity, fairness of process, party autonomy, cost effectiveness, party satisfaction and effectiveness of remedies.

As the new Constitution strives to give access to justice, it has also provided for the practice of various cultural beliefs of our communities within a legal framework to the extent that they remain within the Constitutional parameters.³⁶ Our courts can now without much persuasion adopt a decision made by another forum that followed the principles of justice in reaching its decision.

Kariuki Muigua observes that there is also a creation of other arbitration forums within the current Kenyan legal framework.³⁷ He discusses that courts can expedite justice in labour forums if parties in that labour disputes can use the other forums provided for in the labour statutes as underpinned to the Constitution.

The point of departure from, Muigua's writing is the fact that he has discussed the use of ADR collectively combining the efficacy of arbitration together with other ADR mechanisms of mediation, conciliation and negotiation. This paper delves deeper into the challenges of

³⁵Supra, The Introduction at page 1

³⁶Supra. Note 24 above

³⁷Kariuki Muigua, 'Overview of Arbitration and Mediation in Kenya', (A paper submitted at a Stakeholder's forum on Establishment of Alternative Dispute Resolution (ADR) Mechanism for Labour Relations in Kenya Kenyatta International Conference Center, Nairobi (4th – 6th May, 2011)

effectiveness in one branch of ADR (arbitration). The data collected will assert if Arbitration has been used to help access justice in Kenya and specifically Nairobi and Nakuru counties. Further Kariuki Muigua has mainly focused on the theoretical and practice challenges of arbitration without empirical data. Another departure from Muigua's observations of the advantages of arbitration is that this paper will point out the specific areas in the pre-arbitration stage that need to be re-examined to encourage parties to use arbitration thus enhance justice from the intended parties perspective.³⁸

Another writer in the field of arbitration is Paul Ngotho.³⁹ His uniqueness starts from the fact that he is not lawyer in a field dominated by lawyers. Further unlike most of the writers sampled in the literature on arbitration his writings are based on experiences and facts gathered during the time he has been practicing arbitration.

Paul Ngotho has written encouraging non-lawyers to join the field of arbitration. This will lead to better and improved awards from the arbitrators with expertise in the relevant field.⁴⁰ Paul Ngotho in the paper "Challenges Facing Arbitrators in Africa" has detailed the problems that have been rarely highlighted in the practice of arbitration and very relevant in jurisdiction. Among the problems include the fact that there are few non-lawyers in the field of arbitration. He therefore notes that there is need to encourage and train non-lawyers in arbitration.⁴¹ He writes noting that non-lawyers in the field of arbitration are an endangered species.

In the same paper dealing with challenges in arbitration Paul Ngotho discusses an issue that is very pertinent in the society and within practice of arbitration but is normally discussed in low tones, "corruption". He calls it the elephant in the room. Paul Ngotho has detailed some notable arbitration proceedings which were tainted with corruption. There is need to curb corruption in

³⁸ See page on Research Methodology and chapter 3 that analyses it.

³⁹ <http://www.ngotho.co.ke>

⁴⁰ Paul Ngotho "Challenges Facing Arbitrators in Africa" East Africa International Arbitration Conference. Nairobi (July, 2014) Available at <http://www.ngotho.co.ke>

⁴¹ See the recommendations and conclusions on the need to train other professions to join the field of arbitration.

the practice of arbitration in Kenya and the world over. Measures need to be put in place to ensure that standards are maintained while leaving no room for the arbitration practitioners to practice corruption. The issue of corruption was also raised by two advocates that were sampled in the interview.⁴² These two advocates confirmed the writings of Paul Ngotho by pointing out this cancerous vice that is rocking the boat of arbitration.⁴³

The writings by Paul Ngotho are geared towards the development of ADR in general but he has a positive bias towards the promotion of arbitration in Kenya and Africa. He has written about what made him want to become an arbitrator. In his short piece on that reason he points out a scenario where he wanted to deliver justice when two people were in a dispute and they appointed him as an arbitrator.⁴⁴ He notes that arbitration should be widely practiced to deal with many other sectors example being property disputes, survey and petroleum. This is especially where the subject matter is of public importance and a delay can lead to the complication of the dispute further and further losses.⁴⁵ He advises that it would be ideal if parties considered out of court settlement process that are linked to ADR.

Further writings in the field of arbitration in Kenya are by KyaloMbobu.⁴⁶ He has written several papers in the field of ADR. The main reference paper here is in reference is the Court Annexed ADR.⁴⁷ KyaloMbobu discusses how efficient justice can be obtained by litigants out of the court justice systems once their cases are referred to any of the available branches of ADR. He observes how other jurisdictions' have created an impact towards achieving justice by providing an option for litigants to settle disputes via ADR.⁴⁸ KyaloMbobu observes that arbitration is the most used and developed among the branches of ADR in Kenya, however its widespread use has not been adequately felt towards the reduction of case backlog in the country. He thus discusses

⁴²See the recommendations and conclusions on the need to have quality control measures in the practice of arbitration.

⁴³ See the questionnaires referenced as Number A17 and A33

⁴⁴<http://www.ngotho.co.ke/assets/howibecameanarbitrator.pdf> accessed on 19th August, 2015

⁴⁵<http://www.ngotho.co.ke/assets/article.ngotho.adr.petroleumsector.oct2012.pdf> accessed on 19th August, 2015

⁴⁶A practicing lawyer, arbitrator and a lecture at the Faculty of Law University of Nairobi.

⁴⁷KyaloMbobu, 'Efficacy of Court Annexed ADR: Accessing Justice through ADR' ADR Journal (2013) Nairobi ISBN 978-9966-046-02-4

⁴⁸ Australia, USA, Lesotho and Rwanda,

how other countries have used ADR and the resultant effects on the society. He discusses how these countries have enacted laws that facilitate an early ADR exposure to the cases filed in court with the help of the Registrar of the court or judge.⁴⁹

However KyaloMbobu does not show the extent to which justice has been achieved by litigants using arbitration. He only acknowledges that there have been gains in the delivery of justice by the use of court annexed ADR. He also does not discuss the specific use of arbitration but deals with ADR in general. This paper shows why in Nairobi, Nakuru and Kericho parties to disputes have not been using arbitration in an almost similar magnitude to court litigation despite arbitration being provided for in the Kenyan laws and an existing platform being available.

The next analysis is short paper by Charles Kajimanga.⁵⁰ He has written on how to enhance access to justice via arbitration.⁵¹ He gives an example of the Zambian approach. Being a judge he starts by noting that case backlog has been a major hindrance towards access to justice.⁵² This is a phenomenon that exist world over and it leads to accelerated costs in the pursuit of justice. It is thus necessary to consider if the lack of access to ADR is also a challenge towards access to justice. The judge observes that if the ADR channels are developed they are cheaper, quicker and accessible compared to litigation.

The first impact he notes is that arbitration after it has been anchored in the law, it subsequently warmly received by both the bar and the bench. He acknowledges that this had led to a reduction of the backlog and more cases are also being referred to arbitration. He notes that among the main challenge towards embracing arbitration is the number of individuals whose faith in litigation is still cast on concrete. He indicates that it is necessary that all professions

⁴⁹ This has been confirmed and discussed in the conclusion and recommendation chapter by some findings from the magistrates who gave their replies. A respondent indicated that there is need to have the chief justice gazette practice rules towards the referral of cases for resolution via arbitration.

⁵⁰ A judge, arbitrator and the chairman of the Zambian Chartered Institute of arbitration.

⁵¹ Charles Kajimanga, 'Enhancing Access to justice through Alternative Dispute Resolution Mechanisms, The Zambian Experience' A paper presented at the at the Annual Regional Conference held at the Southern Sun, Mayfair Nairobi, Kenya on (25-26th July, 2013)

⁵² Supra footnote 14 pages 1 and 2.

endeavoursto promote ADR at all spheres. The judge advocates for the creation of awareness and on the available ADR advantages over litigation and how they contribute access to justice.

The main departure of the paper by Charles Kajimanga and this paper is that Kajimanga's paper gives an outline of Zambia while the current one will be based on findings from Nairobi, Nakuru and Kericho in Kenya (though the comparison is appreciated). The paper by Charles Kajimangaalso gives a combination of the benefits of using arbitration and mediation while this paper only deals with arbitration.

The next paper is a dissertation presented for the degree of Doctor of Law in the Faculty of Law at the University of Stellenbosch Edward NiiAdjaTorgbor.⁵³ This paper compares the practice of Arbitration in Kenya, Nigeria and Zimbabwe. These are among the leading jurisdictions in the practice of arbitration in Africa. Similarly they are the countries that have adopted through domestication, the UNCTRAL model law on arbitration. Since they have domesticated this model law, the arbitration that is practiced in these jurisdictions is within the international standards. The author is also a practicing arbitrator in Kenya.⁵⁴ This therefore confirms that he understands the problems faced by an arbitration practitioner or by the arbitral tribunal in Kenya. His works focuses on the on goings during the arbitration proceedings. The work seeks to identify and expunge the impediments and bad practices of arbitration. This will therefore increase efficiency in the arbitration procedure and culture.

In this work by Edward NiiAdjaTorgbor he has focused strictly on the happenings during the arbitration proceedings. This can be confirmed by his research questions and the development of his research questions.⁵⁵This is the point of departure with this work. Our current research work deals with the problems a party to an arbitration problem may encounter when contemplating to

⁵³ Edward NiiAdjaTorgbor, 'A Comparative Study of Law and Practice of Arbitration in Kenya, Nigeria and Zimbabwe, with Particular Reference to Current Problems in Kenya' (2014) Dissertation presented for the degree of Doctor of Law in the Faculty of Law at the University of Stellenbosch University. <http://scholar.sun.ac.za>

⁵⁴ See page iii titled summary and page 17 at the second paragraph of the work above.

⁵⁵ See page pages 16 and 17 of the work above.

pursue arbitration, during arbitration or during the execution of his award. This paper wants to identify and reduce all the incidental challenges to the arbitration process.

Edward NiiAdjaTorgbor has also delved into the issues of the cultural development in arbitration. He displays evidence that there existed similarities in the various African cultures that confirm that arbitration was practiced in the traditional times. Thereafter the similarities were enhanced after the adoption of the common law in most eastern and western Africa's jurisdictions. He notes that arbitration is practiced within the cultural setup and also within the statutory framework. He argues that there exists a lot of scholarly work to show that the adversarial type of litigation existed in the African cultural life. However the practice that existed was for purposes of harmony and mutual co-existence of a society. It also needed to have the wrongdoer make good the loss caused to the society and the complainant.

From the work of Edward NiiAdjaTorgbor it can be confirmed that he has done a good work in identifying the developments in arbitration and the challenges facing a practitioner and the tribunal. However our current work has a focus on the disputing party. How can the parties to the dispute be assured of a speedy trial?

The promotion of arbitration in our society along the commercial line has also been advocated in the Master in Laws thesis by Eric Opiyo he asks if it is time we established an East African arbitration institution.⁵⁶ This is due to the fact that there has been an upsurge in the number of commercial disputes at the many forums available in the region. Once created he envisions that commercial enterprises worldwide will end up preferring the East African region for their business endeavours leading to a direct capital investment and a promotion of our region because of the guaranteed access to justice. This hypothesis stresses that the development of arbitration (read dispute settlement) enhances the quality of life the citizens of a country live.⁵⁷ The main departure with this Master's thesis is that it was a desk work focusing on corporations settling

⁵⁶ Eric Opiyo, 'Examining the Viability of a Regional East African Arbitral Institution' Master of Laws Thesis University of Nairobi (2012) <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/8391>

⁵⁷ Supra note 3.

disputes while our current research is a field research focusing on the use of increasing arbitration to access justice.

Another Masters of Law thesis that seeks to promote the use of arbitration is the work by Daisy OwuorAjima. The thesis focuses on how to make Kenya a hub arbitration of international financial services disputes.⁵⁸ The writer has focused on financial institutions especially banks and the model that they have developed in the settlement of disputes. The write notes that to encourage the participation of the customers to resolve some of the banking disputes, the Kenya Bankers Association together with the Strathmore Law School has established an ADR center though in the first instance it will cover mediation.

Daisy OwuorAjima notes that banks have predominantly used litigation to settle their disputes. She notes that it is time for the consumers of the banking services to use ADR to settle disputes. She notes that for banks to uphold the aspect of confidentiality and avoid the loss of reputation it is necessary for the disputing parties in the financial dispute to result to arbitration.⁵⁹ Among the disputes that Daisy OwuorAjima recommends that can be settled via arbitration include transactional disputes, loans and credit cases and cases in court that involve nominal amounts and so the trial processes is lengthy and costly and of little benefit. She discusses that these cases lead to auctioneers and other third parties when parties use courts leading to endless or lengthy legal process that is unnecessary.

The convergence with this research is that Daisy OwuorAjima also collected field data from some bank staff on their opinion on litigation *vis a vis* arbitration. She found out that the banking staff mostly preferred arbitration since it reduced the reputational risk. Her results show that banks are willing to depart from litigation to arbitration. She notes that only twenty percent of the respondents prefer litigation to arbitration. This leads to the conclusion that ADR needs to be promoted by all arms of government.

⁵⁸ Daisy OwuorAjima, 'Making Kenya a Hub for Arbitration of International Financial Services Disputes' Master of Laws Thesis University of Nairobi(2014)<http://erepository.uonbi.ac.ke/handle/11295/75602?show=full>

⁵⁹ Ibid

The main point of departure with her study is that she only focused only on a segment of the current research site that is financial institutions and not the whole sector of the Kenyan economy and citizens.⁶⁰ Further her field sample was very small (few users of banking services) and the geographical site(s) of data collection are not revealed thus raising issues of reliability of the data collected.⁶¹ She indicated that the banks have also not recommended the use of ADR on matters that relate to crime since there are institutions that are statutory mandated to deal with crime issues.⁶² The aspect of using arbitration in criminal realm is developing in our country. The next case illustrates the approach that the Kenyan courts have taken in relation to the use of ADR in criminal procedure.

The case of **Republic Vs Mohamed Abdow Mohamed** is a recent development in Kenya on the use of arbitration.⁶³ This case confirmed that indeed ADR can be used in the settlement of criminal disputes in the country. This was a case where the accused was charged with murder. Before the hearing of the case started the accused compensated the deceased family and the deceased family confirmed the compensation before court. The deceased family then indicated that they had nothing more to pursue (within the criminal justice trial) against the accused.

When the matter was coming up for hearing the counsel watching brief for the family of the deceased informed court that he had a consent to record. The consent was to the extent that a settlement between the families of the accused and deceased had agreed to withdraw the criminal proceedings after compensation. The office of the Director of Prosecutions did not oppose the application. He convinced the court that the settlement reached was just to the parties.

The most notable is the fact that the deceased family was no longer willing to testify against the accused. This led to the Director of Criminal Prosecution withdrawing the case.

The following is an extract from the case:

⁶⁰ See page 11 on her research methodology which is very brief

⁶¹ See page 58 second paragraph which discusses the sample population

⁶² See page 25 last paragraph

⁶³ Nairobi HC CR Case No 86 OF 2011

“Finally, Counsel submitted that since the time of arrest of the accused, the prosecution had had great difficulty in securing the attendance of witnesses as the said witnesses were not only no longer interested in the prosecution but were actually eager to see the matter marked settled.....

*JUDGE: I have considered the application. Under **Article 157** of the Constitution the Director of Public Prosecution is mandated to exercise state powers of prosecution and in that exercise may discontinue at any stage criminal proceedings against any person. In the unique circumstances of the present application, I am satisfied that the ends of justice will be met by allowing rather than disallowing the application. Consequently, I discharge the accused.*

It can be noted that other than the settlement which was done between the accused and the aggrieved parties, even if the prosecution and the judge would have wanted to proceed with the case there would have been no witness to testify against the accused since they had settled.

The only purpose of proceeding with the case would have been to enhance justice; however justice in this case was done otherwise through settlement. Following the precedent set in this case, it is necessary for magistrates to start using arbitration (more so ADR) in the settlement of misdemeanors against petty offences. I would foresee a scenario where offences of receiving money by false pretenses and petty theft should be arbitrated to ensure the property lost is restituted and the creation of harmony in the society.

1.6.1 ACCESS TO JUSTICE; CHALLENGES THAT LIMIT ACCESS TO JUSTICE;

This paper acknowledges that the discourse on access to justice and the opening up of arbitration are related discourses which can be pursued in a manner that complement each other. However in the course of the work efforts will be to stick to the narrow issues in this topic relevant to

arbitration and justice since many have written on issues access to justice. The challenges to arbitration may also be termed as what hinders access to justice.

This paper will least be concerned with features and progress towards access to justice and more concerned with the challenges that hinder access to arbitration (however they may be related with the earlier being so broad). The difference is minimal but it is necessary that this paper is confined to the challenges within the sphere of access of arbitration. A few papers have been selected (from the topic of Access to Justice) but which may have almost similar approaches in arbitration.

The Kenya judiciary has conducted studies and formed several working committees to pursue ways that it can enhance access to justice by; faster dispute settlement, making courts accessible to litigants, measures to enhance integrity for effective delivery of justice and (of our concern) incorporating the use alternative dispute resolution mechanisms in the court justice system.

The first report being evaluated is the State of the Judiciary and the Administration of Justice annual report for year 2012-2013.⁶⁴ In this second Annual report State of the Judiciary and Administration of Justice Report it discusses the case load that has been increasing. The State of the Judiciary Report, 2012/2013 shows that the Kenyan citizens are filing more and more cases.⁶⁵ As a result the judiciary is employing more resources to help in the settlement of the cases. The report discusses that the resources being employed will be used to settle the cases. Along these measures being put this report suggests that the resources being employed should be towards the arena of increasing the use of arbitration.

The following is an analysis of the relevant extracts by the report of the Sub-Committee of Ethics and Governance of the Judiciary Kenya made in November, 2005.⁶⁶ The committee observed

⁶⁴ The Judiciary, *State of the Judiciary and the Administration of Justice, Annual Report 2012 – 2013*. (2015) www.judiciary.go.ke

⁶⁵ See part one of the report

⁶⁶ The Judiciary Kenya, *Report of the Sub-Committee of Ethics and Governance of the Judiciary Kenya*. (November, 2005) www.kenyalaw.org (the Justice Onyango Otieno committee)

that there is growing congestion in courts. The congestion is partially due to the non-availability of other alternative forms of dispute settlement. The committee in its effort to ensure efficiency and decongest the court made a recommendation that alternative dispute resolution mechanisms should be incorporated into the court system by appropriate legislation. In the final recommendations of the committee the committee came up with some strategies that should be implemented together with the strategic plan 2005 – 2008.⁶⁷ Among these strategies was to introduce ADR into the Kenyan judicial system. However there have not been tangible steps made towards the adoption of ADR in our court justice system. The decision is still left to the individual magistrate to decide if he will settle the matter via ADR or proceed to hear the case.

The Kenya judiciary did commission another report that was geared towards increasing performance management in courts in Kenya.⁶⁸ The report was prepared for purposes of increasing performance in the judiciary in a way that it can be measured and appreciated by citizens. This was also in queue to the fact that the judiciary has been implementing the work system of performance contracts spearheaded by the executive which helps measure the levels of service delivery to the public. In the report it was noted that; Development and implementation of the Information, Education and Communication (IEC) strategy on use of ADR should be prioritized as enjoined by Article 159 (2) (c) of the constitution which provides that alternative forms of Dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.⁶⁹

The report towards the ends makes a recommendation on access to justice. It provides that there needs to be developed and ADR policy/strategy for courts to use. The only point of departure with this work is that the judiciary has not substantiated their recommendations and findings based on empirical data. They have simply made the recommendation based on the constitutional dictate of article 159 (2) (c) and for purposes of providing the citizens with another avenue to settle disputes though this finding is not supported with any imperative finding.

⁶⁷ Supra note 45 above at page 182.

⁶⁸The Judiciary Kenya, *Institutionalizing Performance Management and Measurement in the Judiciary. Report by the Performance management and Measurement Steering Committee*(April 2015) www.judiciary.go.ke

⁶⁹ Page 29 and 85 of the report in the above note

The ICJ Kenyan Chapter that has conducted almost a similar research.⁷⁰ In a study conducted by the ICJ Kenya Chapter it lays emphasis on the delivery of justice via the informal justice sector.⁷¹ These include ADR and the traditional justice systems (TJS). The research notes that ADR and TJS providers have been successful in the delivery of justice as they pursue the use of ADR, however they note that there exists some areas that need to be relooked at to facilitate access to justice particularly by the under privileged in the society. ICJ recognizes because there exists no one system or set of regulation to the record performance within the various ADR and TJS the gains made in this sector are not noticed. The sector is overlooked in the regulation unless when the various (private) institutions set up their various charters carry out their agendas.

The research by ICJ notices that there is a continued growth of the use of ADR worldwide and this has helped in the clearing of the backlog in many jurisdictions. They notice the fact that parties own the conduct of the ADR system proceedings makes it preferable unlike the court justice system which parties find time consuming and they cannot comprehend the complex procedure. The research notices that the TJS have been in use by communities worldwide but the gains have rarely been documented and thus it is not possible to pinpoint how the TJS has been beneficially effective. The other reason why the benefits cannot be enumerated is because no code or system of regulation exists which keeps records of how societies have been using the TJS systems.

The paper notes that there has been minimal support by government in the promotion of ADR and TJS.⁷² Little direct funding and other support are evident. Support in this area in the form of human resource is wanting. The paper notes that this may be a carryover from the colonial era mentality where the social practices of the natives were observed as uncouth and uncivilized. The government should in the realignment of the provincial administration to conform to the new

⁷⁰ The Kenyan section of the International Commission of Jurists (ICJ) Kenya is a non-governmental. Its membership is drawn from the bar as well as the bench and it's led by a council of 7 members.

⁷¹ International Commission Of Jurists (ICJ) Kenya, *Report. Interface between Formal and Informal Justice Systems in Kenya* (June 2011)

⁷² Supra note 35, page 32

Constitution should look into ways of promoting TJS by appointing (or having them elected by the public) elders who will dispense with TJS within various localities.⁷³

The main congruence of the paper by ICJ and this paper is that it identifies that there is need to promote the various ADR institutions. This is mainly within a statutory framework for the good of the ADR principles. This is unlike the current ways where the promotion of ADR institutions is the norm leading to small disjointed institutional frameworks and weaker outreach to the public on arbitration issues.⁷⁴ The major variance with the other discussed papers above is that there is no identification of the arbitration challenges or how arbitration can be promoted independently (and not within the ADR framework) and achieve justice. This paper has delved more into how we can promote the TJS.

This paper is faulted by the fact that ICJ admits that it was carried out the research by reviewing the available literature.⁷⁵ It would have been very ideal if ICJ conducted a small sample survey instead of doing desk research in such a topic. It looks uncorrelated and not extensively analyzed to indicate that TJS are not reported, they are conducted via customs and unwritten laws, informal and indigenous but you conduct a desk study on the same with that hindsight (which little information and record exists). This thus casts doubt to the findings, conclusions and recommendations that have been made in this study.

In Kenya the Kenya Dispute Resolution Centre (DRC) has made tremendous steps in ensuring that disputes are settled via ADR.⁷⁶ The organization has tried to identify the needs of dispute settlement via ADR at the various levels in the society. A paper by its executive director best illustrates what the common citizens' want as they access justice. Emphasis mine;

⁷³ This is in accordance with Schedule 6 section 17, we can also align provincial administration to dispense justice vide the principles of Article 159 (2) (c) and 48 of the Constitution.

⁷⁴ Leonard Obura Aloo, 'Consolidation of Commercial Arbitration: Institutional and Legislative Responses' (2015) 1 Alternative Dispute Resolution Journal ISBN 978-9966-046-04-8. It discusses the possibilities joining commercial arbitration towards a legal efficacy.

⁷⁵ Supra note 40 above at page 7.

⁷⁶ www.disputeresolutionkenya.org website visited on 22nd March, 2015 at 1045hrs.

*‘The security offered by ADR to small traders and communities makes a real difference to their livelihoods. Both arbitration and litigation to them are unintelligible, beyond their means and beyond their control. Interestingly, both the 2000 Report on the Reform of Kenya's Commercial Justice Sector and the 2000 Study on Tanzania's Enabling Environment for Business addressed this specific need as critical to alleviating poverty and improving access to justice.’*⁷⁷

This extract captures the main focuses and elements of this work but our area of concentration is Nairobi, Nakuru and Kericho counties. However there is need to address the issues with specific reference to arbitration. The DRC main work focuses on mediation with little on arbitration. Their work on arbitration is only via reference from the other organizations that deal with arbitration and more so when cases are referred to them.⁷⁸ The point of convergence is the desire to amplify article 159 (2) (c) of our Constitution as it relates to enhancing access to justice.

1.7 THEORETICAL FRAMEWORK

The study is premised on the desire to ameliorate a social ill that is the delay experienced by those seeking justice within Kenyan courts. How can this research ensure that arbitration is used to secure expedited access to justice for all? The theoretical framework is the Sociological School of thought as expounded by Nathan Roscoe Pound.⁷⁹ Other philosophers include Marx Webber, Eugene Von Einrich, Leon Duguit among others.

⁷⁷Brenda Brainch, *The Climate of Arbitration and ADR in Kenya* Paper given to the Colloquium on Arbitration and ADR in African States, King's College London, (June 2003)

Speaker: the paper has also been published in the *Commonwealth Lawyer* 2003, *Indian ICFAI Journal of ADR, Corporate Africa, CEDR (Centre for Effective Dispute Resolution) London website*

⁷⁸Note above on page 2 and 3.

⁷⁹Roscoe Pound. “The Scope and Purpose of Sociological Jurisprudence” (1911) Vol 5, Harvard law review

In this theory they advance a fact that the society existed and thereafter the law was developed to provide for a better working in the society. The law has to develop and keep on advancing with the pace at which the society is moving.

Unlike The Natural Law School and The Positivist School of law which ascribe to superior beings, the Sociological school purports to live within the society and grow with it. Among the failures of the Natural Law School and The Positivist School of law is that they tend to design formulas, to express ideas of right and justice as a means to promote right and justice. There is danger when the society forgets those formulas and ideas and the formulas then exist in abstract for their own sake but not for good of the society.⁸⁰This mechanical approach of the Natural Law School and The Positivist School of law leads to a “code of regulations” being passed over from generation to generation but this code cannot remodel itself to fit into the unique developments of the changing society.

The Sociological Jurisprudence uses empirical research as a tool to evaluate the society. It has made efforts to carry along solutions to human experiences and behavior unlike the classical schools of thought that tended to create a mechanical fix for solutions from an abstract.⁸¹The sociological school foresees the creation of legal institutions which will develop the application of the law. These institutions are meant to shape the law to control the new standards in the society. An example, the solving of disputes via arbitration can by itself be an institution to deliver justice to a society.

This study shall also seek to develop an easier way (through arbitration) for access to justice and thus solve a social menace. In this study there is a low criticism on arbitration laws and rules that have been in existence and how they should be implemented. The main focus is the notion that the institution of arbitration should serve the society and regulate social justice. Once arbitration is entrenched in the society human conduct shall be regulated and the ideals of expedited dispute solving, equality before the law, right to a fair hearing, freedom to pursue the human

⁸⁰ See note above (Roscoe Pound) page 608

⁸¹Omony John Paul, *Key Issues in Jurisprudence; An In-Depth Discourse on Jurisprudence Problem* (1st Edition law Africa 2013). Pages 85-89

capabilities without fear, social and economic rights shall cease to be a mile away and the institution of arbitration shall enforce high standards of civil liberties.⁸²

1.8 RESEARCH METHODOLOGY

The main research instrument was the questionnaire.⁸³ The questionnaire was a blend of restricted and unrestricted format. Most of the questions were restricted so that the information gathered can be properly relayed in graphical and tabular format. The choice of the questionnaire was identified since it would be easy to reach the scattered identified sample population within the sample sites. In conducting the research time was also of essence and limited thus interviews were conducted. The researcher picked the respondents using stratified sampling. A sampling interval was established by dividing the population and the sample in the clusters of litigants, advocates/practitioners of law and magistrates/ judges. The population sample in every category was a comprehensive representation of the relevant group.⁸⁴

In order to get an experience on what challenges exist before the formation of an arbitration tribunal sitting it was necessary to peruse a wide array of the arbitration awards, proceedings and other research reports that have been conducted in this area by other organizations.⁸⁵ This gave a true reflection of the observations, frustrations from the parties and practitioners on the overall environment relating to arbitration access.

1.8.1 Research Sites and Fields

The main study sample population was in the following categories; litigants, practicing advocates, magistrates/judges/arbitrators. Data in this research was collected using two ways; questionnaires and limited interviews. As the author, time was dedicated to collecting the data single handedly so that I can have a first-hand account of the issues that arose while conducting interviews thus understanding the problem statement in depth. The interviews were done as the

⁸² These listed civil liberties are the enviable aspirations of any just society.

⁸³ See appendix 2 and 3.

⁸⁴ Mugenda and Mugenda, *Research Methods – Quantitative & Qualitative Approaches*, (Acts Press Nairobi 2003)

⁸⁵ The proceedings shall include pleadings, proceedings notes and the arbitral award.

respondents were filling the questionnaires and encouraging to hear their position. The questionnaires were circulated within the court premises to the litigants. The judges and magistrates were requested to fill the questionnaires from their respective chambers. The advocates were pursued to their chambers and within the court premises.

1.8.2 Population Sample

The questionnaires were circulated within a Stratified sample population. Stratified sampling is a method where the researcher divides the population sample into cluster groups known as strata. The sample population is then selected randomly within each stratum but proportionally from the other strata.

The sample population has been divided in four stratum. These are litigants, advocates/practitioners of law, judicial officers and magistrates/ judges. The litigants mainly targeted were the business community since they are likely to have had commercial disputes. The advocates/practitioners of law are the ones carrying on their practice in Nairobi, Nakuru and Kericho. However in Nairobi more advocates were sampled than in Nakuru and Kericho since Nairobi is a more robust commercial center in Kenya compared with the other Kenya towns.

1.8.3 Validity and reliability of the data collected

The data collected should be the same if collected again and again using the same instrument.⁸⁶ This enhances the consistency and reliability of the study findings. However a research may yield valid data which may not be reliable.

The research ensured the consistency of the data collected by identifying the correct number of the sample population within each stratum. Each sample population stratum shared the same attributes with respect to exposure to arbitration and their desired levels of enhanced access to justice.

⁸⁶ [hls.harvard.edu/library/empirical-research services/collecting-data/](https://hls.harvard.edu/library/empirical-research-services/collecting-data/) accessed on 12th September, 2015

Description of Data Collection Instruments according to Mugenda and Mugenda questionnaires give a detailed deduction for answers to complex problems.⁸⁷ Questionnaires are a common method of data collection in deduction for a large population because of the relative ease and cost-effectiveness with which they are constructed and administered. Questionnaires give a relatively objective data, are most reliable and effective. For our study the questionnaire method of data collection was used as the main instrument of data collection from the sample group.

1.8.4 Data Analysis Procedure and Presentation

The data collected was both qualitative and quantitative. The qualitative data was graded and presented on tabular and/or graphical format since the answers to the questions can be relayed on a scale. This scale shall be indicative from the lowest integer to the highest indicator.⁸⁸ There is a reliance of the words very good, Good, Fair, Poor and Very poor where 1 represents the best and 5 is very poor or worse

The identification of an objective survey sample was crucial. The survey sample could not have been open to all and sundry but must be limited to only those who have an exposure of arbitration and/or knowledge in issues of access to justice. The use of quantitative and qualitative approaches for data analysis is dominant in the research. Quantitative data from the questionnaire was later coded and entered into the computer software for analysis and collation of responses using figures. The Microsoft Office Excel (version 2007) was used to provide descriptive analyses and production of frequency distribution and percentages. Tables are used to summarize data on the figures collected. The qualitative data generated from interview guide will be categorized as per the arbitration and access to justice principles involved in accordance with specific research objectives and reported in prose format immediately below the quantitative presentation. The qualitative data will be used to enhance the argument from the quantitative data collected and collated.

⁸⁷ Note above

⁸⁸ See page 1 of the questionnaire, The Key. There has been a developing trend and legal discourse in legal research known as Empirical Legal Research ELR. This field deals with the research that was predominantly used in the economics and social sciences but now being focused on pure law theorems. See the Journal for Empirical Legal studies launched in (2004) Cornell law School.

The study also used secondary sources of information. In specific on online research data bases (and various search engines), textbooks, journals, periodicals and conference papers/reports. Also analyzed were various legal instruments/statutes domestic, regional legal instruments and international treaties. Statutes from other jurisdictions have been examined for comparison purposes. The are jurisdictions that have an elaborate and well developed use of Arbitration; specifically the Hong Kong, Singapore and United Kingdom arbitration institutions.

1.9 LIMITATIONS

This research was field based and the identification of an objective sample population which was a key determinant of the outcome and quality of the research. If the resources were available the questionnaire would have been circulated to more towns in Kenya.⁸⁹ This has led to the confinement of the questionnaire within Nairobi, Nakuru and Kericho and thereafter use the results to extrapolate for the whole country.

All arbitrations are conducted in confidentiality.⁹⁰ Knowledge of this fact concerning the style of practice in arbitration may have hindered some respondents from giving objective responses in the questionnaire. Further and as a result most the problems that are encountered by parties to the arbitration process are dealt with without coming to the light.⁹¹

These challenges can only be obtained from the affected parties via interviews, questionnaires, personal experiences and a wide reading of what has been written in this field. In this view, as a researcher I took an elaborate personal initiative to hold in depth interviews so that I could elicit more within the identified sample population.

⁸⁹ The limited resources were financial, human resource and time.

⁹⁰ Kariuki Muigua, *Overview of Arbitration and Mediation in Kenya* Paper submitted at a Stakeholder's forum on Establishment of Alternative Dispute Resolution (ADR) Mechanism for Labour Relations in Kenya (Nairobi on 4th – 6th May, 2011) Page 3

⁹¹ Farooq Khan, *Alternative Dispute Resolution* A paper presented Chartered Institute of Arbitrators- Kenya Branch Advanced Arbitration Course, Nairobi 8-9 March 2007

I have been engaged in several arbitration hearings as a counsel and parallels can be drawn from several encounters.⁹² However as would be expected questionnaires do not yield the best results and thus interviews were a high value addition.

Time was also a crucial factor since the research had to be completed within a maximum period of one month to allow the writing of the remainder chapters. Resources were also limited since the research work was only carried out in three counties of Nairobi, Nakuru and Kericho.

1.10 CHAPTER BREAKDOWN

1.10.1 Chapter one;

This chapter contains an in depth examination of the current problems being encountered by litigants pursuing justice via the court justice system. We have examined the challenges encountered during the institution of arbitral proceedings and practice problems within the Kenyan legal framework as anchored in the Constitution promulgated in 2010. These challenges are evaluated *vis a vis* the delivery of justice to the society (Nairobi, Nakuru and Kericho) via arbitration. We have identified the various hypothetical challenges that face any person who anticipates to initiate arbitral proceedings.⁹³ What are the reasons why one will not prefer arbitration? What limits the access to arbitration within the study counties of Nairobi, Nakuru and Kericho? Access to arbitration is an enhancement of the access to justice,⁹⁴ why are we not facilitating the access to justice through arbitration? It is during the discussions in this chapter that we developed a questionnaire which focuses on the interviewees' experiences in the access and conduct of arbitration within our study counties.

We also examined the Kenyan arbitration framework from the Traditional dispute resolution mechanisms to the current statutory framework. How successful has traditional justice ways

⁹² The writer is a practicing advocate (State Counsel) at the Attorney Generals Chambers, Kenya.

⁹³ Paul Ngotho "Challenges Facing Arbitrators in Africa" East Africa International Arbitration Conference. Nairobi (July, 2014) Available at <http://www.ngotho.co.ke> the hypothetical challenges are discussed from a hypothetical and practice experience point by Paul Ngotho in this article

⁹⁴ *Supra*, note 23

been it been in Nairobi, Nakuru and Kericho as a sample of Kenya? To what extent can this study solve the limitations being faced in the promotion of arbitration in Kenya?

1.10.1.1 Literature Review:

This will be a sub topic in the introduction chapter of the main work. We have identified the gaps and differences that exist from the work so far done by the gurus in this field. The available literature shows that there is a gap in the identification of challenges that face arbitration practitioners, judges or magistrates intending to refer parties in any litigation for arbitration and the potential parties to arbitration. The prior studies done, research and reports written in this area indicate very little data collection on the identification of these challenges that limit arbitration. In specific, arbitration has only been championed in the area of construction and commercial disputes and very little in the area of family succession matters, maritime law land/boundary disputes and procurement. Not much of field work or empirical research has been done pursuing the co-relation between the challenges in access to arbitration and delivery of justice. Much of what has been written in this field are the advantages and disadvantages of arbitration from an analysis of theoretical desk work. At this point we have discussed the gaps that have not been addressed by the prior writers and where we feel we need to borrow from them and enlarge the scope. In this chapter this study has been distinguished with the studies so far done in this field especially the non availability of field data by the practitioners and litigants.

In the literature review we have also discussed the judiciary and other institutional reports that have been published. The judiciary and these other institutions have published a lot on the need to use arbitration. However the survey found out that the judges and magistrates still need more facilitation to be able to use ADR.

1.10.2 Chapter two

The chapter starts by providing the historical background of arbitration in Kenya. It analyzes the developments that have taken place after independence and discusses the various statutes underpinning the practice of arbitration in Kenya and the international statutes that have been adopted locally. This is an analysis of the practice in Kenya under the various disciplines of law;

employment, civil disputes and court annexed forums of arbitration. We have evaluated how Kenya has performed in creating an enabling environment for the practice of arbitration. We have also done some comparison with other jurisdictions within Africa. I will evaluate to what extent arbitration has been successful in Kenya and the challenging areas making it lag behind.

In this chapter we have elaborated the legal framework that supports arbitration in Kenya. All the statutes that may be used for a reference to arbitration have been compared and the extent to which they support arbitration.

1.10.3 Chapter three: Data Collection

This chapter is dedicated to being an analysis of the *modus operandi* the data collection methodology. Here we discuss the choice of the sample group and why that was the best sample group. The challenges in the identification of the sample group members. Data analysis models and the choice of questions in the questionnaire have been evaluated so that we can note the mode of the expected answers and how reliable the results are. We have also discussed the challenges that were encountered during the conduct of the survey.

It is proper to note that we have used a target group that has knowledge on arbitration that is lawyers, litigants, magistrates and other select members of the society. The survey population is not just any person but those from a selected population. The information shall also be represented noting that this is an empirical legal study. The presentation is on graphical charts and tables depending on the analysis being done.

1.10.4 Chapter four: Data Analysis

This chapter has an analysis of the responses collected challenges that limit access to arbitration have been identified from the returned questionnaires and interviews conducted. In this chapter we have picked the root of the problems from the interviewees' perspective and why these problems have not been tackled or eliminated by the current legal framework. We have also scrutinized the current practice and procedure of arbitration in our jurisdiction. At this point we

have also identified what has not been done in the promotion of arbitration and the opinions of the legal practitioners and justice sector players.

In chapter four we have a discussion which identifies with specificity to what extent arbitration has delivered justice to Kenyans.⁹⁵ Tables have been used to show the summarized data collected and analysed. Here we evaluated some of the observations made by the sampled population; example, Can their demands be implemented? To what extent can access (to arbitration) be promoted to suit their demands? To what extent has justice been compromised by the lack of access to arbitration.

1.10.5 Chapter five: Conclusion and Recommendations

The conclusion is a summary of the comparisons made between the prior studies and the data collected in this study. We have identified several challenges and confirmed some of the challenges that have been discussed about in the literature review. We have also come up with recommendations for alleviation of each challenge. The recommendations have been influenced by the analysis of the data collected. The answer shall be anchored in the determination to provide a just and expeditious way of dispute settlement.

We have identified how we can open up avenues of access to expeditious justice for all.

We have also analyzed the hypothesis of why arbitration has been a preserve of a few thus denying access to justice for the majority. The significant responses obtained from the questionnaires and oral interviews have been highlighted and discussed.

⁹⁵ This study does not negate the advances that have been made in the field of arbitration. Eg, Redfem& Hunter, *International Commercial Arbitration*. 1- 4. Arbitration progress and popularity can also be measured by (1) modernization of legislation in many countries; (2) development of institutional arbitration (3) increased accessions to international conventions (4) Judicial support.

CHAPTER TWO

2.0 INTRODUCTION TO ARBITRATION

2.1 HISTORICAL BACK GROUND OF ARBITRATION IN KENYA

Arbitration has been used by mankind since the ancient times which includes King Solomon's wisdom which he used to resolve the issue of the two women and the baby.⁹⁶ In recent past disputes in most African societies were settled through councils of elders who adjudicated over the disputes by hearing parties and coming up with settlements that were widely seen to satisfy each party. A good example can be found in the writings of Chinua Achebe where he discusses the Igbo community.⁹⁷

Jacob Gakeri argues that arbitration existed in Africa and in Kenya as a form of dispute resolution mechanism in the pre-colonial era.⁹⁸ He cites resolution of disputes by a council of elders as a form of dispute resolution. The idea is founded on the fact that the council of elders had the power to determine a dispute with finality. In most instances, the parties had to take an oath of confidentiality before they engaged in the dispute resolution and settlement forum.

2.1.2 Definition of Arbitration

Halsbury's laws of England define Arbitration as a process by which a dispute or difference between two or more parties as to their mutual legal rights and liabilities is referred to and determined judicially with binding effect by the application of law by one or more persons referred to as arbitrator (s) or arbitral tribunal instead of by a court of law. "Judicially determined" indicates that the principles of natural justice are observed.

⁹⁶ 1st Kings 3;16-18

⁹⁷Achebe, Chinua. *Things Fall Apart* (New York: Anchor Books, 1994) ISBN 0385474547

⁹⁸Jacob Gakeri, 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' (June 2011) International Journal of Humanities and Social Science Vol. 1 No.6; page 1 - 2

The Encyclopedia of forms and Precedence⁹⁹

It defines arbitration as a process by which disputes between two or more parties, are determined in private with finality and binding effect by an impartial third person(s) acting in a judicial manner rather than by a court of competent jurisdiction.

The Oxford Advanced Learner's Dictionary¹⁰⁰

It defines Arbitration as the official process of settling an argument or a disagreement between two people or groups by somebody who is not involved.

Khan defines arbitration as a private consensual process in which the parties involved agree to present their grievances to a third party for resolution and settlement of the dispute.¹⁰¹

Early Formation of arbitration in Kenya

In considering, whether arbitration existed in African customary law the operative words are “consensual” and “agree to present their disputes to a third party”. It is unlikely that the parties under African customary law had a choice as to who would hear and determine a dispute. Therefore, the issue of consent and willingness challenges the assumption that this form of dispute resolution was arbitration. However, it was a form of dispute resolution closer to litigation since parties seldom had choice of the forum/community elders to resolve their dispute.

Formal arbitration could have taken off in Kenya in 1914, when the Arbitration Ordinance was passed.¹⁰² One of the salient features of the Act is that it repealed some sections of the Indian Code of Civil Procedure and assigned more powers to the Court. The Ordinance provided a legal framework for arbitration in Kenya until 1968 when the Arbitration Act was legislated.¹⁰³ The 1968 Act was in force until 1995 when the current Act was passed. The current Act mainly

⁹⁹<http://www.lexisnexis.co.uk/en-uk/products/encyclopaedia-of-forms-and-precedents> Page accessed on 14th September, 2015

¹⁰⁰ 6th edition

¹⁰¹ R. Stephenson, *Arbitration Practice in Construction Disputes*, (Butterworth, London, 1998), page 122-4

¹⁰² An Ordinance No 4 of 1914 to amend the Law Relating to Arbitration. February 6th 1914. It came into operation 1st January, 1914.

¹⁰³ Dr. Kariuki Muigua, *Settling Disputes through Arbitration in Kenya* (Glenwood Publishers Ltd, 2012)

adopted the provisions of Model Arbitration Act of the United Nations Commission on Trade Law.¹⁰⁴ This model arbitration act has also been adopted by many leading arbitration nations with an intention of having a worldwide seamless law governing arbitration world over.¹⁰⁵ The model law covers the arbitration process from the formation of the arbitration agreement to the enforcement of the arbitral award.

2.2 KENYAN LEGAL FRAME WORK OF ARBITRATION

The law provisions providing for arbitration in Kenya are under pinned on the Constitution of Kenya,¹⁰⁶ The Investment Disputes Convention Act,¹⁰⁷ Employment Act, the Arbitration Act as amended in 2009 and the Arbitration Rules.¹⁰⁸ Additional provisions may also be found in the Civil Procedure Act and the Civil Procedure Rules¹⁰⁹ and the recent Nairobi Centre for International Arbitration Act.¹¹⁰

These laws provide for; arbitration in general, within the labour, in investment laws and within the land laws.

2.2.1 The Constitution

Arbitration has a constitutional basis as set out by Articles 60, 159 and 189 of the Constitution of Kenya 2010.

The Kenyan Constitution at article 159 provides that alternative disputes resolution mechanisms such as reconciliation, mediation, arbitration and traditional disputes resolution mechanism shall be promoted, as long as they do not contravene the bill of rights and are not repugnant to justice

¹⁰⁴Kariuki Muigua, 'Overview of Arbitration and Mediation in Kenya', (A paper submitted at a Stakeholder's forum on Establishment of Alternative Dispute Resolution (ADR) Mechanism for Labour Relations in Kenya Kenyatta International Conference Center, Nairobi on 4th – 6th May, 2011)

¹⁰⁵http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. Page accessed on 14th September, 2015 at 1040hrs.

¹⁰⁶ Article 159 provides the sources of judicial authority in Kenya which cover ADR

¹⁰⁷ Chapter 522 Of The Laws of Kenya

¹⁰⁸ Legal Notice, No. 58 of 1997

¹⁰⁹ Chapter 21 Laws of Kenya, section 59

¹¹⁰ Act No. 23 of 2013

and morality or inconsistent with the constitution or any written law.¹¹¹ Article 159 provides that in exercising judicial authority, the courts and tribunal shall be guided by principles that include alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted.

In enhancing relationship between national and county government, the constitution provides that National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanism, including negotiation, mediation and¹¹² arbitration.

Article 60 of the Constitution promotes settlement of disputes arising in land issues by use of recognized traditional dispute settlement mechanisms. Article 60 (g) provides that one of the principles in land administration is encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution. This was envisaged after it was realized that land disputes take long to settle within our court justice system and thus other options for settlement should be availed.

2.2.2 The Arbitration Act of Kenya

Kenyan arbitration had been governed by The Arbitration Act, Chapter 49 Laws of Kenya since 1968 when it was repealed by the current Act in 1995. The current Arbitration Act is based on the Model of the United Nations Commission on Trade Law.¹¹³ Subsequently, the 1995 Act was amended vide the Arbitration (Amendment) Act 2009.¹¹⁴

Section 3 of the Act, arbitration means arbitration whether or not administered by a permanent arbitration tribunal. An arbitration agreement on the other hand refers to an agreement by the

¹¹¹ Article 159 (2C and 3)

¹¹² Article 189(4) this is envisaged so that the differences that may hinder the delivery of services can be resolved amicably and faster without affecting the citizens and in a way that will not injure the relationship between the national government, county government and the other responsible state organs. Maybe time is of age for the Attorney General to recommend the creation of an ADR committee that will deal with these disputes.

¹¹³ UNCITRAL <http://www.uncitral.org>

¹¹⁴ which was assented to on 1st January 2010

parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. A party means a party to an arbitration agreement and includes a party claiming through or under a party. Section 6 of the Act provides for stay of proceedings which is the subject of arbitration by a court of law. This provision provides for the interrelationship between arbitration and the court system. Under Section 7, a party to arbitration can seek interim measures from the High Court such as injunctions or any other interim orders from the court during the arbitration process.

Section 10 of the Arbitration Act provides that except as provided in this Act, no court shall intervene in matters governed by this Act. This provision may be rendered unconstitutional because as per the Constitution, the High Court has unlimited jurisdiction.¹¹⁵ Further the Constitution provides that the High Court has the supervisory jurisdiction.¹¹⁶ This supervisory jurisdiction runs over any independent tribunal.¹¹⁷

Section 12 of the Act provides for party autonomy in as far as selection of arbitrator(s) is concerned and provides the various ways in which an arbitrator (s) can be selected. Section 17 provides that the arbitral tribunal can rule on the question of its own jurisdiction. This power of the arbitral tribunal to rule on challenges to its own jurisdiction is known as *kompetenzkompetenz*. This provision raises the question of the independence of the arbitral tribunal in such instances.

Section 20 of the Act gives the arbitral tribunal the power to determine the admissibility, relevance, materiality and weight of any evidence given before the arbitral tribunal.

Section 28 provides that the arbitral tribunal or a party with approval of the tribunal may request from the High Court assistance in taking evidence.

¹¹⁵ Article 165 of the Constitution of Kenya 2010

¹¹⁶ Article 165 (6) of the Constitution gives the High Court the power to supervise tribunals and all bodies that exercise quasi judicial functions

¹¹⁷ Article 165 (3) :The High Court has jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144

Section 35 provides for the recourse to the High Court against an arbitral award given by the arbitral tribunal and the grounds for contesting such award. To a large extent, the arbitration process as provided for in the Act relies a lot on the court system.

2.2.3 The Civil Procedure Act and the Civil Procedure Rules

The Civil Procedure Act Section 1A and 1B provides the overriding object of the act being to facilitate the just, expeditious, proportionate and affordable settlement of Civil Disputes governed by the Act.¹¹⁸ This can be interpreted to imply that the courts are free to involve alternative dispute mechanism to achieve the overriding interest in civil matters.¹¹⁹ Section 59 provides for reference of disputes to arbitration which shall be governed by the prescribed rules being Order 46.¹²⁰

Order 46 Rule 1 provides for reference of a matter to arbitration where parties are interested before judgment is pronounced upon application to the court.

2.2.4 Labour Laws

The Employment Act provides for the settlement of labour disputes between employer and employee.¹²¹ The act provides for determination of complaints relating to summary dismissal or unfair termination;¹²²

“ A labor officer who is presented with a claim under this section, shall after affording every opportunity to the employee and the employer to state their case, recommend to the parties what in his opinion would be the best mean of settling the disputes in accordance with the provision of section 49”

¹¹⁸ Chapter 21, Laws of Kenya

¹¹⁹Section 1A Civil Procedure Act Cap 21, Laws of Kenya

¹²⁰ The Civil Procedure Rules

¹²¹ Chapter 226, Laws of Kenya

¹²² Section 47(2)

The Industrial Court Act¹²³ provides that the Industrial Court may refuse to determine any dispute before it, other than an appeal or review if the Industrial Court is not satisfied that an attempt has been made to resolve the dispute through reconciliation.¹²⁴

Section 58 of the Labor Relations Act¹²⁵ provides that;

- 1. An employer, group of employers or employers' organization and a trade union may conclude a collective agreement providing for;*
 - a) That conciliation of any category of trade disputes identified on the collective agreement by an independent and impartial conciliator appointed by agreement and the parties*
- 2 An award in an arbitration in terms of a collective agreement contemplated on subsection (1) is final and binding and-*
- 3 Is subject to appeal on points of law to any court*
- 4 May be set aside by the industrial court on any ground recognized in law*
- 5 May be enforced by the Industrial court*

The arbitration in most labour disputes is conducted before the labour officers in the respective county. The Employment and Labour Relations Court in Kenya often places more evidential weight on the findings of the labour officer who may have first arbitrated on the dispute before it was filed in court.

2.2.5 The Evidence Act

To avoid legal technicalities in the arbitration process, the Evidence Act under Section 2 provides that evidence rules shall not apply to proceedings before an arbitrator.¹²⁶ This is for purposes of parties within the arbitration tribunal to proceed with their own rules and in a manner that they best want to settle the dispute.

¹²³ Chapter 234, Laws of Kenya

¹²⁴ Section 15

¹²⁵ Act No. 14 of 2007

¹²⁶ Cap 80 of the Laws of Kenya

This is emphasized in the article by Paul Ngotho where he discusses that any person can represent a party to an arbitration tribunal.¹²⁷ This section is supposed to emphasize a speedy trial with least legal hurdles during arbitration proceedings.

2.2.6 The Nairobi Centre for International Arbitration

This act aims to facilitate the marketing and creation of Nairobi as a Centre for arbitration.¹²⁸ It hopes to promote arbitration proceedings in Nairobi to the international business and commercial fraternity. Section 5 of the Act gives the function of the center to be among other functions to promote, facilitate and encourage the conduct of international commercial arbitration, ensure that arbitration is reserved as the dispute resolution process of choice.¹²⁹ This is a new Act and the center is currently being set up with an office of the registrar and thereafter identifies its panel of arbitrators who shall conduct the arbitral proceedings.¹³⁰

2.3 CHARACTERISTICS OF ARBITRATION

2.3.1 Advantages of arbitration

Satisfaction; unlike the court proceedings which are imposed on a party and may further be dragged by either party the arbitration process is a creature of the parties by agreement and thus a concept of acceptance of the process.

Clarifies Issues; arbitration allows parties to point out issues and explain themselves unlike court procedures where time is limited and parties end up complicating issues and considering the new developments parties are now being demanded to file submissions thus reducing the parties abilities to elucidate issues before the judge.

¹²⁷ See note earlier writings by Paul Ngotho at Note 39-41 and “Challenges Facing Arbitrators in Africa” East Africa International Arbitration Conference, Nairobi - July 28-29, 2014 at page two of this article where he details when he appeared to represent a party in an arbitration tribunal.

¹²⁸ Act No. 26 of 2013

¹²⁹ See related writings in the literature review by Eric Opiyo, *Examining the Viability of a Regional East African Arbitral Institution*. University of Nairobi Masters of Law thesis (2012)

¹³⁰ This Act is modeled and comparable to the Hong Kong and Singapore arbitration institutions.

Flexibility; arbitration proceedings may be concluded faster than the court process as parties determine the pace at which they want the courts to be heard by the arbitrator.¹³¹

Outcome of the matter is confidential; Unlike court procedure, the outcome/award is confidential and only known to the parties who may choose to publish it or file it in court.

Allows communication; Parties can easily communicate to each other unlike court process where there is too much tension that cannot allow informal communication.¹³²

Party Centered; arbitration places the attention on the parties and the resolution of the dispute at hand. In the court process most of the attention is on the judge or magistrate. The other attention in court is to the adherence of the legal process and law. This is referred to as party autonomy.¹³³

Flexibility; Parties are allowed to conduct the arbitration process in a manner they feel fit unlike court process where they are forced to come to court on certain days, file documents within time frames and they cannot control how long the dispute will take to settle.

Finality of arbitration decisions; parties cannot appeal an arbitration decision. They may however move to court to have it executed.¹³⁴

¹³¹GithuMuigai and JacquelineKamau, 'The Legal Framework of Arbitration in Kenya' in GithuMuigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi) 6

¹³² Steven GatembuKairu, 'The Conduct of the Arbitral Process' in GithuMuigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi) 60, 61 and 62

¹³³KariukiMuigua, *Settling Disputes Through Arbitration in Kenya* (2nd Edition. Glenwood Publishers Ltd. 2012 Nairobi) 127

¹³⁴ Supra note 131 at page 6 and 7

2.3.2 Disadvantages of arbitration

Negotiation Power; During arbitration one party may have a higher ability to negotiate (by having better representation) than the other party hence the weaker party may feel over powered.

No precedents; There are few published arbitration awards and the few cannot be relied upon in a new case. Arbitration decisions do not form precedents that can be used in future since the decisions are confidential.

No Lawyers Involved; for arbitration proceedings it is not mandatory to have lawyers representing parties.¹³⁵

2.4 COMPARISON BETWEEN ARBITRATION AND LITIGATION

2.4.1 Features of arbitration

These features and observation are a further discussion of the arbitration act.¹³⁶

Arbitration is consensual

Arbitration can only take place if both parties have agreed to it. In the case of future disputes arising under a contract, the parties insert an arbitration clause in the relevant contract providing how they will commence the dispute settlement via arbitration.¹³⁷

The parties choose the arbitrator(s)

The parties can select a sole arbitrator together. If they choose to have a three-member arbitral tribunal, each party appoints one of the arbitrators; those two persons then agree on the

¹³⁵ Paul Ngotho “Challenges Facing Arbitrators in Africa” East Africa International Arbitration Conference. Nairobi (July, 2014) Available at <http://www.ngotho.co.ke>

¹³⁶ See earlier foot note

¹³⁷ KyaloMbobu, ‘The Arbitration Agreement’ in GithuMuigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi) 11 and 12

presiding arbitrator. Alternatively, a third party may suggest potential arbitrators with relevant expertise or directly appoint members of the arbitral tribunal.

Arbitration is neutral

Parties to arbitration are able to choose such important elements as the applicable law, language and venue of the arbitration. This allows them to ensure that no party enjoys an advantage with respect to the forum or venue.

Arbitration is a confidential procedure

The parties to Arbitration are able to control the privacy of the entire process, its outcome and the final award.

The decision of the arbitral tribunal is final and easy to enforce

The parties may agree to enforce the decision of the arbitral tribunal without delay or threats of execution since the process is consensual all the way to finality. International arbitral awards are enforced by national courts under the New York Convention, which permits them to be set aside only in very limited circumstances. More than 140 countries are parties to this Convention.¹³⁸

2.4.2 Features of Litigation

The Court system is a state provided mechanism in terms of the human resources and also in terms of structures.

The Court system constitutes of an appellate system

Litigation is not consensual in that parties need not consent on going to court (Judgments in default)

There are clear mechanisms for enforcement of court decisions such as provided under the Civil Procedure Rules (execution of decrees and orders)

Litigation is destructive of relations in that it is a win lose situation.

¹³⁸Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (2nd Edition. Glenwood Publishers Ltd. 2012 Nairobi) 152

2.4.3 Advantages of arbitration over the Shortcomings in Litigation

Arbitration is a flexible method of Dispute resolution in terms of time, venue and the procedures that are adopted. This is normally agreed at the preliminary meeting or via the early exchange of letters by parties.¹³⁹

Arbitration is less expensive in terms of time spent to arrive at a resolution/ settlement. There are no numerous court fees like in the court system.

It is an amicable way of dispute resolution: Arbitration is a win win situation and as such it preserves relationships.

There is more confidence in the Arbitration process than there is in the court system. Parties are at liberty to decide on the impartial third party.

There are few technicalities in Arbitration unlike in litigation where one can lose a good claim solely on technicality grounds.

The fact that Arbitration is a consensual process helps the parties be able to decide on the applicable Arbitration mechanism and also on the applicable laws. This helps avoid problems that could be posed by conflict of laws.¹⁴⁰

Arbitration is a right based approach rather than an interest based approach in determination of disputes.

Arbitration takes a shorter period of time unlike in litigation where cases have been known to drag on for several years (Justice delayed is justice denied)

Arbitration is more approachable and accessible way of dispute determination since it will only require the identification of a neutral third party.

Arbitration has a cultural background, it is homegrown

Integrity- People are honest to a large extent in Arbitration because of the ownership of the process

The expertise in Arbitration may be absent in the court system¹⁴¹

¹³⁹Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (2nd Edition. Glenwood Publishers Ltd. 2012 Nairobi) 124 and 125

¹⁴⁰ Ibid 11 and 12

¹⁴¹Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (2nd Edition. Glenwood Publishers Ltd. 2012 Nairobi) 143, 145 and 146

Parties to Arbitration can control the publicity involved in the process especially in confidential and private matters

Arbitration is still applicable in Criminal law (economic crimes amnesty, amnesty in exchange for immunity.)¹⁴²

Common features in arbitration and litigation;

2.4.3 The pre-trial conference¹⁴³

The Advocates for the disputants present an overview of their case before a judge or a magistrate, who provides a non binding opinion as how the case might be resolved if it goes to trial. Parties on the basis of that opinion resolve the dispute. It works as a case management tool in the judiciary or the arbitrator.

A summary of the above listed features and other common attributes are elaborated in a table format here below¹⁴⁴.

No	Features and attributes	Arbitration	Litigation
1.	Flexibility of the procedure	Yes	No
2.	Flexibility of time	Yes	No
3.	Clarity of issues, participation and communication	Yes	No
4.	Amicable way of dispute resolution	Yes	No
5.	Approachable	Yes	Yes
6.	Accessible	Yes	No
7.	Incorporation of Experts in the disputed field	Yes	No

¹⁴²Republic Vs Mohamed Abdow Mohamed HCCR Nairobi Case No 86 OF 2011 unreported eKlr

¹⁴³ Ibid note 19 and 20

¹⁴⁴ Source of the table and the contents in it are from the author

8.	Acceptability of the process by parties	Yes	No
9	Confidentiality	Yes	No
10	Inclusion of innovative solutions/settlement	Yes	No
11	Party acceptance to the forum/tribunal	Yes	No
12	External interference eg technicalities, other parties, politics and external forces	No	Yes
13	Avenue for appeal; if error/mistake appears	No	Yes
14.	Cost effectiveness	No	No

2.5 ARBITRATION AND ACCESS TO JUSTICE IN KENYA

In Kenya there is no single regulatory body for arbitration and many people are turning to foreign regulators such as the Chartered Institute of Arbitrators of the UK and the American Arbitration Association of the US.¹⁴⁵ However, the Institute of Arbitrators Kenya provides an avenue for arbitration on matters concerning arbitration.

Access to justice has been an issue of great concern in Kenya with the government focusing on the formal justice system. Over time; there has been increased use of Informal Justice Systems (IJS) such as Alternative Dispute Resolution (arbitration) and Traditional Justice Systems (TJS).¹⁴⁶ Therefore we can say that arbitration has a key role to play in ensuring access to justice. Arbitration bears certain attributes that can be tapped and lead to justice and fairness.¹⁴⁷

Article 48 of the constitution of Kenya provides for the right of access to justice. The Article stipulates thus:

¹⁴⁵ See, International Commission of Jurists (ICJ) Kenya, *Report. Interface between Formal and Informal Justice Systems in Kenya* (June 2011) At page 13 and further discussed in the literature review

¹⁴⁶ Ibid. Executive Summary

¹⁴⁷ Kariuki Muigua, *Heralding a New Dawn: Achieving Justice through Effective Application of Alternative Dispute Resolution mechanisms in Kenya*, A paper Presented at the Chartered Institute of Arbitrators (Kenya Branch) (Nairobi on 25th & 26th July 2013)

“The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

This provision places a responsibility on the government to the best of its ability to facilitate the citizenry to achieve justice in all spheres of life. Access to justice is a right that has to be fulfilled progressively in consonance with the government’s economic capabilities.¹⁴⁸

Arbitration can be seen in access to justice in that the formal justice system is riddled with many challenges and this has forced Kenyans to resort to Alternative Dispute Resolution mechanisms including the Informal Justice Systems. These challenges include the fact that the courts are largely inaccessible to most Kenyans since they are far apart, they follow procedures that are alien to the locals, are arbitrary and unfriendly, take too long to conclude matters, are susceptible to corruption, are inefficient. Arbitration includes dispute resolution processes and techniques by which disputing parties reach an agreement outside the normal litigation process all over the world. Arbitration is becoming more popular with some jurisdictions requiring pre-trial negotiations before a matter can be subjected to the normal court process. The increased use of arbitration is also attributable to the increasing backlog of cases in the ordinary courts, the perception that arbitration is less costly and time efficient and also the fact that arbitration is mostly confidential and the desire of the disputing parties to determine who handles their case (the Mediator or Arbitrator).¹⁴⁹

The Civil procedure rules under Order 46 provide for Arbitration under a Court Order and other alternative dispute resolutions. The rules create opportunities for litigants to try and resolve their dispute without going through the rigors of the court process.

Arbitration plays a key role in access to justice as it has numerous advantages over litigation. For instance, arbitration allows the parties to arrive at prompt decisions unlike litigation which may drag on for years, further; there is no requirement for elaborate procedures unlike litigation.

Thus we can say that arbitration has a role to play in enabling access to justice, especially for those who cannot afford to hire a lawyer. The majority of those who are seeking justice are from

¹⁴⁸ Ibid note 14 and 15 and the Problem Statement

¹⁴⁹ Ibid note 19 and 20

poor backgrounds, as such, the use of informal arbitration goes a long way to ensure that such persons access justice in line with Article 48 of the constitution.

2.6 INSTITUTIONAL ARBITRATION IN KENYA

Generally as the Arbitration Act recognizes, arbitration can be conducted by institutions or individual arbitrators. The Chartered Institute of Arbitrators (Kenya Branch), established in 1984, is the umbrella body that oversees, promotes and facilitates determination of disputes by Arbitration and other forms of Alternative Dispute Resolution (ADR). The Kenyan Branch maintains a register of its members who are knowledgeable and experienced Arbitrators and facilitates their appointment. The membership is spread within various disciplines such as law, insurance, surveyors, engineers and other.¹⁵⁰ The institute relies on its membership to conduct the arbitrations whenever parties opt to source for an arbitrator through the institution.

Another institute that provides ADR services is the Dispute Resolution Center. This is a not-for-profit organization founded in 1997. Through its founders and a selected Panel of Neutrals, DRC offers a wide range of ADR services appropriate to many different kinds of disputes. The institute also offers training for mediators.

2.7 CURRENT CHALLENGES TO THE ARBITRATION ACT

2.7.1 The interference by court

The courts should rarely interfere with an arbitral award. However, section 37 of the Kenyan Arbitration Act gives the courts a wide leeway to interfere.¹⁵¹ Section 37 provides as follows;

Grounds for refusal of recognition or enforcement

¹⁵⁰ See www.ciarbkenya.org/about.html

¹⁵¹ Kariuki Muigua, 'Making East Africa a Hub for International Commercial Arbitration: A Critical Examination of the State of the Legal and Institutional Framework Governing Arbitration in Kenya'. (Nairobi May, 2013) see <http://www.kmco.co.ke/attachments/article/114/>

(2) if the High Court finds that—

- (i) *the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or*
- (ii) *the recognition or enforcement of the arbitral award would be contrary to the public policy of Kenya.*

This section has given the Kenyan courts a wide discretion in the interference and enforcement of the arbitral awards, local or foreign. It only requires the party whom the award does not favour to make an application to the high court seeking to set aside the award on the grounds of public policy of Kenya. The Kenyan courts have not helped much in this area but have acted to limit the extent of application of the act in defining public policy. In the case of *Christ for All Nations v Apollo Insurance Co. Ltd*¹⁵² in which it was held *inter alia*:

“Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality.”

Public policy thus extends to anything that is in contrary to the national interests and contrary to justice and morality. Parties in the interpretation of public policy have brought up wide discretion in the definition of public policy.

¹⁵²[2002] 2 E.A 366

CHAPTER THREE

3.0 SAMPLE IDENTIFICATION, DESIGN AND DATA COLLECTION

3.1 Sample Identification

The data was collected from three counties in Kenya that is Nairobi, Nakuru and Kericho. The reason for the choice of these counties is because they experience a vibrant legal practice evidenced by the presence of busy High Court and magistrate courts Stations.¹⁵³ These counties also have a blend of urban, semi urban, semi rural and rural lifestyles of the citizens living there. Kericho was chosen because in accordance with the last census it has a high rural population with an easy access to a commercial town setting with a court set up.¹⁵⁴ This would be ideal in comparing the attributes of arbitration in both big commercial cities like Nairobi and a smaller town like Kericho but with vibrant business community.¹⁵⁵ Nakuru demonstrated to have a good mix of both urban and rural population with access to a modern commercial setup.

The sample survey population is divided into four strata of clusters of people who are actively involved in the justice sector in Kenya. They are; judges and magistrates, advocates, judicial officers and litigants. Each stratum had their own questionnaire but they were related in view of extracting the expected feedback. The main feature of the questionnaire was to find out to what

¹⁵³ A way of identifying a vibrant legal practice station is the availability of a High Court station with the Environment and Land Court and Employment and Labour Relations Court.

¹⁵⁴ <https://www.opendata.go.ke/facet/counties/Kericho> Accessed on 19th September, 2015.

It indicates that from the 2009 census conducted in Kenya, county of Kericho had an urban population of 38.7%. This indicates that majority of the people in Kericho live a rural lifestyle but with an easy access to an advanced court justice system. This makes it different from Nakuru County which was recorded to have a higher urban population. Nakuru was recorded to have 45.8% of its population being urban. The Nakuru population is also more active in commerce sector than Kericho and also enjoying a good access to the court justice system with courts two High Court station at Nakuru town and Naivasha town and three magistrate court stations. Concerning the Nairobi city County its population is 100% urban recorded in the same census survey. This population has an easy access to the whole structure of the court justice system in Kenya. I relation to the whole Kenyan population of 38,610,097 according to the same census the Average percentage that consists of the urban dwellers is 32.3% making a total of Kenyan urban population of 12,487,375.

This will also help draw the inference if arbitration is affected by the susceptibility to urban or rural exposure.

¹⁵⁵ Note above

extent each strata of the sample recommended and used arbitration to enhance delivery and access to justice. The questionnaire also expected to have the respondents list the challenges they encounter in arbitration. This is because the sample population in the chosen strata is commonly involved in judicial litigation bathe sample counties and in the country.¹⁵⁶

The litigants were also sampled since they are in a position to say what they expect regarding their satisfaction from court in view of disputes they have filed. The litigants were also were also to give a feedback in regard to the dispensation of justice from the current short comings they have experienced as they litigate in court. Some of the litigants were eager to fill the questionnaire and handed it back immediately. Some litigants filled the questionnaire as they waited to see counsel in private chambers. Some blatantly refused to fill it.

3.2 Data Collection

3.2.1 Trial questionnaire

Before the final questionnaire was distributed a trial questionnaire had been distributed. This was done a month earlier. The results obtained from the trial questionnaire led to the necessary changes being done. The main change was the realization of the fact that it would yield better results if the trial population was divided into four strata. That is judges or magistrates, advocates, court clerks or judicial officers and litigants. Each strata of respondents was then to have its unique questionnaire applicable to it.

Among the main questions altered include the questions if the party had entered into a binding contract and if that contract provided for arbitration. It was noted that this question should be omitted from the questionnaire to be filled by the magistrate and court clerks or judicial officers but advocates and litigants are best placed to discuss this questions. This actually led to a very good realization that there are advocates who do not include arbitration as one of the options for dispute settlement when they draw up contracts. They all had varying legitimate reasons for omitting or occasionally inserting that clause.

¹⁵⁶ C. R. Kothari. *Research Methodology, Methods and Techniques*, (2nd Revised Edition New Age International Publishers) See page 57 – 58.

Some preliminary questions to judges or magistrates and advocates were eliminated. These are the questions which asked if the respondent had been involved in any litigation. Further this also assisted in the identification of the sample population and the distribution of the sample population.

3.2.2 Questionnaire administration sites

The questionnaire was also distributed at court premises. Randomness was guaranteed since it was not known or expected which lawyers, litigants or clerks we expected to find in court that day and which side of the court premises they would be found and thus be sampled.

Majority of the lawyers indicated that they were so engaged in court duties and they requested that I collect the questionnaire later in the day at their chambers. Some filled up the questionnaire and handed it back within a short while.

Some criminal law practitioners also filled the questionnaires for me. It was a unique realization of the different ways the public prosecutor *vis a vis* the private defence counsel for a criminal filled the questionnaire.

Judicial officers were also sampled in the stratum of clerks and judicial officers. To administer the questionnaire to the judiciary staff prior authority was sought from the Court Administrative Officer at the respective court stations.¹⁵⁷ Majority of the judicial officers in the court registries filled the questionnaire with ease and were cooperative. The judicial officers including legal clerks in law firms play a crucial role in the dispensation of justice. They are the ones who are responsible to the preparation of the litigant and his documents before he files them in court or before he sees an advocate or the litigant files the case in court. They play a crucial role because they sift the issues presented by the litigant before the decision on the merits of the case can be assessed by the advocate or judge/magistrate.

¹⁵⁷ This was at the Nairobi Milimani, Nakuru and Kericho courts stations.

Authority from the respective head of station was also sought before I could administer the questionnaire to the magistrates at the respective stations. Majority filled the questionnaire as I distributed the copies in the court premises and I collected the questionnaire within hours of the same day.

On the negative side others were not at all interested with looking or even receiving the questionnaire. They simply dismissed me. Several others took the questionnaires but did not fill it. They kept postponing my collection of the questionnaire and I did not get it back. Some of the litigants were more eager to have their day in court pursuing what took them there than spend time filling a questionnaire.

3.3.1 Conducting interviews

In some few cases interviews were conducted. These interviews were conducted guided by the questionnaire. Initially during the designing of the questionnaire it was anticipated that it would be adequate. The research methodology thus did not anticipate any oral interviews. However during the actual data collection some respondents requested some clarifications and discussions would ensure leading to the interviews being conducted.

During the circulation of the questionnaires it emerged that some of the interviewees were willing to share their experiences in the field of arbitration than merely filling up the questionnaire. The author encouraged their views via an interview within the parameters of the questions in the questionnaire. Some of the interviewees did not want to hold the questionnaire and fill it up, they preferred a scenario where the questions were read to them and they answered as they freely discussed their responses giving their experiences and opinions.

Some of the interviewees had different handicaps¹⁵⁸ as they could not read the questionnaires or fill up the questionnaires and thus offered their feedback orally through an interview.¹⁵⁸ All the

¹⁵⁸ An example was an advocate who had difficulties with his sight. He requested that he be assisted in the filling the questionnaire as we discuss the questions. The same was encountered with a disabled litigant.

responses were noted beside the mandatory questions contained in the questionnaire. The remarks made beyond the questionnaire consisted of personal experiences.¹⁵⁹

3.3.2 Telephone Interviews:

Towards the end of the data collection phase it was noted that some questionnaires circulated via email had not been returned. It was thus necessary that a method of getting the feedback be sought. The phone numbers for the interviewees were sought and they were called. During the answers to the questions, the interviewees also gave more information than was contained in the questionnaire. As noted above they discussed their experiences in arbitration.

3.4 Application of Empirical Legal Research Methodology *vis a vis* the research topic

The data collection questionnaire was modeled along the empirical legal research methods of data collection.¹⁶⁰ Empirical legal research focuses on the feedback obtained through observation. This feedback can be reported in a numeric or non numeric format. With specific inference to this paper is that justice cannot be measured but it can be observed and the measure of its existence relayed in a numeric (quantitative) or non numeric (qualitative) format. The start of an empirical research is the ‘hunch’ that a certain hypothesis exists and it is necessary that it be analyzed. The empirical legal research creates a link between the sociological jurisprudence and the functions of legal institutions since the data collected via the empirical research will support a preposition in the society.¹⁶¹

This chapter shall present the data collected from the sample population and we shall try to analyze it to extrapolate the feedback from respondents. The main aspect is to begin with the data collection methodology and then how reliable it is. The empirical legal research methods of data collection is supposed to be tailored in a way that the identification of the sample population

¹⁵⁹ See the case studies in the conclusion paragraph.

¹⁶⁰ Lee Epstein & Andre D. Martin. “An Introduction to Empirical Legal Research” Oxford University Press, 2012 Washington. <http://empiricallegalresearch.org/> at chapter 1

¹⁶¹ See the Theoretical Framework at page 36 – 38 above

is without errors, not bias and the results reliable despite the fact that the legal research is normally qualitative. The data collection method was also influenced by the research question. With our research question the sample population was reduced from anybody to a clique of people who understand dispute settlement, how courts work, arbitration and/or the delivery of justice. This is also because the results are only beneficial to this group of people. These groups of respondents are normally found at the court premises where they go to solve their disputes and at the legal practitioners' chambers where they go to launch their disputes.

The study questionnaires were designed for; judges and magistrates, advocates, judicial officers and litigants. Each questionnaire sought responses that required both numeric answers(quantitative) answers and non-numeric(qualitative) questions. For the quantitative questions we shall then endeavour to relay the results on tables and graphs. The data that would have been given as non-numeric(qualitative) was coded in a way that gave a quantitative response leading to an easier analysis.

This led in the identification of the most chronic reasons why we seldom pursue arbitration.

CHAPTER FOUR

4.0 DATA ANALYSIS AND OBSERVATIONS FROM THE FEEDBACK

4.1 Respondents Understanding of Arbitration

The first question in the questionnaire that was administered to the advocates asked the question “What do you know about arbitration in Kenya?”. This question was open ended and was intended to establish the extent of the respondent understanding of arbitration. From the manner the question was answered there was a very high score that majority of the advocates understood what is arbitration and how it is practiced. Majority went as far as discussing the laws governing arbitration in Kenya. This leads to a conclusion that majority of advocates understand the arbitration process and if they wanted to invoke they knew what guidelines and regulations to follow. However a number of them answered in a manner that indicated that arbitration was similar to mediation or conciliation.

The advocates’ exposure to arbitration was also sought. Question number 2 asked if the advocate has ever used arbitration. It was a closed question requiring a ‘yes’ or ‘no’ answer. Majority of the advocates seem to have used arbitration. Out of the 97 filled and returned, 95 answered this question. Out of the 95 who answered this question, 82 have been engaged in an arbitration forum before while 13 have never taken part in any arbitration forum. The question confirmed the above preposition that that majority of advocates understand the arbitration process and if they wanted to invoke they knew what guidelines and regulations to follow. Below is a tabular representation of the same. Table 2

Advocates who have used arbitration

Advocates who have ever used arbitration	95
Advocates who have never used arbitration	2
Total Respondents	97

4.2 Effectiveness of Arbitration

Majority having used arbitration they all had varying outcomes regarding the effectiveness of the arbitration process. The levels of satisfaction on the outcome from an arbitration process have a subjective measure depending on what transpired during the respective sessions and the type of dispute that was being resolved. This led to the effectiveness of arbitration in dispute settlement being rated in a manner to suggest that arbitration has been effective. The rating score sheet had a scale with the value 1 being very good while 5 being very poor.¹⁶² The respondents averaged a score of 2.1298 out of 5. This confirmed that the respective arbitration tribunals attended to functioned properly leading to resolution of the dispute at hand in a manner that was satisfactory to the parties. Below is a tabular representation of the same. Table 3

How effective was arbitration?

1 very good and 5 indicating very poor

Category	Rating	Score
Very Good	13	
Good	46	
Fair	13	
Poor	5	
Very Poor	0	
Total respondents	77 out of 97	
Abstaining respondents	20	
Average score		2.1298
Highest expected score		1
Lowest probable score		5

¹⁶² Refer to appendix 4 the key in each questionnaire

4.3 Referral to arbitration

Question number four asked if the ‘advocate often suggests arbitration his clients as a dispute settlement mechanism for arbitration out of the 97 advocates’ respondents 92 answered the question. It would seem that 5 advocates polled work in positions where they do not have an option to advise the client which means of disputes settlement to use.

At the analysis we noted that out of the 92 respondents 73 advocates replied that they often suggest arbitration to their clients. The remainder 19 usually do not recommend their clients for arbitration. A further look at their questionnaires indicates that the advocates who normally do not refer their clients for arbitration have good and valid reasons for not referring their clients for arbitration. The reasons vary from experience in the practice of arbitration or a perceived perception about the conduct of arbitration. It should also be noted that referring a client to arbitration is dependent upon the client accepting advice and opting not to go to court. Below is a tabular representation of the same. Table 4

Do you often suggest arbitration to your clients?

Yes	73	
No	19	
Abstaining respondents	5	
Total respondents	92 out of 97	

Among the leading reasons given was that their clients have a preconceived mind that they want to have the dispute determined via the court justice system. The client going for dispute settlement seems to have a mindset that the only way to have their matters determined is via the court justice system and not any other form where they can compromise their claim.

Some advocates also seem to have the opinion that arbitration is not a means to an end in the dispute settlement.¹⁶³ They were of the opinion that there is no need to pursue arbitration and thereafter end up in court again pursuing implementation of the award.¹⁶⁴ This opinion was also amplified by some advocate who stated that “clients typically prefer to litigate in court for a final determination”.¹⁶⁵ And “some clients are not agreeable to the same and prefer the normal court process”.¹⁶⁶ This clearly shows that the clients want to settle the matter with finality and therefore any forum that indicates that the matter will not be dealt with conclusively will not be accepted. However the advocates’ in-depth analysis and/or understanding of arbitration on this response was wanting since in arbitration there will be no appeal and the challenges that can be put forward to challenge an arbitration are limited.

The advocates who have also used arbitration seem to have an opinion that arbitration is expensive and they cannot use it for some type of claims especially the small claims. This also applies where the client may not afford the arbitration fee. A look form the recommended deposit for an arbitrator to take up your matter shows that an amount of approximate (on the lower scale) Kenya shillings 200,000.00 is needed for a good arbitrator.¹⁶⁷ This amount is colossal and majority may not afford. This is unlike the court fees which normally don’t exceed Kenya shillings 10,000.00 for a dispute which is non-liquidated.

4.4 How often do judges and magistrates suggest the use arbitration to parties in court?

This was a closed question where the respondent was asked if the magistrate, judge or any judicial officer ever suggested that you use arbitration. This was a closed question with two answer options ‘yes’ or ‘no’. This question was asked to the advocates and litigants. The

¹⁶³ See the response by A10

¹⁶⁴ See the response by A50

¹⁶⁵ See the response by A36

¹⁶⁶ See the response by A49

¹⁶⁷ See the Remuneration, Appointment Fees and Other Charges from the Chartered Institute of Arbitrators Kenya dated 17th April, 2013 giving the guidelines for arbitrators remuneration where Chartered Arbitrator can charge a high of Kenya Shillings 25,000.00 per hour while the cheapest rate was for an Associate Arbitrator who is recommended to charge a low of Kenya shillings 7,500.00 per hour.

respondents to this question were 93 out of a total of 97 advocates' respondents. 9 out of the 93 indicated that the judges or magistrates they have appeared before have never suggested the use of arbitration to them towards the resolution of any matter. This is a concern since the minimum expectation would be that at least an advocate has had a matter where the court ought to have suggested an alternative dispute settlement model. However 9 respondents' advocates have never been advised by the judge or magistrate to pursue dispute resolution via arbitration. 84 respondents' advocates indicated that they have been referred by the judge or magistrate for the settlement of a matter via arbitration. This shows that majority of the judges and magistrates prefer having a matter being settled via arbitration instead of litigation. Below is a tabular representation of the same. Table 5

Has the magistrate, judge or any judicial officer ever suggested that you use arbitration in any case? 'yes' or 'no'

Yes	84
No	9
Total respondents	93 out of 97

This resonates with the conclusion (in the final chapter) that there needs to be an emphasis by judges and magistrates on the need to be analyzing all the matters before them and then making an opinion addressed to the parties if they can have the matter referred to ADR more so arbitration.¹⁶⁸

In discussing this question it would be necessary to check what the magistrates answered when asked if they were asked if they often suggest to litigants to settle their disputes via arbitration. Out of the 6 magistrates sampled only one indicated that she does not. However she later at a different question indicated that she had referred a breach of contract dispute for settlement via arbitration. This shows that judicial officers have been referring and/or recommending parties with disputes for arbitration.

¹⁶⁸ See the recommendations to the Kenyan Judiciary in chapter 5

4.5 Case law interpretation of the section 59 Civil Procedure Act and of Order 46 Civil Procedure Rules

There have been several cases decided on the application of order 46. The way the court has severally applied and interpreted order 46 there is a confirmation that the same is not exhaustive on the use of arbitration. In the case of *Paul Oranga Muma Vs Dominic Muma Kworo*¹⁶⁹ the high Court was of the opinion that for the court to adopt an award the parties must have consented to refer the matter for arbitration before the court. This was in a matter relating to boundary issue which was referred to a surveyor who was to thereafter issue an award after listening to the parties and visiting the ground. The court had referred the matter on land issues to a surveyor and the Land Registrar since they were the experts in the field for hearing and determination and thereafter adopt the report as a judgment and order of the court.

However one of the parties challenged the court order adopting the awards by the experts (Surveyor and the Land Registrar) and the court upheld challenge since the referral for arbitration has to be made by the consent of the parties. The upshot in the matter is that the court should be empowered to have an upper hand in the referral of a matter for arbitration. The court should have a dominant opinion on the effecting of court annexed ADR mechanism. This can even be enhanced if the court is provided with a panel of arbitrators.¹⁷⁰

In another fairly recent case which also arose and was determined within the sampled county of Nairobi the court was of a similar opinion but it interpreted it differently. This was in the case of *Midroc Water Drilling Ltd Vs Cabinet Secretary and two Others*¹⁷¹. This matter concerned the interpretation of the FIDIC Conditions of Contract which are commonly used in construction contracts.¹⁷² In this matter the judge held that order 46 rule 20 does not limit the court in the

¹⁶⁹HC ELC Kisii Case No 5 “B” OF 2008 unreported

¹⁷⁰ See the questionnaire number A17

¹⁷¹HC Nairobi Milimani Commercial Courts case No 267 of 2013 e-Klr

¹⁷²FIDIC has long been renowned for its standard forms of contract for use between contractor, sub contractors and the employee. They are the conditions of contract for Works of Civil Engineering construction. It's a standard contract and conditions of contract, its more of a model general contracting contract for international construction works. These standard conditions of contract for construction are used in various jurisdictions across the world. The conditions are best known for their range of standard conditions of contract for the construction, plant and design

application of arbitration. The judge was of the opinion that Article 159 (2) (c) of the Kenyan constitution has increased the courts options in out of court settlements. Further in the interpretation of sections 1A and 1B of the Civil Procedure Act the court can adopt ADR and use it to achieve substantive justice.

At this point it is notable that Civil Procedure Act¹⁷³ at section 59C it provides that:

(1) A suit may be referred to any other method of ADR where the parties agree or he court considers the case suitable for such referral

(2) Any other method of ADR shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion order.

With this section in mind any judge or magistrate can therefore refer a matter for arbitration *suomoto* irrespective of the parties' opinions or opposition to ADR. The knowledge of this issue of law was not well demonstrated among the magistrates interviewed. It is also necessary if these sections of the law can be actualized via the enactment of practice rules.¹⁷⁴

4.6 The role of judicial officers and clerks in arbitration

The other category of the sample population was the judicial officers and clerks. They were sampled because they are actively involved in the dispensation of justice in the community and in the absence of a judge, magistrate or advocate you will always find a judicial officer or a court clerk at work in court or at advocates' chambers. More often they take the brief to the advocate

industries. At clause 67 it discusses the methods of dispute settlement within its mechanisms where the disputes arising during the enforcement of the contract any dispute is referred to the engineer.

¹⁷³ Supra

¹⁷⁴ See the questionnaire by the respondent no JM2

for further advice or to the magistrate for determination. During their handling of the brief at the preliminary level the litigant may engage the clerk or judicial officer for their opinion in the matter or during the period of continued litigation. Some have mellowed in their understanding of the law and they draft pleadings for approval by the advocate. Their opinion is thus important in the dispensation of justice.

As a result judicial officers and court clerks were asked if they normally recommend arbitration to litigants. This was a closed question requiring a ‘yes’ or ‘no’ answer. Out the 30 respondents only 5 responded that they do not refer parties to a dispute for arbitration. 4 respondents abstained from answering this question while 21 answered that they normally recommend arbitration. The table below is a representation of the results. Table 6

Do you normally recommend arbitration to litigants?
‘yes’ or ‘no’

Yes	21
No	5
Respondents who abstained from answering this question	4
Total respondents	30

The above question was followed with the question if the judicial officer or clerk has ever witnesses a judge, magistrate or advocate refer a dispute for arbitration. This was a closed question requiring a ‘yes’ or ‘no’ answer. It is necessary to appreciate that majority of the litigants with small claims or a dispute will approach any person with a legal understanding for purposes of an advice on the position of the law as a result the opinion of the judicial officer or court clerk is crucial. The table below is a representation of the results. Table 7

Have you ever witnessed a judge, magistrate or advocate refer a dispute for arbitration?
 ‘yes’ or ‘no’

Yes	17
No	7
Respondents who abstained from answering this question	6
Total respondents	30

This clearly indicates that the judicial officers with their limited understanding of the law would still refer a dispute for determination through arbitration or ADR. In the questions that followed they recommended that sensitization be conducted for so that more people can be made aware of arbitration. One noted “that majority of Kenyans have no knowledge about arbitration exists in Kenya”.¹⁷⁵

4.7 Does the judiciary encourage the use of arbitration?

This question was put forward to the magistrates as a closed question requesting a ‘yes’ or ‘no’ answer. All the 6 magistrates sampled answered this question in the affirmative confirming that the judiciary indeed has been supporting the settlement via ADR.¹⁷⁶ During the distribution of the questionnaire some of the magistrates were interviewed so that they can give an in depth understanding of their position. The feedback obtained from the interviews was that there is a lacuna on the mode of implementation of ADR and the referral of matters for settlement to the other dispute settlement systems. A magistrate indicated that should she note that a dispute is well suited to be referred for arbitration what procedure would she invoke and still appear neutral? Further it is unclear if she would recommend an arbitrator and it is also necessary to consider if the parties can afford the services of an arbitrator. The table below is a representation of the results. Table 8

¹⁷⁵ See the response by C5 (with the grammatical error) C22, C23 and C15

¹⁷⁶ This is a confirmation of the judiciary reports that there is need to use ADR to settle disputes. See the literature review

Are you normally encouraged by the judiciary to refer cases for arbitration?
 ‘yes’ or ‘no’

Yes	6
No	0
Respondents who abstained from answering this question	0
Total respondents	6

This scenario can best be discussed with the comment made by an advocate that the Judicial service Commission needs to hire salaried arbitrators.¹⁷⁷ This would be easy for a magistrate to refer a matter for arbitration. The salaried arbitration panel can be hired from various professional backgrounds like engineering, accounting, insurance but people trained on arbitration.

4.8 Knowledge of arbitration forums and Institutions

A question was asked to the advocates sampled if ‘they knew of the existence of the Chartered Institute of Arbitrators Kenya’. This was a closed question with a ‘yes’ or ‘no’ answer. They indicated that they knew the existence of the Chartered Institute of Arbitrators Kenya. This question was asked for purposes of confirming if an advocate needs to institute an Institutional Arbitration proceedings, is he aware of an institution he will approach or the procedure he will engage. Out of all the advocates sampled only 2 were not know of the existence of the institution.

This also confirms that the institute has advertised itself adequately within the potential members and the practitioners of law. Below is a tabular representation of the same. Table 9

¹⁷⁷ See the response by A17

Are you aware of the existence of the Chartered Institute of Arbitrators Kenya?

Yes	95
No	2
Abstaining respondents	0
Total respondents	97

4.9 Reference to arbitration through the arbitration clause in any agreement

Among the most common ways a commercial dispute can be referred to arbitration is through the inclusion of a clause in the agreement that refers any dispute emanating from that agreement for arbitration. In recognition of the fact that most agreements are drawn by advocates the questionnaire asked the question “Do you include the arbitration clause in any agreement or contract for your clients?” This was a closed question with three replies that is ‘always’, ‘occasionally’ and ‘never’. This question also sought to know if advocates normally advance arbitration as a settlement model in commercial disputes since an advocate who would include the arbitration clause in an agreement would also refer a commercial dispute for arbitration.

Majority of the respondent’s advocates confirmed that they indeed include the arbitration clause in the agreements they draft. Out of the sampled 97 advocates, 72 indicated that they always include the arbitration clause in any contract they drew. 17 indicated that they occasionally included it while 8 do not include it. This shows that majority of the advocates will most certainly want a dispute sorted out via arbitration. This can be also interested to indicate there is potential to have more disputes solved via arbitration. A response from the sampled advocates is shown below in a tabular representation. Table10 below.

Do you include the arbitration clause in any agreement or contract for your clients?

‘Always’ occasionally’ or ‘never’

Always	72
--------	----

Occasionally	17
Never	8
Total respondents	97

An advocate indicated that he used to but he no longer does it.¹⁷⁸ This is despite the fact that the question was closed and answers required were either of the three noted above. He included his own narrative which read “used to, I no longer”. This implies that he used to include the clause but he later stopped. The respondents who answered never were expected to qualify their answers. In qualifying his answer he indicated that “I have lost faith in arbitration”. Further below he discussed about the fact that there is need to eradicate corruption in arbitration.¹⁷⁹

Two court clerks were also of the same opinion that an arbitrator may use the dispute settlement forum for their own gain. They indicated that they may lack faith in the arbitrator.¹⁸⁰

Another advocate respondent who answered this question in a unique manner and in a way that suggested there is high potential in arbitration responded that “this is standard clause in most government of Kenya contracts of a commercial nature”. This response was from the questionnaires circulated among government advocates. This clearly shows that the government is eager to dispute settlement for arbitration. The same should also be noted along the fact that there was a government sponsored bill which was assented to law establishing the Nairobi Centre for International Arbitration. This is a recent Act of parliament legislated for purposes of creating institutional arbitration under the auspice of the law.¹⁸¹ This act indicates there will be an office of a registrar of the Nairobi Centre for International Arbitration and a secretariat. The office will thereafter admit dispute that will be heard through the appointed arbitrators.

¹⁷⁸ See the response by A33

¹⁷⁹ This response confirms the writings by; Paul Ngotho “Challenges Facing Arbitrators in Africa” East Africa International Arbitration Conference. Nairobi (July, 2014) at page 4 – 8. Available at <http://www.ngotho.co.ke> where notes that arbitration is one of the challenges in arbitration

¹⁸⁰ See the response by C21. Note that this was an experienced court clerk as observed via her age of 59 years and the response by C26.

¹⁸¹ Kenya Gazette Supplement No. 40 (Acts No. 26 of 2013). Date of Commencement: 25th January, 2013

It is also notable that among the reasons why parties to a dispute prefer arbitration is due the fact that the court process is slow. However the parties answering this question also indicated that the arbitration process is expensive and thus the court would be a good and cheap option. One respondent indicated that “the court system is more open, less expensive and has generally reformed”.¹⁸² This answer indicated that there are advocates who are confident to pursue litigation avoiding arbitration and with valid reasons. In answering why she would not use arbitration one advocate indicated “the cost and length may be as long and more tendentious than litigation”.¹⁸³

¹⁸² See the response by A16

¹⁸³ See the response by A10

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

The first set of conclusions and recommendations from the feedback and data collected from the sampled population will be applicable to the general public and practitioners of law while the later part will be addressed to the judiciary.

Looking at the hypotheses that had been identified at the start of the paper we can note that the data collected has confirmed that indeed there exist some correlation between arbitration and access to justice. This is shown in the respondents' answers to the questions posed. The lawyers and judges/magistrates interviewed indeed confirmed that there is a need to have the use of arbitration enhanced. They confirmed that more resources need to be used to have arbitration spread out within the country.

The data collected was very critical in the analysis of the way forward in the development of arbitration so that the country can enhance the delivery of justice as anticipated at article 159 (2) (c). The last five questions required the respondents' opinion(s) and the recommendations of what needs to be done to enhance the use of arbitration in Kenya.

The first set of recommendations are geared towards the general public and private practitioners of law. They can only be enforced if there is a general understanding between the justice sector player institutions and the interested parties within the general public.

5.1 Enhancing Training and Awareness in Arbitration

Among the lawyers the most notable recommendation was that training be conducted to enhance knowledge in the field of arbitration. This opinion was raised at the final part of the questionnaire which asked for what the respondent would want done for purposes of developing

arbitration in Kenya.¹⁸⁴The notable answer phrases included the word “*creating awareness*” “*sensitization*” and “*advertising arbitration*”. One advocate discussed arbitration as “available mostly in Nairobi and not rural areas.” In another question he commented that “it is mostly centered in Nairobi since that is where there is sufficient sensitization of the arbitration option.”¹⁸⁵ This response is identical to the findings in the paper by MusiliWambua.¹⁸⁶

Some of the lawyers however in their discussions defined arbitration as mediation. They answered suggesting that the duties of an arbitrator include bringing the parties to in disputes together for the negotiations on the dispute towards finding a middle ground. They also indicated that in the process of arbitration parties are expected to cede their positions to facilitate an amicable settlement. These are attributes inherent in mediation and not arbitration.

This issue can be addressed by conducting continuous trainings on ADR to judges, magistrates’ lawyers and the general public.¹⁸⁷

Some of the fears and biases towards arbitration could also be addressed through continued periodic training and conferencing. It noteworthy to point out that one of the advocates interviewed was fearful that injunctive orders could not be adequately addressed through an arbitration forum.¹⁸⁸ There was also the lack of confidence that an injunction by an arbitrator can be enforced. However the issue at hand was the failure by counsel to acknowledge that a party may proceed to the courts of law and obtain an injunction pending the start of the arbitral

¹⁸⁴ Paul Ngotho “Challenges Facing Arbitrators in Africa” East Africa International Arbitration Conference (Nairobi - July, 2014) Available at <http://www.ngotho.co.ke> At page 9 and 10

¹⁸⁵ See Questionnaire number A45

¹⁸⁶ MusiliWambua ‘Broadening Access to Justice in Kenya through ADR; 30 years on’ Kenya Journal of Alternative Dispute Resolution’ (Vol 3 No1 2015)

¹⁸⁷ There was a consistent display of lack of knowledge in the field of arbitration and the procedure of getting parties to solve a dispute via arbitration. Advocates also made comments like need to be trained in arbitration procedures. Few advocates showed a well grounded understanding of arbitration.

¹⁸⁸ Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (2nd Edition Glenwood Publishers Ltd. 2012 Nairobi) 134 - 138

proceedings. The writer also acknowledges that arbitration may not have developed in leaps and bounds like litigation to facilitate granting of orders similar to Mareva injunctions and Anton Piller orders.¹⁸⁹

The consistent recommendation made by advocates which is the creation of awareness (partially highlighted above) and training is emphasized by the writer.¹⁹⁰ There is need for advocates to appreciate that there is no written down procedure for conducting proceedings before an arbitrator. The core procedure is about rules of natural justice. It may also be agreed by the parties on what procedure to follow. This aspect of the lack of understanding that it is the parties to an arbitral tribunal who set their procedure was demonstrated by the feedback obtained. Other advocates admitted lack of knowledge in arbitration.¹⁹¹

The justice sector institutions need to also consider enhancing training to the general public on arbitration.¹⁹² Specifically, the public needs to understand that an arbitrator is a private judge who can deliver justice and issue binding and compelling orders to the parties. From the feedback obtained some of the litigants who knew the existence of arbitration did not comprehend the finality of an arbitral award. Some held the view that if dissatisfied with an award they would set it aside or appeal at the courts of law which will exercise an appellate jurisdiction to the award.¹⁹³

The litigants should also be made to understand that it is important to sit down on a round table with the other disputing party in the presence of an arbitrator. This is because litigants displayed an attitude that the reason why they filed the dispute in court is because of; “I need to punish this

¹⁸⁹ *Mareva Compania Naviera SA v International Bulk carriers SA*, [1975] 2 Lloyd's Rep 509 (C.A. 23 June 1975), [1980] 1 All ER 213 and *Anton Piller KG v Manufacturing Processes Ltd & Others* [1975] EWCA Civ 12, [1976] 1 All ER 779 (8 December 1975)

¹⁹⁰ Ibid. noted above

¹⁹¹ However this lack of knowledge would be addressed to the bench or the parties to the dispute.

¹⁹² The justice sector players may consider conducting this training on the wider ADR and traditional dispute resolution mechanisms for an effective multi sector approach.

¹⁹³ These were sentiments from a few advocates

other party” and “I have taken a hard line position and I am not bulging”. Such instructions by litigants to the advocates give little chances in changing the clients’ perception to accepting arbitration as a dispute resolution mechanism.

Here are some of the responses from advocates why they do not pursue arbitration. One of the respondents advocate indicated the *‘unwillingness of the clients’* as one of the reasons for not using arbitration. Another advocate indicated *‘my clients refuse this option’* clearly indicating that a large number of litigants refuse ADR as a way of settling disputes. Along this line there was another response that *‘the clients are not agreeable to it, they believe the courts have the ultimate solution’*.¹⁹⁴

These training forums would also act as an advertisement of the availability of the arbitration channel to dispute settlement.

5.2 Recommendations to the Kenyan Judiciary

The research questions that had been posed in the first chapter have all been answered by the following findings. The following list of recommendations will answer the first and second questions that asked “what challenges are faced by those intending to settle a dispute via arbitration in Kenya” the second question that has also been answered is “what limits access to arbitration in Kenya.” The respondents have given valid reasons that should be considered in the answer to the questions and that should be considered in the development of arbitration.

The majority of the advocates, court clerks and judicial officers interviewed confirmed that judges and magistrates do recommend the solving of matters before them via arbitration. However this emerged to be an individual responsibility of the magistrate but not as an objective issued by the judiciary. The judiciary has done little to facilitate the use ADR to resolve

¹⁹⁴ These are some of the answers to question 6 (the second part) and question 15 of the questionnaire to advocates. See appendix 4 - II

disputes.¹⁹⁵ The magistrates interviewed indicated that they recommended arbitration in both civil and criminal disputes.

5.2.1 Including ADR in Performance measurement to judicial officers

There have been several recommendations by the various judicial committees and task forces formed that the judiciary needs to use ADR to settle disputes.¹⁹⁶ However the wide spread implementation has not been actualized. The judiciary has not done much in the use of arbitration to settle disputes. Trainings and recommendations have not done much leading to a show of frustration by the Chief Justice on how there has been a low uptake of ADR in Kenya.¹⁹⁷

From this paper I would recommend that among the performance targets the judicial service commission should delegate to judges and magistrates is that judicial officers to ensure that; recommend arbitration and arbitrate in cases where the litigants accept. The judiciary can easily make a follow up since the case can be brought up after a while to confirm the progress of arbitration in that single case.

5.2.2 Developing practice directions for magistrates regarding arbitration

On the development of arbitration the judges and magistrates were asked;

Explain how you would like the judiciary to assist in the settlement of disputes through arbitration.

Among the most outstanding recommendation prompted by this question was that “*the Chief Justice can actualize article 159 (2) (c) of the constitution by signing practice directions on alternative justice system*”. This was repeated by another respondent magistrate who noted that; “*enacting practice rules*”

¹⁹⁵ See the recommendations of: The Judiciary Kenya, *Report of the Sub-Committee of Ethics and Governance of the Judiciary Kenya* (November, 2005) www.kenyalaw.org (The Justice Onyango Otieno committee)

¹⁹⁶ See the note above and appendix 1 - Reports by committees/commissions/tribunals and policy papers

¹⁹⁷ See note one

These suggestions are novel since no procedure exists on how any judge or magistrate can refer a matter for arbitration. This has led to a free for all style where a judge or magistrate refers matters for arbitration (or ADR) without any formality or procedure but out of their own intuition. As a result the judiciary should consider legislating simple procedure directions that will facilitate referral of matters to arbitration but not encumber the process of invoking arbitration. This recommendation of publishing of the practice directions for arbitration and the responses collected via the magistrates indicate that order 46 of the Civil Procedure Rules is inadequate in the referral of an ongoing court case for arbitration.¹⁹⁸

Although arbitration has not been fully embraced to be used in the criminal justice system, the magistrates have actively been using it.¹⁹⁹ Among the offences which magistrates normally refer for arbitration are the simple crimes; assault, offences of creating disturbance and ‘petty criminals’. The practice directions for arbitration should also consider some guidance to the magistrate and prosecutor on the type of offences that the magistrate may refer for arbitration.²⁰⁰

The use of ADR in criminal matters would also require the engagement of the Office of the Director of Public Prosecutions. The Director of Public Prosecutions should also issue policy directions to the State Counsels working under him how ADR will be conducted once the complainant is willing to forgive the offender/criminal. During the interview with a state counsel at the Office of the Director of Public Prosecutions I was informed that the state counsel is not supposed to suggest to the parties the option of them settling the case. Any settlement should emanate from the parties to the dispute.²⁰¹ The role of counsel should only be to encourage the parties and not take part in the negotiations.

¹⁹⁸ See supra KyaloMbobu, Court Annexed ADR

¹⁹⁹ *Republic Vs Mohamed Abdow Mohamed Nairobi* HC CR Case 86 OF 2011

²⁰⁰ There is a deliberate use of the words ‘practice directions’ instead of ‘rules’ or ‘procedure’ that will govern referral to arbitration. Reference is also made to the Chartered Institute or Arbitration Rules which are very simple and easy to adhere to during the conduct of arbitration. <http://www.ciarbkenya.org/publications.html>

²⁰¹ Questionnaire number A93

The magistrates were also aware that the available specialists in arbitration charge high fees to decide matters. The high fees are way beyond what many litigants can afford. This has led to the particular magistrate being wary of referring matters to the known arbitrators since the parties may not afford the high fees. As a result the magistrate argued that there is need to be availed arbitrators who can conduct arbitration at fees that are affordable rate or the judiciary to hire arbitrators for the disputing parties. This recommendation resonates well with an advocate who suggested that the Judicial Service Commission to recruit salaried arbitrators.²⁰² These are the same arbitrators whose names will be availed in a list that can be circulated to courts and their names picked randomly to decide any matter that will be referred for resolution via arbitration.

Through case law the courts have severally confirmed that even without the practice rules the courts can refer a matter for arbitration. This was held in the case of *NyameinoMagetoVsSimionMagetoNyameino*²⁰³ where the court was of the opinion that in the provisions regarding arbitration the relevant sections of law enacted are exhaustive and thus not necessary to invoke sections 3A, 1A and 1B.

5.2.3 Recommendations based on proceedings and conduct of the arbitration process

The Kenyan Act has tried in many ways to foster development in the arena of international commercial arbitration.²⁰⁴ What follows here below are recommendations linked to the court annexed arbitration. However more still need to be done, among the recommendations and changes that I propose include;

5.2.4 Publishing of more details to enhance institutional arbitration

The Chartered institute of arbitrators should publish more information for those willing to conduct institutional arbitration through the institute. Their rules, mode of appointing arbitrators registered with the institute, expected expenses, available experts in the various fields, available

²⁰² Questionnaire number A17

²⁰³ HC ELC Kisii Case No 168 OF 2011 unreported eKlr

²⁰⁴ Since its modeled along the UNCITRAL model law

stenographers should be information that can be accessed online without going through the institute.

This should also be read together with the recommendation made by a respondent that Kenya lacks a developed framework for the development of arbitration.²⁰⁵ Despite the fact that the arbitration clause is standard clause in the government contracts institutional arbitration as noted is opaque having provided little information to that party who is contracting with the government.

This publishing will also help in the development of quality control which is lacking. All institutional awards should be published after a period of about six months so that the other players in the field can scrutinize the basis of any award. This will also reduce the susceptibility of corruption since the veil that will cover corruption may be uncovered through publishing.

5.2.5 A non-interference policy by judges

The wide discretion that the judges have had in the definition of section 37 should be elucidated soonest through precedent. The current wordings in the Arbitration Act gives the judge a wide discretion which may lead to the interference with the arbitral proceedings. This should be limited to reduce interference by the courts.

5.2.6 Timely delivery of rulings and awards concerning arbitrations

The civil procedure rules provide that a ruling or judgment can take sixty days to deliver.²⁰⁶ This should be different if the ruling has an effect to arbitration proceedings. Once the ruling of interlocutory applications filed by parties to arbitration in court is expedited, the delivery of justice is also facilitated at the arbitral tribunal.

²⁰⁵ Questionnaire number A96

²⁰⁶ See order 21 rule of the Kenyan Civil Procedure Rules 2010

To facilitate timely disposal of cases there may be the need to harmonize the workings of the Arbitration Act and the civil procedure rules regarding arbitration.²⁰⁷ The existence of the two *modus operandi* in the referral of court cases to an arbitration forum injures the development of international commercial arbitration in Kenya. This conflict arises

5.2.7 High arbitration fees

This topic is well discussed by J B Havelock in his article titled “Costs and Interest”. He starts off by noting that arbitration is not cheap, there are fees to be paid to the arbitrator, expert witness costs, arbitration rooms to be hired, services of a stenographer and other related costs. As a result arbitration appears as an expensive option.²⁰⁸ There ought to be an exploratory research on the need to have arbitrators charge affordable fees. This should end with making the arbitral process more affordable.

The issue of high arbitration fees was raised by an advocate interviewed. The advocate explained her case scenarios as follows;²⁰⁹

Her client wanted to settle a matter out of court since it was a simple dispute. The advocate wrote a letter to the Chartered institute of arbitrators Kenya requesting for the appointment of an arbitrator and one was appointed. The parties held preliminary meetings and thereafter the arbitrator demanded a deposit which was colossal and the parties to the dispute could not afford. The parties to the dispute had no choice but to abandon the arbitration forum since she/party to the dispute could not raise the initial deposit. The most astonishing fact is that the arbitrator to date is still demanding the amount for the time spent during the preliminary meeting via fee note. This is despite the fact that no substantive hearing took place.

²⁰⁷ See Cap 21 at order 46

²⁰⁸ J B Havelock, ‘Costs and Interest’ in GithuMuigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi) 157

²⁰⁹ Questionnaire number A7

This concerned advocate summarized the interview that she no longer refers her clients for arbitration and that she advises them to use the court justice system since it is affordable.

The issue of high arbitration fee can be noted that it is a phenomenon existing in arbitration world over. The Hong Kong Arbitration Center has published its fees.²¹⁰ The fee schedule does not indicate that arbitration is cheap but it confirms that high costs may deter the settlement of a dispute via arbitration. A claim being filed at the centre that does not exceed 400,000.00 Hong Kong Dollars (HKD) is charged an administrative fee of 19,800 HKD. This is approximately 5% of the disputed amount (if the disputed amount is 400,000.00 HKD).²¹¹ This figure may increase if you include the items listed by J B Havelock.²¹²

5.2.8 More resources should be invested in the field of arbitration by the justice sector players

The justice sector government players in conjunction with the judiciary, private institutions of arbitration should be brainstorming on the development of arbitration. Very little has been invested in the identification how each institution can promote arbitration by referral of disputes training or otherwise. What the institutions have done is merely indicate that ADR needs to be promoted without a guideline or work formula on how to do it.

²¹⁰<http://www.hkiac.org/en/arbitration/arbitration-rules-guidelines/hkiac-administered-arbitration-rules-2013/schedule-of-fees-2015>

It would be necessary if the Kenyan Chapter of the Chartered Institute of Arbitrators would publish the arbitral charges that the party intending to commence arbitration through it would incur. A party willing to pursue an institutional arbitration via Kenyan Chapter of the Chartered Institute of Arbitrators cannot make an informed decision since the information cannot be obtained free. These are some of the reasons which reduce the enhancement of making Kenya an attractive and viable arbitration dispute settlement centre. The lack of information may be a hindrance to any objective party to a dispute.

²¹¹ 1 HKD = 13.31 Kenya Shillings on 12th October, 2015

²¹² J B Havelock, 'Costs and Interest' in Githu Muigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi) page 157

The resources may include the hiring of arbitrators by justice sector players. A number of people keep off from arbitration since they fear that they may not afford the fee quoted by arbitrators. If the fee issue was looked into with an intention of lowering or cost sharing it, the number of cases pursued via arbitration would increase.

5.2.9 Few advocates prefer arbitration

The number of cases referred to arbitration is not encouraging. Advocates seem to prefer the court litigation process since they are familiar and used to it or the client lack of finances to pursue arbitration. This can be noted from the fact that not all advocates would include an arbitration clause in an agreement which would be instrumental to refer a matter for arbitration if the parties disagreed.

During one of the interviews an advocate also noted that it would be ideal for advocates to refer matters which have a definite known amount referred for arbitration or an ADR session of conciliation. He indicated when a client approaches an advocate with instructions that he owes a third party an amount that is known and that he requires more time to settle the amount an injunction is sought in the first instance. The injunction more often spin into years of litigation and the debtor misuses it and spends more money on litigation which was not expected. The course of action more often changes once it is realized that the claim can be set aside or challenged. This leads to the debtor being convinced that he can challenge the whole amount which he owed the third party leading to more time being spent in court litigation. This scenario was also confirmed by a different advocate respondent.²¹³ This advocate observed that an advocate who stated that legal practitioners mislead clients to pursue arbitration since they prefer arbitration

²¹³ See questionnaire A82 and A97

5.2.10 Training of Arbitrators with diverse educational and professional backgrounds

An accountant would be more comfortable appearing before an arbitrator (or judge) who has studied and understands accounting. The same would also be ideal for a doctor, engineer or any other professional. The multi professional training will enhance cultural backgrounds that will develop arbitration and arbitrators. This will also bring in competition and quality assurance standardization in the field of arbitration since the regulation and misconduct of a professional member arbitrator can be taken up by his professional association. This will reduce the controversial arbitral awards and decisions. What needs to be done is to ensure that the training to the multi professional practitioners ensure the standards of fair judicial practice and the right for a fair hearing and trial to any party to a dispute are maintained. This may promote arbitration while reducing the consistency in the arbitration practice.

This argument is further substantiated by Justice Torgbor in his recent paper “Opening up International Arbitration in Africa”.²¹⁴ He notes that the model law which has been domesticated world over does not preclude any person from acting as an arbitrator. He writes;

..... There is support therefore for the development of a modern arbitration culture that enables every person to share in the opportunity and experience of participation in international arbitrations where they are suitably qualified to do so. (emphasis mine)

This confirms that everyone can participate in arbitration. It is a field that is supported by; agreement of parties, UNCITRAL model law and there is no standard acceptable procedure other than the rules of natural justice being the guiding light. It is therefore necessary to make individual efforts to support delivery of justice via arbitration.

²¹⁴Justice Edward Torgbor ‘Opening up International Arbitration in Africa’. ADR Journal (2015) Vol 3 Nairobi ISBN 978-9966-046-04-8 Page 21 and 23

5.2.11 Further areas of Research

There is need to conduct further indepth research in the area. Due to the geographical spread of counties in the country the problems prevalent in Nakuru and Kericho may not be exactly similar to the ones present in the counties of Wajir and Garisssa and thus there may exist unique challenges in the inculcation of arbitration within the counties.

More justice sector players should also be involved extensively in this reseach. Justice is a collective responsibility. The Non-Governmental Organizations and governace sector players should also be approached to give and input.

Attaining justice is a pooled action for a better nation.

REFERENCES

Statutes

1. Inter-American Convention on Commercial Arbitration²¹⁵
2. The Arbitration Act of Kenya Chapter 49 of the laws of Kenya. Enacted in 1995
3. The Arbitration Act of UK Act no 6 of 1996
4. The Arbitration Act of Zimbabwe
5. The Civil Procedure Act Cap 21 of the laws of Kenya
6. The Commercial Arbitration Act
7. The Constitution of Kenya Promulgated in 2010
8. The Convention on the Enforcement of Arbitral Awards²¹⁶
9. The Employment Act No 12 of 2007
10. The UNCITRAL Model law²¹⁷
11. The Investment Disputes Convention Act Chapter 522 Of The Laws of Kenya

BIBLIOGRAPHY

Books

1. Andrew Tweeddale and KerenTweeddale, *Arbitration of Commercial Disputes* (2007 Edition, Oxford University Press)
2. Bernstein R, Tackaberry J & Marriot AL, *Handbook of Arbitration Practice* (3rd edition (1998) 13)
3. Bix Brian, *Jurisprudence and Context* (4th Edition Sweet & Maxwell London)
4. C. R. Kothari. *Research Methodology, Methods and Techniques*, (2nd Revised Edition New Age International Publishers)
5. Enid A. Marshall, *The Law of Arbitration* (4th Edition Sweet and Maxwell London)

²¹⁵(entered into on 16 June 1976), 14 ILM 336, United States Code.

²¹⁶Popularly referred to as ‘The New York Convention’. This convention requires courts to enforce foreign arbitral awards. Kenya is a contracting party to this convention; Kenya signed the convention on Feb, 1989.

²¹⁷ UNCITRAL is an acronym for “United Nations Commission on International Trade Law. This is an international model law that seeks to harmonize domestic laws of arbitration of various jurisdictions and create a special regime for international cases.

6. Githu Muigai, *Arbitration Law and Practice in Kenya*, (2013 Law Africa Nairobi)
7. Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (2nd Edition. Glenwood Publishers Ltd. 2012 Nairobi)
8. Lee Epstein & Andre D. Martin. "An Introduction to Empirical Legal Research" (Oxford University Press, 2012 Washington) <http://empiricallegalresearch.org/>
9. Mugenda O M and Mugenda A G, *Research Methods – Quantitative & Qualitative Approaches*, (2003 Nairobi ACTS Press)
10. Omony John Paul, *Key issues in jurisprudence; an in-depth discourse on jurisprudence problem* (1st Edition law Africa 2013)

Scholarly Journals and articles

1. Clint A. Corrie and others, Challenges in International Arbitration for Non-Signatories. Comparative Law Yearbook of International Business. LLP Dallas, Texas, United States.
2. Daisy Owuor Ajima, Making Kenya a Hub for Arbitration of International Financial Services Disputes Master of Laws Thesis November, 2014 <http://erepository.uonbi.ac.ke/handle/11295/75602?show=full>
3. 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*. Dissertation presented for the degree of Doctor of Law in the Faculty of Law at the University of Stellenbosch University <http://scholar.sun.ac.za>
4. Emilio Cardenas & David W. Rivkin, A Growing challenge to Ethics in International Arbitration.
5. Eric Opiyo, Examining the Viability of a Regional East African Arbitral Institution. 2012. <http://erepository.uonbi.ac.ke:8080/xmlui/handle/123456789/8391>
6. Jacob K. Gakeri, Placing Kenya on the Global Platform: An evaluation of the Legal Framework on Arbitration. International Journal of Humanities and Social Science. Vol 1 No 6; June 2011.
7. Justice Edward Torgbor 'Opening up International Arbitration in Africa'. ADR Journal (2015) Vol 3 Nairobi ISBN 978-9966-046-04-8

8. KyaloMbobu, Efficacy of Court Annexed ADR: Accessing Justice through ADR. ADR Journal ISBN 978-9966-046-02-4
9. Leonard OburaAloo, Consolidation of Commercial Arbitration: Institutional and Legislative Responses (2015) 1 Alternative Dispute Resolution Journal
10. Ojwang J B “Rural Dispute Settlement in Kenya” (1975-1977) Zambia Law Journal
11. Owen Fiss, Against Settlement, 93 Yale Law Journal 1073 (1984)

Conference Papers

1. Brenda Brainch, ‘The Climate of Arbitration and ADR in Kenya’ (Paper presented to the Colloquium on Arbitration and ADR in Africa States, King’s College London, June 2003)
2. Farooq Khan, ‘Alternative Dispute Resolution’ (A paper presented Chartered Institute of Arbitrators- Kenya Branch Advanced Arbitration Course, Nairobi 8-9 March 2007)
3. Frank Sander, 1.Varieties of Dispute Processing, The Pound Conference: Perspectives on Justice in the Future (A. Levin & R. Wheeler eds., West, 1979)
4. KariukiMuigua, ‘Overview of Arbitration and Mediation in Kenya’, (A paper submitted at a Stakeholder’s forum on Establishment of Alternative Dispute Resolution (ADR) Mechanism for Labour Relations in Kenya Kenyatta International Conference Center, Nairobi on 4th – 6th May, 2011)

Reports by committees/commissions/tribunals and policy papers

1. Institutionalizing Performance Management and Measurement in the Judiciary Report by Performance management and Measurement Steering Committee. April 2015. www.judiciary.go.ke
2. Patricia KameriMbote and MigaiAkech. Kenya Justice Sector and the Rule of Law. A review by Afri MAP and the Open Society Initiative for Eastern Africa March 2011
3. The Judiciary Kenya, Report of the Sub-Committee of Ethics and Governance of the Judiciary Kenya. November, 2005. www.kenyalaw.org(the Justice OnyangoOtieno committee)

4. The Judiciary Kenya, State of the Judiciary Report, 2012 - 2013. The Second Annual State of the Judiciary and Administration of Justice Report. www.judiciary.go.ke

Websites

1. hls.harvard.edu/library
2. <http://empiricallegalresearch.org>
3. <http://erepository.uonbi.ac.ke>
4. <http://scholar.sun.ac.za>
5. <http://www.ngotho.co.ke>
6. <http://www.uncitral.org/uncitral/en/index.html>
7. www.ciarbkenya.org
8. www.jstor.org
9. www.judiciary.go.ke
10. www.kenyalaw.org
11. www.kmco.co.ke

APPENDIX 1

Dear Respondent,

The undersigned is a Master of Laws student at the University Of Nairobi conducting a study on “CHALLENGES IN DISPUTE RESOLUTION IN KENYA: WHY HAS THERE BEEN LIMITED USE OF ARBITRATION IN THE SETTLEMENT OF DISPUTES IN KENYA”. This research project is for purposes of my partial fulfillment of my Master of Laws degree. The further objective of this research project is to attempt to understand why there has been limited use of arbitration in Kenya. Through your participation, I eventually hope to understand how best we can promote the use of arbitration in Kenya resulting to the promotion of justice in Kenya.

The sample survey respondents to this questionnaire have been randomly identified as those who are aware of arbitration in Kenya. Enclosed with this letter is a three page questionnaire that asks a variety of questions about your attitudes toward arbitration in Kenya. Kindly complete the questionnaire and send it back to me in hard or soft copy format.

If you choose to participate, kindly write your email address and/or mobile phone number on the questionnaire. This will be essential if I may need a clarification to any response. I do not need to know who you are and no one will know whether you participated in this study. Your responses will not be identified with you personally, nor will anyone be able to determine which company you work for. Nothing you say on the questionnaire will be shared out or distributed and your participation is voluntary.

If you have any questions or concerns about completing the questionnaire or participating in this study, you may contact me at nguyowachira@gmail.com. Your participation will be highly appreciated.

Sincerely,

NguyoWachira Patrick,
Master of Laws Student,
UNIVERSITY OF NAIROBI

APPENDIX 1 – I

QUESTIONNAIRE

KEY

- a. Place your mark in the brackets. eg (\surd) or (**x**)
- b. 1 () =Very good
- 2 () =Good
- 3 () =Fair
- 4 () =Poor
- 5 () = Very poor)

(1 Represents best while 5 indicates worse)

INTRODUCTION

- i. Name
- ii. Contacts; Email address and/or mobile phone number
..... (I may need to clarify your response. I do not
need to know who you are and no one will know)
- iii. County

QUESTIONS

- 1. Have you ever used arbitration to settle disputes in court?
Yes ()
No ()

- 2. How effective was arbitration on this scale?
1- () =Very good
2 -() =Good
3 -() =Fair
4 -() =Poor
5- () = Very poor)
(Represents best while 5 indicates worse)

- 3. Do you often suggest arbitration to your litigants as a dispute settlement mechanism?

Yes ()

No ()

4. How many cases have you used/referred for settlement through arbitration?

In the last one month;

() none, () 3 cases, () 4 cases, () 5 cases **or** specify how many _____

In the last 3 months;

() none, () less than 5 cases, () more than 10 cases **or** specify how many _____

In the last one year;

() none, () less than 5 cases, () more than 10 cases **or** specify how many _____

5. What are the reasons why you do not necessarily refer cases for arbitration?

1 = () Lack of faith in arbitrators

2 = () litigants and advocates do not enquire and so I do not offer it

3 = () I did not give litigants that option since they chose a judicial mechanism

4 = () I expect it to be expensive than a judicial mechanism

5 = () I generally prefer court

Give any other reason for not referring cases for arbitration _____

6. Are you aware that you can refer cases for arbitration?

Yes ()

No ()

7. Do parties appearing before you opt to go for arbitration?

Yes ()

No ()

8. If YES,

how many in the in the last one month?

() none, () 3 cases, () 4 cases, () 5 cases **or** specify how many _____
how many in the last 3 months?

() none, () less than 5 cases, () more than 10 cases **or** specify how many _____
how many in the last one year;

() none, () less than 5 cases, () more than 10 cases **or** specify how many _____

9. Are you aware of any specialized arbitration lawyers, arbitrators, forums, arbitration chambers or arbitration institutes you can refer for help in arbitration and dispute settlement?

Yes ()

No ()

10. Are you normally encouraged by the judiciary to refer cases for arbitration?

Yes ()

No ()

11. Explain how you would like the judiciary to assist in the settlement of disputes through arbitration?

12. What in your opinion what should be done to encourage people to settle disputes via arbitration?

1=() open arbitration forums near courts

2=() advertise arbitration for people with disputes

3=() make it mandatory for lawyers/judges to give parties to a dispute the option to use arbitration

4=() government to hire arbitrators in all sectors

5=() training of arbitration to be enhanced to more people

Give any other reason _____

13. What in your opinion hinders the use of arbitration in Kenya?

14. In your opinion how effective has Kenya been in using arbitration to settle disputes.

1- () =Very good

2 -() =Good

3 -() =Fair

4 -() =Poor

5- () = Very poor)

(1 Represents best while 5 indicates worse)

15. Will you consider arbitration as a dispute settlement mechanism next time?

Yes ()

No ()

APPENDIX 1 – II

QUESTIONNAIRE

KEY

- c. Place your mark in the brackets. eg ($\sqrt{\quad}$) or (\times)
 - d. 1 () =Very good
 - 2 () =Good
 - 3 () =Fair
 - 4 () =Poor
 - 6 () = Very poor)
- (1 Represents best while 5 indicates worse)

INTRODUCTION

- iv. Name
- v. Contacts; Email address and/or mobile phone number
..... (I may need to clarify your response. I do not
need to know who you are and no one will know)
- vi. County

QUESTIONS

- 1. Have you ever used arbitration in any dispute; litigation, quasi judicial or before a tribunal?
 - i. Yes ()
 - ii. No ()

- 2. How effective was arbitration on this scale?
 - a. 1-() =Very good
 - b. 2 -() =Good
 - c. 3 -() =Fair
 - d. 4 -() =Poor
 - e. 5-() = Very poor)

Represents best while 5 indicates worse)

3. Do you often suggest arbitration to your clients as a dispute settlement mechanism?
- i. Yes ()
 - ii. No ()
4. How many cases have you used/referred for settlement through arbitration?
- a. In the last one month;
 - b. () none, () 3 cases, () 4 cases, () 5 cases **or** specify how many _____
 - c. In the last 3 months;
 - d. () none, () less than 5 cases, () more than 10 cases **or** specify how many ____
 - e. In the last one year;
 - f. () none, () less than 5 cases, () more than 10 cases **or** specify how many ____
5. What are the reasons why you do not necessarily use arbitration?
- a. 1 = () I did not know arbitrators exist
 - b. 2 = () Lack of faith in arbitrators
 - c. 3 = () I did not give my clients that option
 - d. 4 = () I expected it to be expensive
 - e. 5 = () I generally prefer court because it is familiar
 - f. 6 = () my clients did not enquire and so I did not offer it
- Give any other reason for not using arbitration _____
- _____
- _____
6. Are you aware that you can invoke arbitration in Kenya in any civil related dispute?
- i. Yes ()
 - ii. No ()
7. Has the magistrate, judge or any judicial officer ever suggested that you to use arbitration in any case?
- i. Yes ()
 - ii. No ()

8. If YES how often in the last one month?

a. () 1 case, () 3 cases, () 4 cases, () 5 cases **or** specify how many _____

9. Are you aware of any specialized arbitration lawyers, arbitrators, forums, arbitration chambers or arbitration institutes you can refer for help in arbitration and dispute settlement?

i. Yes ()

ii. No ()

10. What do you know about arbitration in Kenya?

11. Do you include the arbitration clause in any agreement or contract for your clients?

i. Yes ()

ii. No ()

iii. Occasionally ()

12. If No explain why?

13. Are you aware of the existence of the Chartered Institute of Arbitrators (CI Arb)?

i. Yes ()

ii. No ()

14. What in your opinion what should be done to encourage people to settle disputes via arbitration?

- a. 1=() open arbitration forums near courts
- b. 2=() advertise arbitration for people with disputes
- c. 3=() make it mandatory for lawyers/judges to give parties to a dispute the option to use arbitration
- d. 4=() government to hire arbitrators in all sectors
- e. 5= () training of arbitration to be enhanced to more people

Give any other reason _____

15. What in your opinion hinders the use of arbitration in Kenya?

16. In your opinion how effective has Kenya been in using arbitration to settle disputes.

- a. 1- () =Very good
 - b. 2 -() =Good
 - c. 3 -() =Fair
 - d. 4 -() =Poor
 - e. 5- () = Very poor)
- i. (1 Represents best while 5 indicates worse)

17. Will you consider arbitration as a dispute settlement mechanism next time?

- i. Yes ()
- ii. No ()

KEY

e. Place your mark in the brackets. eg (\checkmark) or (**x**)

f. 1 () =Very good

2 () =Good

3 () =Fair

4 () =Poor

7 () = Very poor)

(1 Represents best while 5 indicates worse)

INTRODUCTION

vii. Name

viii. Contacts; (I may need to clarify your response but your name and contact remain confidential)

Email address

mobile phone number

ix. Sex: male () female ()

x. Age

xi. Highest level of education

xii. County

Are you () litigant/a party in a dispute

() judicial staff or court clerk

() business person

() others –please specify

QUESTIONS

1. What do you know about arbitration in Kenya?

2. Do you normally recommend arbitration to litigants?
- i. Yes ()
 - ii. No ()
3. Have you witnessed the Judge/magistrate/advocate refer a dispute for arbitration settlement?
- i. Yes ()
 - ii. No ()
4. How effective was arbitration on this scale?
- a. 1-()=Very good
 - b. 2-()=Good
 - c. 3-()=Fair
 - d. 4-()=Poor
 - e. 5-()= Very poor)
5. If you do/did NOT refer the litigants to use arbitration what was the reason
- a. 1 = () I did not know arbitrators exist
 - b. 2 = () Lack of faith in arbitrators
 - c. 3 = () My lawyer/judge did not expose me to the arbitration option
 - d. 4 = () I expected it to be expensive
 - e. 5 = () I generally prefer court because it is familiar

Give any other reason for not recommending arbitration

6. Are you aware that you can invoke arbitration in Kenya in any civil related dispute?
- i. Yes ()
 - ii. No ()

7. Are you aware of any arbitration lawyers, arbitrators, forums, arbitration chambers or arbitration institutes you can refer for help in arbitration and dispute settlement?

i. Yes ()

ii. No ()

8. Has any litigant ever asked you about arbitration?

i. Yes ()

ii. No ()

9. If yes, did that litigant pursue arbitration?

i. Yes ()

ii. No ()

10. Are you aware of the existence of the Chartered Institute of Arbitrators (CI Arb)?

i. Yes ()

ii. No ()

11. What in your opinion should be done to encourage people to settle disputes via arbitration?

a. 1=() open arbitration forums near courts

b. 2=() advertise arbitration for people with disputes

c. 3=() make it mandatory for lawyers/judges to give parties to a dispute the option to use arbitration

d. 4=() government to hire arbitrators in all sectors

e. 5=() training of arbitration to be enhanced to more people

f. Give any other reason _____

12. What in your opinion what hinders the use of arbitration in Kenya?

13. In your opinion how effective has Kenya been in using arbitration to settle disputes.

- a. 1- () =Very good
- b. 2 -() =Good
- c. 3 -() =Fair
- d. 4 -() =Poor
- e. 5- () = Very poor)

14. Will you consider arbitration as a dispute settlement mechanism in future?

- i. Yes ()
- ii. No ()

APPENDIX 1 – IV

QUESTIONNAIRE

KEY

g. Place your mark in the brackets. eg (√) or (x)

- h. 1 () =Very good
- 2 () =Good
- 3 () =Fair
- 4 () =Poor
- 8 () = Very poor)

(1 Represents best while 5 indicates worse)

INTRODUCTION

xiii. Name

- xiv. Contacts; Email address and/or mobile phone number
 (I may need to clarify your response. I do not
 need to know who you are and no one will know)
 - xv. Sex
 - xvi. Age
 - xvii. Level of education
 - xviii. County
- Are you() litigant/a party in a dispute
 () business person
 () others –please specify

QUESTIONNAIRE

1. Have you ever been involved in any dispute; litigation, quasi judicial or before a tribunal?
 - i. Yes ()
 - ii. No ()

2. Was arbitration used to settle the dispute?
 - i. Yes ()
 - ii. No ()

3. How effective was arbitration on this scale?
 - a. 1-()=Very good
 - b. 2 -()=Good
 - c. 3 -()=Fair
 - d. 4 -()=Poor
 - e. 5-()= Very poor)
4. Represents best while **5** indicates worse)

5. Were you represented by a lawyer in that case?

- i. Yes ()
- ii. No ()

6. If you did not use arbitration what was the reason

- a. 1 = () I did not know arbitrators exist
- b. 2 = () Lack of faith in arbitrators
- c. 3 = () My lawyer/judge did not expose me to the arbitration option
- d. 4 = () I expected it to be expensive
- e. 5 = () I generally prefer court because it is familiar

Give any other reason for not using arbitration _____

7. Are you aware that you can invoke arbitration in Kenya in any civil related dispute?

- i. Yes ()
- ii. No ()

8. Has your lawyer, the magistrate, judge or any legal authority advised you to use arbitration as a dispute settlement method?

- i. Yes ()
- ii. No ()

9. Are you aware of any arbitration lawyers, arbitrators, forums, arbitration chambers or arbitration institutes you can refer for help in arbitration and dispute settlement.

- i. Yes ()
- ii. No ()

10. Have you ever used arbitration?

- i. Yes ()

ii. No ()

11. What do you know about arbitration in Kenya?

12. Have you ever entered into any binding agreement or contract with any person or business? (either verbal or written)

i. Yes ()

ii. No ()

13. If yes, did that agreement / contract provide for arbitration as a dispute settlement mechanism in case of any disagreement?

i. Yes ()

ii. No ()

14. If No explain why you did not want to settle disputes in that agreement using arbitration

15. Are you aware of the existence of the Chartered Institute of Arbitrators (CI Arb)?

i. Yes ()

ii. No ()

16. What in your opinion what should be done to encourage people to settle disputes via arbitration?

- a. 1=() open arbitration forums near courts
- b. 2=() advertise arbitration for people with disputes
- c. 3=() make it mandatory for lawyers/judges to give parties to a dispute the option to use arbitration
- d. 4=() government to hire arbitrators in all sectors
- e. 5= () training of arbitration to be enhanced to more people

Give any other reason _____

- f. _____

17. What in your opinion hinders the use of arbitration in Kenya?

18. In your opinion how effective has Kenya been in using arbitration to settle disputes.

- a. 1-() =Very good
- b. 2 -() =Good
- c. 3 -() =Fair
- d. 4 -() =Poor
- e. 5-() = Very poor)
- i. (1 Represents best while 5 indicates worse)

19. Will you consider arbitration as a dispute settlement mechanism next time?

i. Yes ()

ii. No ()

APPENDIX 2



UNIVERSITY OF NAIROBI
COLLEGE OF HUMANITIES & SOCIAL SCIENCES
SCHOOL OF LAW, PARKLANDS CAMPUS
OFFICE OF THE DEAN

Telephone: 254-020- 2314371-5
Cell Phones: 0724-922 608/ 0734-273 568
Fax: 254-020-3744284
E-mail: deanlaw@uonbi.ac.ke

P.O Box 30197
00100 G.P.O.
Nairobi,
Kenya.

23rd July, 2015

**NATIONAL COMMISSION FOR SCIENCE,
TECHNOLOGY & INNOVATION
P.O. BOX 30623 – 00100
NAIROBI
UTALII HOUSE, UHURU HIGHWAY**

Dear Sir/Madam

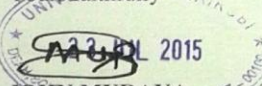
RE: NGUYO PATRICK WACHIRA - G62/70225/2013

This is to confirm that the above named is a bonafide student at the University of Nairobi School of Law. He is undertaking studies leading to the award of Master of Laws degree (LLM).

Mr. Nguyo is in the process of writing Project Paper as partial fulfilment for Master of Laws degree programme. He would like to obtain permit in order to collect data for his Project Paper.

Any assistance accorded him will be appreciated.

Yours faithfully


JOHN MURAYA
ADMINISTRATIVE ASSISTANT
SCHOOL OF LAW

CONDITIONS

- 1. You must report to the County Commissioner and the County Education Officer of the area before embarking on your research. Failure to do that may lead to the cancellation of your permit**
- 2. Government Officers will not be interviewed without prior appointment.**
- 3. No questionnaire will be used unless it has been approved.**
- 4. Excavation, filming and collection of biological specimens are subject to further permission from the relevant Government Ministries.**
- 5. You are required to submit at least two(2) hard copies and one(1) soft copy of your final report.**
- 6. The Government of Kenya reserves the right to modify the conditions of this permit including its cancellation without notice.**

RESEARCH CLEARANCE PERMIT

NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

Serial No. A 6813

CONDITIONS: see back page