

**A REVIEW OF PRIVACY AND CONFIDENTIALITY
IN ARBITRATION IN KENYA**

BY

MUCHIRI ERIC THIGE

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SCHOOL OF LAW

SUPERVISOR: MR. L. OBURA ALOO

NAIROBI

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DECLARATION

I, **MUCHIRI ERIC THIGE**, declare that this paper is my original work and has not been submitted to any University or College for academic credit.

Signature _____

Date _____

I certify that this project paper was prepared under my guidance and supervision.

MR. L. OBURA ALOO

Signed _____

Date _____

DEDICATION

To my parents Peter and Anne Muchiri, my siblings Rose, Benson and Caroline, and our lovely one Vanessa Watetu thank you for all your support and encouragement.

To my Supervisor Mr. Aloo, my pupil masters Muri, Mwaniki & Wamiti (once a pupil master always a pupil master) thank you for your guidance and encouragement in the academic and legal profession.

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ABSTRACT

Kenya enacted a fresh constitutional order in 2010. The Constitution expanded the Bill of Rights besides providing for national principles and values of governance. The Constitution heralded a new order to which all the existing laws and practices had to conform.

Privacy and confidentiality are some of the attributes that arbitration enjoys over other dispute resolution mechanisms. Yet, some jurisprudence has emerged in Kenya that shows that privacy and confidentiality are no longer regarded as central to arbitration. Further, there exist different schools of thought – one from the United Kingdom, and the other from Australia – as to whether confidentiality attaches to materials and evidence used in arbitration.

This study set out to examine the scope of privacy and confidentiality in Kenya in light of the new constitutional dispensation. It was found that the core legislation on arbitration in Kenya is silent on privacy and confidentiality. Thus, resort has to be had to party autonomy which allows parties to determine the applicability of privacy and confidentiality. It was found that the Constitution of Kenya has eroded the contours of privacy and confidentiality. This is especially due to constitutional supremacy, emboldened Bill of Rights, and the novel national values and principles of governance.

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CHAPTER 1

1. Background

Privacy and confidentiality of arbitration proceedings have been touted as some of the attributes that arbitration has over other dispute resolution mechanisms especially litigation.¹ Privacy of the proceedings means that third parties are to be excluded from the hearings or arbitration proceedings.² On the other hand, confidentiality is about the parties' obligation to each other not to disclose information concerning the arbitration to third parties.³

The Arbitration Act, Act No 4 of 1995 as amended by the Arbitration (Amendment) Act 2009 (both hereinafter referred to as "the Arbitration Act") is the primary source of arbitration law in Kenya. However, the Act is silent on privacy and confidentiality.

The Civil Procedure Act⁴ also provides for court-annexed arbitration. This is where parties to a dispute that is before the court can apply before judgment for a reference of the dispute to be settled through arbitration.⁵ Still, neither the Act nor the Rules provide for privacy or confidentiality of the arbitration process.

¹ Muigua K., *Settling Disputes Through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers Limited, (2017) at page 3.

² Richard Smellie, Fenwick Elliott Solicitors, <<https://bit.ly/2OVUNGS>> as accessed on 17th March 2017.

³ Ibid.

⁴ Chapter 21, Laws of Kenya.

⁵ Pursuant to Section 59 of the Civil Procedure Act, and Order 46 of the Civil Procedure Rules, 2010.

Article 10 of the Constitution of Kenya (hereinafter referred to as “the Constitution”) provides for values and principles that are binding on all persons in Kenya. These values and principles are applicable to “persons” and not “citizens”.⁶ Thus, even foreign arbitrators and parties are constitutionally bound to apply the stated values and principles before, during and even after arbitrations.

The rule of law, democracy, participation of the people, good governance, integrity, transparency and accountability are some of the national values and principles of governance that would appear to affect privacy and confidentiality of the arbitration proceedings.⁷ Can privacy and confidentiality stand in light of such values and principles? If yes, how are such attributes of arbitration modified?

It is against this background that this study seeks to analyse the scope of privacy and confidentiality before, pending and after arbitration in Kenya.

2. Statement of the Research Problem

In *Nyutu Agrovet Limited v Airtel Networks Limited*⁸, the efficacy of the attributes of arbitration which include privacy and confidentiality was questioned. The Court stated,

“Arbitration is one of the dispute resolution mechanisms ...It is preferred by many parties who usually agree on the mode of appointment of the arbitrator long before a dispute arises. It is also meant to be *cheaper, faster and more confidential as* compared to ordinary litigation. This is nonetheless debatable at present as arbitration is becoming more *cumbersome, expensive and inefficacious as each day goes by.*” [Emphasis mine]

⁶ Article 260 of the Constitution defines a “person” as including a company, association or other body of persons whether incorporated or unincorporated.

⁷ Article 10 (2).

⁸ Nairobi Civil Application Number 61 of 2012.

Kenya enacted a new constitutional order in 2010. The Constitution is the supreme law of the Republic, and if a law is inconsistent with it, then it is void to that extent. The Constitution also invalidates any act or omission that contravenes it.⁹ In light of such constitutional provisions, any arbitration law, practice or attribute must conform to the Constitution.

In view of such issues, the study will seek to explore the scope of privacy and confidentiality in arbitrations that are conducted in Kenya. Whereas most arbitration proceedings are carried out in private, this privacy is not equal to confidentiality of the proceedings. As stated, the Act is silent about confidentiality. That notwithstanding, the two prominent arbitration institutions in Kenya – the Nairobi Centre for International Arbitration¹⁰ and the Chartered Institute of Arbitrators, Kenya Branch - have rules explicitly providing for confidentiality. Rule 34 (1) of the Arbitration Rules, 2015 of the Nairobi Centre for International Arbitration¹¹ is such a provision. The parties cannot divulge details of awards or proceedings unless they agree to do so in writing, the parties are under a legal duty to do so, or to enforce or challenge the award.

Yet, the media is always reporting on cases of arbitrations.¹² This is especially so when there are enforcement proceedings, interlocutory applications, or post-award appeals or

⁹ Articles 2 (1) and 2(4) of the Constitution of Kenya, 2010.

¹⁰ Established under the Nairobi Centre for International Arbitration Act, No. 26 of 2013.

¹¹ Nairobi Centre for International Arbitration (Arbitration) Rules, 2015.

¹² See for example <http://www.businessdailyafrica.com/Kebs-on-the-spot-over-Sh102m-tender/539546-3519328-1gnhw4/> (as accessed on 18th January 2017) on report of an arbitration award that has been challenged. See also <http://mobile.nation.co.ke/business/Court-spares-Airtel-Sh500m-fine/1950106-2647646-format-xhtml-98j4qq/index.html> (as accessed on 18th January 2017) on an extensive report of the arbitration proceedings and award in the *Nyutu Agrovet* case.

reviews. This situation begs the questions: is there a duty of confidentiality in Kenya? If there is, what are its limits? These are the questions that the study will seek to answer.

3. Justification of the study

This study is justified by the fact that privacy and confidentiality are put forward as the merits arbitration enjoys over other forms of dispute resolution.¹³ Yet, their scopes are not clear. This ambiguity has led courts to question these attributes as arbitration is seen as becoming more “inefficacious”.¹⁴ The Constitution raises new issues that call for a clearer demarcation of privacy and confidentiality in arbitration. Otherwise arbitration laws, practices, acts and orders may be invalidated for being contrary to the Constitution.

Thus, a clear understanding of the privacy and confidentiality in arbitration is of essential guidance to such parties and the general public.

4. Objectives of the study

One of the objectives of this study is to analyse the scope of privacy and confidentiality in arbitration in Kenya considering the Constitution. It will be sought to examine the scope of such phenomenon pending, during and after arbitration proceedings.

Upon such a study, it will seek to put out the reforms that can be made to these attributes of confidentiality.

5. Research questions

The following are the questions that the study will seek to answer:

- (a) What is the scope of privacy and confidentiality in arbitration in Kenya?
- (b) Pending commencement of arbitration proceedings, what are the extent and limits of confidentiality of such proceedings?

¹³ Muigua *op. cit.*, p. 3.

¹⁴ *Nyutu Agrovet case.*

- (c) During arbitration proceedings, how far is the expanse of privacy and confidentiality and what are the boundaries thereof?
- (d) Does privacy and confidentiality continue after arbitration proceedings, and if so what are the stretch and limits of such attributes?
- (e) What reforms to privacy and confidentiality in arbitration can be proposed?

6. Hypotheses

This research proceeds on two hypotheses:

- (a) That privacy and confidentiality are central to effective arbitration; and
- (b) That the Constitution has affected the privacy and confidentiality of arbitration proceedings in Kenya.

7. Theoretical framework

There are a number of theoretical approaches to arbitration, the major ones being:

- a) the jurisdictional theory,
- b) the contractual theory,
- c) the hybrid theory, and
- d) the autonomous theory.

a) The jurisdictional theory

The jurisdictional theory invokes and emphasizes on the powers of States to supervise arbitrations conducted within their jurisdictions.¹⁵ Even though this school of thought

¹⁵ Yu, "A Theoretical Overview of the Foundations of International Commercial Arbitration", [2008] 1(2) Contemporary Asia Arbitration Journal 255 at 258 <<https://bit.ly/2DOOuUq>> accessed on 7th March 2017.

appreciates that arbitration proceedings originate from the parties' arbitration agreement, it advocates that the validity of the arbitration agreements, procedures and enforcement must be regulated by national laws.¹⁶ Arbitrators are equated to judges of national courts; they are 'required to apply the rules of law of a specific state to settle the disputes submitted to them'; and arbitration awards are regarded as judgments of the municipal courts both capable of enforcement in a similar manner.¹⁷

This theory has been criticised for its overemphasis on the regulation of arbitration by domestic laws. It has been argued that such thinking negates arbitral autonomy, the contractual nature of arbitration, and that it stifles development of international commercial arbitration.¹⁸

The jurisdictional theory will be germane to this research especially where I will be interrogating how courts handle confidentiality of arbitration proceedings. The Arbitration Act limits the intervention of courts only to specific instances, among them being interlocutory applications, and recognition and enforcement of awards.¹⁹ Thus, confidentiality of arbitration proceedings is impacted by the supervisory powers of the courts.

b) The contractual theory

This theory is premised on the reasoning that arbitration is based on the contract between the parties; this contract is to be given primacy over the laws of the state. Adam views the contractual theory as follows: "it is the agreement to arbitrate that alone gives the

¹⁶ *ibid.* Also see Mann-Long Chang, "Harmonisation of Procedural Law in International Commercial Arbitration", (DPhil thesis, University of Stirling 2009) at 283 < <https://bit.ly/2B17OGp> > as accessed on 7th March 2017.

¹⁷ Yu *op. cit.*, p.258.

¹⁸ Chang *op. cit.*, p.283.

¹⁹ S. 10, "Except as provided in this Act, no court shall intervene in matters governed by this Act".

arbitrators the authority to make the award. They, in turn, in resolving the dispute, are acting as the agents or ‘mandataires’ of the parties.”²⁰ Thus, deference has to be had to the contract evincing the arbitration clause.

The theory has been criticised for “ignoring the restraints which are imposed by the law in practice” such as public policy.²¹ Parties cannot contract out of public policy considerations and such a contract is liable to be set aside.²² Also, the theory does not clearly explain how recognition and enforcement is to be done; such actions are dependent on the law of the states and not on the agreement between the parties.²³

c) The autonomous theory

This theory arose out of focus on the “use and purpose of arbitration” placing arbitration on an autonomous “supra-national” level.²⁴ Rubellin-Devichi is explaining the theory suggests that “[i]n order to allow arbitration to enjoy the expansion it deserves, while all along keeping it within its appropriate limits, one must accept, I believe, that its nature is neither contractual, nor jurisdictional, nor hybrid, but autonomous.”²⁵

One of the major limitations of this theory is that it fails to consider the role of states in promoting arbitration e.g. during recognition and enforcement and places high regard on the autonomy of arbitration. Further, the theory looks like it appeals to the partial

²⁰ Adam S., “Separability of Arbitration Clauses - Some Awkward Questions about the Law on Contracts, Conflict of Laws and the Administration of Justice”, < <https://bit.ly/2Kv7eZI>> as accessed on 10th December 2017.

²¹ Chang *op. cit.*, p.284.

²² *ibid.*

²³ *ibid.*

²⁴ Yu *op. cit.*, p.278.

²⁵ *ibid.*

surrender of legal sovereignty of the states which may hinder the application of the theory in practice.²⁶

The theory appeals to, and explains why, some of the commentators advocate for establishment of international organizations to regulate international commercial arbitration.

d) The hybrid theory

This is a ‘compromise’ theory between the jurisdictional and contractual theories; it acknowledges that arbitration relies on both the jurisdictional and contractual elements.²⁷

Thus, arbitration is defined as “a mixed juridical institution, sui generis, which has its origin in the [parties’] agreement and draws its jurisdictional effects from the civil law.”²⁸

The theory is criticised for its central tenet that the jurisdictional and contractual elements can harmoniously interact without one trouncing the other. Far from it, without assistance from the state, the recognition and enforcement of awards would falter.²⁹ Thus, it would appear that the jurisdictional elements always triumphs over the contractual elements of arbitration.

This study will be based on the hybrid theory because privacy and confidentiality are determined by both the jurisdictional elements of Kenyan law, and the arbitration contract between the parties. For example, constitutional provisions must underpin any arbitration agreements and practices otherwise they will be null. At the same time, whatever agreement that the parties negotiate upon can clearly demarcate the extent of privacy and confidentiality. Thus, the arbitration agreement and the laws of the land should be

²⁶ Chang *op. cit.*, p. 287.

²⁷ Yu *op. cit.*, p. 274.

²⁸ *ibid.*

²⁹ Chang *op. cit.*, p. 286.

considered on an equal footing if a clear scope of privacy and confidentiality of the arbitration is to be had.

8. Literature review

Various scholars and practitioners have addressed the arbitration features of privacy and confidentiality. Up to the 1990s, the law on the issue appears to have been settled: there was an implied, if not express, confidentiality obligation albeit in England. Then, the Australian High Court in *Esso Australia Resources Limited v. Plowman*³⁰ held that no such implied duty of confidentiality existed. This disturbed the hitherto well-established English position especially considering that both countries have common law legal systems.³¹

In Kenya, it would appear that due to the colonial heritage of a common law legal system, the English position was retained. That was until 2010 when Kenya promulgated a new constitutional order which places the Constitution as the basis of rule of law and governance in Kenya. Whereas the Constitution enjoins courts and tribunals to promote alternative forms of dispute resolution including arbitration³², it also lists transparency and accountability as applicable values and principles in enactment, application or interpretation of any law in Kenya.³³ Further, every citizen now has the constitutionally-enshrined right of access to information, although it can be limited.³⁴ With such provisions, the previously implied attributes of privacy and confidentiality would appear to have had their range clipped.

³⁰ [1995] HCA 19.

³¹ See <<https://bit.ly/2PFk5OF>> as accessed on 18th March 2017).

³² Article 159 (2) (c) of the Constitution.

³³ *ibid*, Article 10.

³⁴ *ibid*, Article 35.

a) Privacy of proceedings

Privacy and confidentiality of proceedings are different issues but which cannot be satisfactorily considered in mutual exclusion. For example, opening up arbitration proceedings to third parties thus breaching privacy would inevitably lead to questions about confidentiality of the proceedings. Michael Pryles in his contributory chapter entitled ‘Confidentiality’ highlights differences between the two features in the following statement,

“While privacy is a concept which prevents strangers from attending a hearing, confidentiality is a concept which imposes obligations on the participants to the arbitration.”³⁵

Paulsson and Rawding in their article ‘The Trouble with Confidentiality’ critically analyze confidentiality especially in international arbitration.³⁶ The authors commence by examining the practical aspects of the confidentiality; they note that arbitration activities are conducted in private; generally, third parties do not attend the hearings; also, generally, written records of arbitration proceedings are not available to third parties.³⁷ In their opinion, notwithstanding the lack of express stipulations, the edicts of privacy are subsumed in arbitration agreements in common law jurisdictions. Their opinion springs from the judgment of the English High Court in *Oxford Shipping Company Limited v Nippon Yusen Kaisha (The Eastern Saga)*³⁸ in which it was stated,

“It is implicit in this [agreement to arbitrate] that strangers shall be excluded from the hearing and conduct of the arbitration...”

³⁵ Michael Pryles, “Confidentiality” in *Leading Arbitrators’ Guide to International Arbitration*, 2nd Edition, 415 at 453 <<https://bit.ly/2Dym2oW>> as accessed on 26th March 2017.

³⁶ Paulsson J., and Rawding N., “The Trouble with Confidentiality” [1995] 11 (3) *Arbitration International*, 303.

³⁷ *ibid* at 304.

³⁸ [1994] 2 *Lloyd's Rep* 373 at 739.

Kenya has a common law legal system. The position taken by Paulsson and Rawding also seems to apply in Kenya. Aloo and Wesonga reckon that this implied duty of confidentiality exists in Kenya. They state,

“The attitude [that there is an implied duty of confidentiality] of the Kenyan authors and courts is similar. However, despite this widespread acceptance of privacy and confidentiality as a feature of arbitration, there is no statutory foundation for it.”³⁹

Muigua reiterates this position in his paper ‘Constitutional Supremacy over Arbitration in Kenya’ in which he states,

“Unless parties agree otherwise in an Arbitration agreement or choose later to resort to court, all the aspects of the case are confidential. Secondly, Arbitration is a private and consensual process.”⁴⁰

Further, some Kenyan arbitration institutions rules expressly provide for the duty of confidentiality. For instance, Rule 34 (1) of the Arbitration Rules, 2015 of the Nairobi Centre for International Arbitration places a confidentiality obligation on the parties.⁴¹ The parties cannot divulge details of awards or proceedings unless they agree to do so in writing, the parties are under a legal duty to do so, or to enforce or challenge the award.

However, Muigua proceeds to note that given constitutional supremacy and being the source of the rule of law, the law and practices of arbitration need to conform to the Constitution, and any inconsistency will lead to such law or practice being declared null.⁴²

On their part, and upon analysis of the different countries’ approach to the duty of confidentiality vis-à-vis the Constitution, Aloo and Wesonga conclude that unless

³⁹ Aloo Obura L., and Wesonga E. Kadima, “What is there to hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in light of the Constitution of Kenya 2010” (2015) 3(2) Alternative Dispute Resolution at 2 <<https://bit.ly/2PECTh3>> accessed on 18th January 2017.

⁴⁰ Kariuki Muigua, “Constitutional Supremacy over Arbitration in Kenya” (2015) 3(2) Alternative Dispute Resolution at 10 <<https://bit.ly/2FsiiIa>> accessed on 18th January 2017.

⁴¹ Under the Nairobi Centre for International Arbitration Act, No. 26 of 2013.

⁴² Muigua, *op. cit.*

expressly provided for, or there are potential threats to state interests, privacy and confidentiality should not apply to arbitrations involving the government, and that such arbitrations should be open to the public.⁴³ They argue that such openness of proceedings fortifies transparency and accountability.

Mutubwa in his paper “Confidentiality in Arbitration under the Constitution of Kenya 2010: An Illusory Myth or Valid Attribute” interrogates the twin arbitration attributes in Kenya in light of the Constitution.⁴⁴ Mutubwa agrees with Muigua by stating that there is constitutional supremacy over arbitration and arbitral tribunals.⁴⁵ He also agrees with Aloo and Wesonga that values such as public participation, accountability and transparency are to be considered during arbitration.⁴⁶

Mutubwa identifies several instances in which the Constitution impacts on confidentiality of arbitration proceedings: right of access to information, national values and principles of governance, right to fair hearing, and claw-back provisions in the Arbitration Act.⁴⁷

On access to information, Mutubwa notes that Article 35 (1) of the Constitution allows any citizen access to information held by the State and any other person, if such information will aid in the protection of the citizen’s right or fundamental freedom. On the basis of such a right, he argues, a citizen can apply to court to access the evidence, materials, notes and awards in an arbitration that would otherwise have been shielded by the confidentiality. That notwithstanding, Mutubwa appears not to have comprehensively

⁴³ Aloo and Wesonga *op. cit.* p. 28.

⁴⁴ Wilfred A. Mutubwa, “Confidentiality in Arbitration under the Constitution of Kenya 2010: An Illusory Myth or Valid Attribute” (2016) 4(2) *Alternative Dispute Resolution* at 72 <<https://bit.ly/2DOOHaj>> accessed on 18th April 2017.

⁴⁵ *ibid* at 74.

⁴⁶ *ibid*.

⁴⁷ Mutubwa *op. cit.* pp. 77- 86.

considered the limitations on the right as summarised by Lady Justice Ngugi in *Nairobi Law Monthly Company Limited v KENGEN & 2 others*⁴⁸ in the following words,

“As correctly submitted by the 1st Interested Party and the Amici Curiae, the reasons for non-disclosure [of information under Article 35 (1)] must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information.”

Section 6 of the Access to Information Act, 2016 also lists various limitations to the right.⁴⁹ These include where the disclosure may undermine Kenya national security; impede the due process of law; cause substantial prejudice to commercial interests of entity or third party from whom information was obtained; may infringe professional confidentiality as recognized in law or rules of a profession.

These limitations guard against the erosion of confidentiality while exercising the right of access to information.

Furthermore, Mutubwa argues that transparency and accountability can erode confidentiality in arbitrations especially the ones involving government, or government agencies.⁵⁰ On the other hand, he argues that the constitutional right to privacy can be used to prevent against such incursions on confidentiality; and that the national values and principles of good governance can be achieved during the challenge and enforcement of arbitral awards.⁵¹

⁴⁸ *Nairobi Law Monthly Company Limited v KENGEN, Edward Njoroge & the AG Milimani HC Petition No. 278 of 2011.*

⁴⁹ Access to Information Act, Act No. 31 of 2016.

⁵⁰ Mutubwa *op. cit.* p. 81.

⁵¹ *Ibid*, p. 82.

Mutubwa then considers the constitutional right to have a dispute settled by a fair and public hearing.⁵² If such an article were to be liberally applied, it would mean that arbitration hearings should be carried out in public and not in camera. This provision touches on the privacy of the arbitration proceedings. Mutubwa argues that this constitutional right can be limited, which would allow for privacy of the arbitration proceedings.⁵³ Further, that the constitutional right to privacy can be interpreted to mean that parties have a right to have their disputes settled in private.⁵⁴

On claw-back provisions of the Arbitration Act, Mutubwa notes the instances where confidentiality cover of the arbitration proceedings is removed. These are during applications for interim measures, stay of proceedings, challenges to arbitrator's appointment, appeals and reviews.⁵⁵ In all these instances, the materials provided to the court will wear off the confidentiality that the parties enjoy in arbitration.

Mutubwa concludes by arguing that confidentiality in arbitration is threatened or eroded by the Constitution especially when third parties have a legitimate constitutional claim to information.⁵⁶

b) Confidentiality during the course of the proceedings

Paulsson and Rawding highlight three issues on confidentiality that may arise during the arbitration hearing of a dispute:⁵⁷

- i) Can the existence of the dispute, and the resultant arbitration, be disclosed without an accord of both parties? On this issue, they note that parties may be under a duty to

⁵² Article 50 of the Constitution of Kenya.

⁵³ Mutubwa *op. cit.* 84.

⁵⁴ *Ibid.*

⁵⁵ Mutubwa *op. cit.* pp. 85-86.

⁵⁶ *Ibid.*, p.96.

⁵⁷ Paulsson and Rawding *op. cit.* pp. 304 – 305.

report the existence of the dispute to third parties e.g. regulators, auditors or to an acquirer during a due diligence. Nevertheless, they note that unilateral disclosures tend to be selective and favouring one side of the story.

Pryles is of the opinion that the Australian judgment in *Esso Australia Resources Ltd* favours the position that “there is no confidentiality attaching to the existence of arbitration”.⁵⁸ He cautions that the position might be different in England and Wales; this is a legal jurisdiction with which Kenya shares a common legal system.

- ii) Can evidence disclosed during an arbitration hearing be disclosed in other proceedings? An absolute rule of confidentiality means that such evidence should not be disclosed. Yet, such evidence may be the basis of a case by a third party.

The authors discuss extensively the two positions taken on the issue: one by the English courts following the decisions in *Dolling-Baker v Merrett & another*⁵⁹ and *Hassneh Insurance Co. of Israel & Others v Stuart J. Mew* [1993] 2 Lloyd’s Reports 243⁶⁰ (both in which it was decided that party can only use documents obtained during discovery in the dispute in which they were obtained and nowhere else); the other one by the Australian court’s decision in the *Esso Australia Resources Ltd* case, and the American decision in *United States v Panhandle Eastern Corporation & 9 others*⁶¹ (both in which there was outright rejection of the suggested obligation of confidentiality about the happenings in an arbitration hearing).

- iii) During an arbitration hearing can a third party rely on evidence obtained from a separate arbitration? The authors suggest that third parties are not to be unjustifiably restrained by the confidentiality obligations.

⁵⁸ Pryles *op. cit.* p. 454.

⁵⁹ [1991] 2 All ER 891.

⁶⁰ [1993] 2 Lloyd’s Reports 243.

⁶¹ 842 F.2d 685.

c) Confidentiality of and after the award

On confidentiality after the award, Paulsson and Rawding pose the question whether upon finalization of the proceedings, an award, record or materials from an arbitration can be divulged without the approval of both parties. They suggest that if the losing party decides to settle, the issue of confidentiality rarely arises.⁶² This is not the case when there are recognition and enforcement proceedings, or there is an appeal or review of the award.

Elina Zlatanska extensively discusses publication of awards in her article “To publish, or Not To Publish Arbitral Awards: That is the Question...”.⁶³ She lists and discusses the following as arguments in favour of publication: development of law, certainty and predictability, consistency, legitimacy, education and training, improved quality of arbitral awards, prevention of conflict of interests (neutrality), improved integrity and reputation of arbitrators, equality of arms, and improved status of arbitration institutions.⁶⁴ Against publication of awards, Elina lists and discusses the following issues: erosion of arbitration and rise of litigation, reduced protection of technical and business data, additional costs and delays, destruction of parties’ reputation, and increase in business costs for the arbitral tribunals.⁶⁵

To resolve these two extreme positions about publication of awards, Elina suggests that there be an automatic mechanism enjoining the parties to identify the confidential information that they would not like to be published; the arbitrator will then write two awards: one containing all the confidential information which will be given to the parties,

⁶² Paulsson and Rawding *op. cit.* p. 305.

⁶³ Elina Zlatanska, “To publish, or Not To Publish Arbitral Awards: That is the Question...” (2015) 81(1) *ARBITRATION: The International Journal of Arbitration, Mediation and Dispute Management*, 25.

⁶⁴ *Ibid*, pp. 27 – 32.

⁶⁵ *Ibid*, pp. 32 – 34.

and the other being the redacted version which can be published.⁶⁶ She also suggests that there be a uniform award template divided into three parts namely: (1) description of the facts; (2) procedural issues; and (3) the reasons and the decision. Such a template, she suggests, will make the publication of the awards quick and efficient as the sensitive areas can be easily pointed out. However, she acknowledges that such a template is bound to run into problems as arbitrators have different writing styles.⁶⁷ Lastly, Elina suggests that there be a centralized body in charge of publication, and an online system of publication. For these last suggestions, she acknowledges the logistical issues of running such an institution, and the challenges posed by attempts to centralize publication when there are myriad online sources.⁶⁸

Elina finishes her article by proposing that further research be conducted to determine whether confidentiality is still highly valued by the parties when they are getting into arbitration. In addition, she recommends that arbitral institutions do amend their rules to allow for publication and to draft model clauses to deal with confidentiality.⁶⁹

From the above literature review, it is to be seen that there is no clear-cut position about privacy and confidentiality in Kenya. Indeed, the High Court of Kenya has taken opposing sides on the issue which shows the gap that needs to be bridged. This research shall attempt to plug in this gap.

9. Research methodology

The methodology to be used for the research will be qualitative. Qualitative research involves an interpretative and naturalistic approach to the research.⁷⁰ Further, Anderson

⁶⁶ Ibid, p.35.

⁶⁷ Ibid.

⁶⁸ Elina, *op. cit.*, p.36.

⁶⁹ *ibid.*

⁷⁰ Denzin and Lincoln, *Handbook of Qualitative Research*, 1st Edition, Sage Publications Inc., (1994).

states that qualitative research involves working with data from the “social world and the concepts and behaviors of people within it” which data are not discrete.⁷¹

I shall seek to study the twin issues of privacy and confidentiality as legislated and practiced in Kenya and across the world. Upon such a study, I shall interpret and bring out the meaning that such a study communicates before giving conclusions and recommendations.

I will be the key research instrument for the research. I shall be the one to collect the data, study them, and interpret them before coming up with conclusions and recommendations.

In collecting the data, I shall study and investigate the descriptions of privacy and confidentiality as handled in the various data sources. The analyses of the data shall involve exploring my perception of the two attributes as informed by the collected data.

The primary data sources will include statutes, reported cases, journals, working papers, newspaper articles and treaties. Secondary sources will consist of the internet, policy documents and legal textbooks. All the data will be in words as written down in the various data sources.

One of the key limitations of the study is that biases might affect the collection and analyses of the data. These biases may stem from my previous knowledge about the subject, or from the bias of the people who wrote down the data such as the judges, legislators and authors.

Also, the volume of the material to be studied so as to collect the data may be huge and time-consuming.

⁷¹ Anderson Claire, “Presenting and Evaluating Qualitative Research” Am J Pharm Educ. 2010 Oct 11; 74(8): 141. <<https://bit.ly/2nPORIE>> accessed on 13th September 2018.

Another identifiable limitation especially on the reported cases as a source of data is that not all cases on privacy and arbitration are reported. Further, even for the reported cases, only the cases by the superior courts (High Courts, Courts of Appeal or Supreme Courts) are available leaving out the cases by the subordinate courts which may have novel views on the issues. The sources of data may thus be curtailed in this way.

Qualitative data are usually presented by using illustrative quotes, which quotes are raw data as retrieved from the data sources.⁷² The data collected shall be presented by way of illustrative quotes. An analysis, discussion or justification shall precede or follow any of the illustrative quotes.

10. Chapter Arrangement

This thesis is arranged and presented in five chapters:

Chapter 1 – Research proposal

This Chapter sets out the research problem, the literature review, and lists various hypotheses.

Chapter 2 – Overview of the law of arbitration in Kenya.

This Chapter gives a summary of the various laws, practices, and institutions that regulate arbitration in Kenya. The theory espoused by such laws and practices are also discussed in the Chapter.

Chapter 3 – Privacy of arbitration proceedings in Kenya

This Chapter picks out the attribute of privacy of arbitration. A differentiation is made between privacy and confidentiality followed by an extensive discussion of privacy. The discussion includes the Kenyan position especially in light of the robust Constitution.

⁷² Anderson Claire, *Op Cit.*

Chapter 4 – Confidentiality in arbitration proceedings in Kenya

Flowing from the discussion on privacy of arbitration, Chapter 5 takes on confidentiality. Various provisions regulating confidentiality are discussed, and a comparative with the laws and practices of other countries undertaken.

Chapter 5 – Conclusion and recommendations.

This Chapter gives an epilogue of the various issues arising from the preceding chapters and discusses recommendations.

Chapter 2

Overview of the law of arbitration in Kenya

1. Introduction

In this Chapter, different laws and practices that govern arbitration in Kenya are elaborated. This is to provide the bases for, and give guidance to, further extensive discussion on the issues.

2. Legislative and institutional framework

There are various laws that govern arbitration in Kenya. Some of the laws provide for the substantive rules applicable to arbitration, while others provide for the procedural and institutional rules. Others provide for both.

2.1. The Constitution

The Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.¹ Arbitration is now one of the applicable dispute resolution mechanisms in Kenya. Any legislation or practices regulating arbitration in Kenya must conform to the constitutional provisions otherwise they would be invalid to the extent of their inconsistency.

Article 159 (2) (c) of the Constitution provides that in exercising judicial authority, courts and tribunals ought to be guided by, among others, the principle that alternative forms of dispute resolution including arbitration should be promoted.

¹ Articles 2 (1) and 2(4) of the Constitution of Kenya, 2010

This Article elevates arbitration as a means of resolving disputes in Kenya, and the policy in resolution of conflicts has shifted so as to encourage settlement of disputes by arbitration.²

The Constitution also has other provisions that influence arbitration law and practice in Kenya.³ The provisions which impact privacy and confidentiality in arbitration include national values and principles of governance⁴, the right to privacy⁵, right to access to justice⁶, right to access to information⁷, right to fair administrative action⁸, and the right to a fair hearing.⁹ The influences of these provisions on privacy and confidentiality in arbitration will be discussed later.

2.2. The Arbitration Act

The Arbitration Act is the primary source of arbitration law in Kenya as it governs both domestic and international arbitrations.¹⁰ Prior to the amendments in 2010, the Arbitration Act was almost a replica of the UNCITRAL Model Law on International Commercial Arbitration. The changes in 2010 were on arbitrator's immunity, duties of the parties to arbitration, costs, interest, expenses and the effect of an award.¹¹

² Muigua K., *Settling Disputes Through Arbitration in Kenya*, 3rd Ed., Glenwood Publishers Limited, (2017) at page 7.

³ Kariuki Muigua, "Constitutional Supremacy over Arbitration in Kenya" (2015) 3(2) *Alternative Dispute Resolution* at 10 <<https://bit.ly/2FsiiIa>> accessed on 18th January 2017.

⁴ Constitution of Kenya, *op. cit.*, Article 10.

⁵ *Ibid*, Article 35.

⁶ *Ibid*, Article 48.

⁷ *Ibid*, Article 35.

⁸ *Ibid*, Article 47.

⁹ *Ibid*, Article 50.

¹⁰ Section 3 (2) of the Arbitration Act, 1995.

¹¹ Njeri Kariuki, 'Arbitration procedures and practice in Kenya: overview' (2016) Thomson Reuters Practical Law <<https://tmsnrt.rs/2TtnoHe>> as accessed 9th May 2017

The Arbitration Act, and the Rules thereunder¹², do not have express provisions on privacy and confidentiality. That fact notwithstanding, the principle of party autonomy is underpinned at section 20 (1) of the Arbitration Act which allows parties to agree on the procedure to be followed by an arbitral tribunal in the conduct of the proceedings. In *Kenya Oil Company Limited & another v Kenya Pipeline Company*¹³ had this to say concerning the principle,

“The principle of party autonomy underpinning arbitration is premised on the platform that provided it does not offend strictures imposed by law, parties in a relationship have the right to choose their own means of resolving disputes without recourse to the courts or by limiting the circumstances under which recourse to the courts may be had.”¹⁴

Confidentiality and privacy are some of the procedural matters to be agreed upon by the parties. Indeed, it has been suggested that some of the matters to be settled during the preliminary hearing of an arbitration are ‘the rules of procedure under which the arbitration will be conducted and the fact that it is private’.¹⁵ Nevertheless, the parties still remain free to agree on the extent of the privacy and confidentiality of the proceedings under the Arbitration Act. Based upon the same principle of party autonomy, parties can adopt institutional rules, which have express provisions on privacy and confidentiality, as the procedural rules to be used in the proceedings.

2.3. The Civil Procedure Act¹⁶

¹² Arbitration Rules, 1997.

¹³ [2014] eKLR

¹⁴ Ibid, paragraph 36

¹⁵ Muigua K., *Settling Disputes Through Arbitration in Kenya*, *op. cit.* p.139. Further, the court in *Joseph W. Karanja & another v Geoffrey Ngari Kuira* [2006] eKLR in which the court held that ‘matters of procedure...are often dealt with by agreement at preliminary meetings of the Arbitrators and we do not consider that every such matter necessarily needs to be incorporated in a formal amendment to the Arbitration agreement.’

¹⁶ The Civil Procedure Act.

The Civil Procedure Act provides for court-annexed arbitration. This is where parties to a dispute that is before the court can apply before judgment for a reference of the dispute to be settled through arbitration.¹⁷ The conduct of such references is governed by Order 46 of the Civil Procedure Rules. However, the Civil Procedure Act and the Rules are silent as to the issues of privacy and confidentiality of the arbitration proceedings undertaken under them. Nevertheless, it has been stated that the Civil Procedure Act and Rules ‘complement the provisions in the Arbitration Act’¹⁸. In that case, the principle of party autonomy applies so that parties are free to set the extent of privacy and confidentiality during the proceedings.

2.4. Nairobi Centre for International Arbitration Act (NCIA Act)¹⁹

This is an Act which establishes the Nairobi Centre for International Arbitration (hereinafter referred to as “Nairobi Centre”), which is a regional centre for international commercial arbitration.²⁰ The NCIA Act also establishes a Court besides providing for alternative dispute resolution mechanisms.²¹

The Nairobi Centre is an independent entity which has a board of directors composed of professionals from the East Africa region.²² It provides institutional support for the conduct of both international and domestic arbitration, and other forms of alternative

¹⁷ Ibid, Section 59.

¹⁸ Muigua, “Overview of Arbitration and Mediation in Kenya” (Stakeholder’s Forum on Establishment of Alternative Dispute Resolution (ADR) Mechanisms for Labour Relations In Kenya), Kenyatta International Conference Centre, Nairobi, on 4th – 6 th May, 2011) at 7 <<https://bit.ly/2zkGRS5>> as accessed 10 May 2017.

¹⁹ Nairobi Centre for International Arbitration Act No. 26 of 2013.

²⁰ Ibid, Section 4. Also see <<http://ncia.or.ke/about-ncia/>> as accessed 9th May 2017

²¹ The Nairobi Centre for International Arbitration Act, *op. cit.*, preamble.

²² Ibid.

dispute resolution.²³ The provisions of the NCIA Act prevail in the event of any inconsistency or conflict between them and the provisions of any other Act on matters relating to the Nairobi Centre.²⁴

Section 15 of the NCIA Act bars any person from divulging, publishing, or otherwise disclosing, any document, material or information relating to the business and affairs of the Centre unless the disclosure is required under specified circumstances.²⁵ The NCIA Act also bars any person from disclosing any information by which to his knowledge has been disclosed in contravention of the NCIA Act.²⁶ It is a criminal offence to contravene those provisions; it is punishable by imprisonment, a fine, or both.²⁷

The Board of Directors of the Nairobi Centre promulgated the Nairobi Centre for International Arbitration (Arbitration) Rules, 2015 (NCIA Rules) which became effective on 24th December 2017. The NCIA Rules provide for the commencement of the arbitration, the composition of the arbitral tribunal, and the conduct of the arbitral proceedings, schedules on fees and costs among other provisions. They generally govern the conduct of arbitrations under the NCIA Act.

The NCIA Rules were made pursuant to section 25 of the NCIA Act which empowers the Board of Directors to make such Rules. A strict reading of the quoted section 25 appears to show that the Board does not have powers to make Rules for the general conduct of arbitrations under the NCIA Act up to when an award is delivered. The Board can only

²³ Ibid.

²⁴ Ibid, Section 3. The section talks of the Act prevailing in matters relating to its purpose; the Act's purpose can be gleaned from its preamble.

²⁵ The specified circumstances are if it is under any law, when required by a court of law, or if it is required for performance of the discloser's duties or functions under the Act.

²⁶ The Nairobi Centre for International Arbitration Act, *op. cit.*, Section 15 (2).

²⁷ Ibid, Section 15 (3).

make Rules concerning arbitral awards, and the proceedings in the Arbitral Court, but not concerning the arbitral process leading to the award. The NCIA Rules can be challenged on those bases.

The above notwithstanding, the NCIA Rules also have explicit provisions regarding privacy and confidentiality. Firstly, Rule 22 (4) of the NCIA Rules provides that all meetings and hearings shall be in private unless the parties agree otherwise in writing. Secondly, Rule 34 (1) of the NCIA Rules imposes a duty of confidentiality on the parties to arbitration in that the parties cannot divulge details of awards or proceedings unless they agree to do so in writing, the parties are under a legal duty to do so, or to enforce or challenge the award. These Rules underscore the principle of party autonomy in which parties are free to agree on the extent of the privacy and confidentiality accorded to their arbitration proceedings.

3. Institutional Rules

Other than the statutorily-established Nairobi Centre for International Arbitration, there are other institutions which have rules on the conduct of arbitration in Kenya. These include the Chartered Institute of Arbitrators (Kenyan Branch).

3.1. Chartered Institute of Arbitrators (Kenya Branch)

The Chartered Institute of Arbitrators (Kenya Branch) is a professional membership organization for arbitration and other forms of Alternative Dispute Resolution.²⁸ The Chartered Institute of Arbitrators (Kenya Branch) Arbitration Rules, 2015, formulated by the Chartered Institute of Arbitrators, govern arbitral proceedings that are carried out through the Kenyan Branch.²⁹ The Rules are silent on the issue of privacy and

²⁸ < <http://www.ciarbkenya.org/about.php>> as accessed 10 May 2017.

²⁹ Ibid.

confidentiality but parties can agree on the procedure to be followed during the preliminary meeting of arbitration.

4. Conclusion

This chapter has discussed the legal and institutional framework governing arbitration in Kenya with regard being had to the provisions that concern privacy and confidentiality. Save for the express provisions in the NCIA Act, which can also be set aside by the parties, it can be seen that the other Acts have the principle of party autonomy entrenched in them. The NCIA Act appears to follow the hybrid theory in that the Court and the Arbitral Tribunals have express powers to punish for breach of confidentiality and privacy but subject to the parties prior agreement on the subject. In so far as it concerns this principle of party autonomy, the Kenyan laws appear to accord with and implement the contractual theory on arbitration. However, questions remain as to why even with such a contractual approach, privacy and confidentiality in arbitration increasingly appear to be weakening, if not weakened.

Chapter 3

Privacy of arbitration proceedings in Kenya

1. Introduction

In this Chapter, different laws and practices that govern privacy of arbitration proceedings in Kenya are interrogated. Privacy of proceedings may be one of the ways in which confidentiality is safeguarded.

Privacy involves preventing strangers from attending an arbitration hearing.¹ This is to be contrasted with confidentiality which involves imposition of obligations on the participants to an arbitration.² Privacy relates to the public access to the arbitration hearing while confidentiality concerns the information relating to arbitration which includes evidence, documents, transcripts, arbitrator's notes, pleadings, and the award.³

Privacy sprouts from the assumption that arbitrations result from contracts, and that party autonomy allows parties to determine how their arbitration is to be undertaken. This was aptly captured by the High Court in *Oxford Shipping Company Limited v Nippon Yusen Kaisha (The Eastern Saga)*⁴ in which he held that,

“The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is

¹ Michael Pryles, ‘Confidentiality’ in *Leading Arbitrators’ Guide to International Arbitration*, 2nd Edition, 415 at 453 < http://www.arbitration-icca.org/media/4/81638619135587/media012223892932650confidentiality_chapter_for_leading_arbs_guide.pdf> as accessed on 26th March 2017.

² Ibid.

³ Per Justice Armstrong Q.C. in *In the Arbitration to determine the 2014 Steward Obligation for the Blue Box Obligation* < <https://www.amo.on.ca/AMO-PDFs/Waste-Management/Blue-Box/Blue-Box-Arbitration-Public-Private-Decision-2014.aspx>> as accessed 22 March 2018.

⁴ *Oxford Shipping Company Limited v Nippon Yusen Kaisha (The Eastern Saga)* [1994] 2 Lloyd's Reports 373.

implicit in this that strangers shall be excluded from the hearing and conduct of the arbitration.”

Further, the Arbitration Act is highly restrictive of the instances in which the court can intervene in proceedings. Moreover, the Act states that where parties had not provided for the procedure, the same is to be decided by the parties and the arbitrator.⁵

2. The Kenyan position

2.1. The Constitution

Any discussion on the Kenyan position on privacy has to begin with the Constitution. This is informed by the supremacy of the Constitution which Constitution binding all persons – including arbitrators and parties to arbitrations - and state organs.⁶ Further, the Constitution renders invalid any law that is inconsistent with it, and invalidates any act or omission in contravention with it.⁷ Thus, arbitration proceedings, and their requirements for privacy, must comply with the Constitution.

In so far as privacy in arbitration is aimed at barring access to the hearing, the right to a fair hearing under Article 50 (1) of the Constitution is pertinent. The said article entitles any person that has a dispute capable of settlement by application of law to have it decided in a fair and public hearing before a court, or an independent and impartial tribunal or body. Thus, any aggrieved party is entitled to a public hearing be it before a court or an arbitral tribunal. The court of appeal has interpreted the right to a fair hearing in the following terms,

“Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual

⁵ Section 20 of the Arbitration Act, 1995.

⁶ Article 3 (1) of the Constitution of Kenya.

⁷ Ibid, Article 3 (4).

having the benefit of a public hearing before a court or other independent and impartial body.⁸ [Emphasis mine]

Unlike the right to a fair trial under Article 50 (2) of the Constitution, which essentially relates to criminal trials, the right to a fair hearing can be curtailed. For example, so as to uphold the rule of law, a court can curtail access to courts of a party that has disobeyed court orders as stated in *A.B & another v R.B.*⁹

Therefore, the right to a public hearing before a court or other independent and impartial body is germane to the issue of privacy.

2.1.1 Right to a public hearing

A public hearing inheres in the right to a fair hearing. Other than being stipulated at Article 50 (1), the stipulation for a public hearing also finds footing under the Universal Declaration of Human Rights (“UDHR”) which states that “*everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations...*”¹⁰ Similarly, this provision is reflected at Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”). The said Article 14 provides that “*in the determination of any...of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent,*

⁸ Per Lady Justice Okwengu in *JSC v Gladys Boss Shollei* and CAJ Nairobi Civil Appeal Number 50 of 2014.

⁹ [2016] eKLR . This decision was affirmed by the Court of Appeal in *Dr. Fred Matiang’i the CS, Ministry of Interior and Co-ordination of National Government v Miguna Miguna, DPP, DCI, IG and LSK* Nairobi Civil Application No. 1 of 2017.

¹⁰Article 10, Universal Declaration on Human Rights, 1948, <http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> accessed 22nd March 2018. Kenya is a signatory of the UDHR being a member of the United Nations since 1963.

independent and impartial tribunal established by law.”¹¹ By dint of Article 2(6) of the Constitution, which makes any treaty or convention which Kenya has ratified to be part of the law of the land, the provisions of the UDHR and ICCPR on public hearing apply to Kenya.

An open hearing is seen as an essence of the rule of law. Lord Bingham was of the view that the rule of law requires “*that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.*”¹² This formulation can be traced to Jeremy Bentham, who stated as follows,

“Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”¹³

Public hearings allow the public to follow implementation of justice; they can follow and criticize such processes of rendering justice; and generally for transparency.¹⁴ Further, Beverley McLachlin, P.C, a former Chief Justice of Canada, identifies 3 functions of a public hearing being,

“(1) it assists in the search for truth and plays an important role in educating the public by permitting access to and dissemination of accurate information;

(2) it ensures and enhances judicial accountability, deterring misconduct by judges, police officers and prosecutors; and

¹¹ Article 14 of the International Covenant on Civil and Political Rights < <https://bit.ly/Jz4HwZ> > accessed 22nd March 2018.

¹² Tom Bingham, *The Rule of Law* (London: Penguin Group Ltd., 2010) at 8.

¹³ Quoted by Beverley McLachlin, P.C., “Openness and The Rule Of Law” (Annual International Rule of Law Lecture, London, United Kingdom, January 8, 2014) < <https://bit.ly/2PF1rZL> > accessed 22nd March 2018.

¹⁴ *Ibid* at 2.

(3) it performs a therapeutic function by permitting the community to see that justice is done.”¹⁵

The right to a public hearing is also a limb of the right to freedom of expression that is provided for under Article 33 of the Constitution. A person has the freedom to “*seek, receive or impart information or ideas*”.¹⁶

Nonetheless, both the constitutional rights of public hearing and freedom of expression can be limited. This was the issue in *Edmonton Journal v. Alberta (Attorney General)*. The Canadian Supreme Court was of the view that freedom of expression “*protects listeners as well as speakers*” and that “*the importance of freedom of expression and of public access to the courts through the press reports of the evidence, arguments and the conduct of judges and judicial officers is of such paramount importance that any interference with it must be of a minimal nature.*”¹⁷

This constitutional dictates for a public hearing would appear to be at crossheads with the privacy that is characteristic of arbitral proceedings. However, as earlier stated, a public hearing can be limited, as long as the limitations fit the criteria specified at Article 24 of the Constitution. These limitations include privacy and right of access to information.

2.1.1.1 Right to privacy

Privacy curtails the right to a public hearing. Privacy is a “pluralistic value” that protects “intimacy, friendship, dignity, individuality, human relationships, autonomy, freedom, self-development, creativity, independence, imagination, counterculture, eccentricity, freedom of thought, democracy, reputation, and psychological well-being.”¹⁸

¹⁵ Ibid at 4.

¹⁶ The Constitution of Kenya, *op. cit.*, Article 33 (1).

¹⁷ Per Cory J.

¹⁸ Daniel J. Solove, *Understanding Privacy*, (Harvard University Press, 2008), 98.

Article 31 of the Constitution provides that every person has a right to privacy. The provision has been the subject of several judicial determinations locally. Whereas one does not have to lay a basis to access public information, the converse holds for access to private information. In *Trusted Society of Human Rights Alliance & 3 others v JSC & 3 others*¹⁹, the Court held that,

“In my view where a person is seeking purely public information, he or she does not have to demonstrate a specific interest in the information. However, Article 31 of the Constitution requires that information relating to a person’s family or private affairs ought not to be unnecessarily required or revealed. To me it does not matter whether that information was acquired by the person in possession thereof in his official capacity or not. If that information is not necessary it ought not to be revealed and a reading of Article 31 in my view seem to suggest that the burden of showing the necessity to reveal such information falls on the person seeking the same.”

In balancing between privacy and the right to a public hearing, Right Honourable McLachlin, P.C. states that a reasoned identification and examination of the issues at hand need to be made in a way in which fundamental principle of open justice can be upheld and at the same time respond to the varying circumstances of cases.

In so far as they relate to arbitration, court decisions in Kenya on the privacy limitation on the right to a public hearing are varied. The jurisprudence is unsettled perhaps due to the myriad circumstances that the courts have had to decide upon in such cases. In *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others*²⁰, the High Court held that arbitrations should be open to the public just like litigations, especially where the

¹⁹ *Nairobi Petition No. 314 of 2016.*

²⁰ *Nairobi JR Misc. Application No. 374 of 2013.*

dispute involves a public entity. In learned judge Odunga's view, such public hearing furthers the value of transparency as is required under Article 10 of the Constitution.²¹

However, another High Court in *Centurion Engineers & Builders Ltd. v Kenya Bureau of Standards*²² took a sharp contrasted position from that stated in the *Senator Johnstone Muthama* case. Justice Havelock (as he was then) was categorical that in as much as arbitration hearings should be conducted in suitable rooms, they are closed to the public, and are confidential to the parties.²³ Justice Havelock distinguished the *Senator Johnstone Muthama* case by stating that the court in that case had relied on the procedure for arbitration hearings in Northern Carolina which was inapplicable in Kenya.²⁴

Further in the case of *Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited*²⁵, the High Court was of a whole novel view that the right to a public hearing is inapplicable to arbitration hearings as they are private and consensual. The Learned Justice Onguto stated that "in my view, arbitral forums do not qualify to fall under Article 50(1). Arbitral forums are always conducted in private and even though arbitrators are expected to conduct themselves in a judicial manner, they must not observe the court style which is what Article 50 contemplates. Thus...the extent of ... [article] 50(1) of Constitution cannot be fetched on an arbitral process."

²¹ *Senator Johnstone Muthama v Tanathi Water Services Board & 2 others* Nairobi JR Misc. Application No. 374 of 2013 at paragraphs 13 and 18.

²² [2014] eKLR

²³ *Centurion Engineers & Builders Ltd. v Kenya Bureau of Standards* [2014] eKLR at paragraph 7.

²⁴ Ibid.

²⁵ Milimani Miscellaneous Application Number 158 of 2016.

2.1.1.2 Right of access to information

This right may also be a claw-back on the right to a public hearing. Article 35 (1) of the Constitution allows any citizen to access information held by the state and any other person, if such information will aid in the protection of the citizen's right or fundamental freedom. Thus, it may be hypothetically stated that a citizen can apply to court to attend arbitration proceedings as a third party if that is the only way to access information that he requires. Nevertheless, the right is not absolute; it has limitations which were considered by Lady Justice Ngugi in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others*.²⁶ She stated as follows,

“As correctly submitted by the 1st Interested Party and the Amici Curiae, the reasons for non-disclosure [of information under Article 35 (1)] must relate to a legitimate aim; disclosure must be such as would threaten or cause substantial harm to the legitimate aim; and the harm to the legitimate aim must be greater than and override the public interest in disclosure of the information sought. It is recognised that national security, defence, public or individual safety, commercial interests and the integrity of government decision making processes are legitimate aims which may justify non-disclosure of information.”

Further, section 6 of the Access to Information Act, 2016 also lists various limitations to the right.²⁷ These include where the disclosure is likely to undermine the national security of Kenya; impede the due process of law; substantially prejudice the commercial interests of the entity or third party from whom information was obtained; or infringe professional confidentiality as recognized in law or by the rules of a profession. These limitations can be used to excuse the privacy of arbitral proceedings from the right to a public hearing.

3. The Arbitration Act

The Arbitration Act does not have express provisions on privacy of the proceedings. The Act follows the UNCITRAL Model Law on International Commercial Arbitration 1985

²⁶ [2013] eKLR.

²⁷ Access to Information Act, Act No. 31 of 2016.

that also does not have express provisions. However, under the Act parties may determine the procedure to guide the arbitration. This means that parties can determine whether to open up the proceedings to the public or not. This is a clear deference to party autonomy which principle undergirds arbitration.

Nevertheless, some authors caution that whether privacy is one of the procedural aspects for parties to agree on is “a question of fact and very unpredictable.”²⁸ This caution is well-founded especially in light of the warning sounded off in the *Senator Johnstone Muthama* case where the learned judge differentiated between arbitrations involving private matters and arbitrations involving public matters. For the latter, the court held that such arbitrations had to be held in public.²⁹

4. Statutory arbitrations

Statutory arbitrations are different from private arbitrations. Unlike private arbitrations which mainly spring from an agreement between the parties, statutory arbitrations emanate from, and are impelled by a statute. The parties do not have a say whether they are willing to arbitrate or not; they must do so.

Statutes which provide for such mandatory non-consensual arbitrations are the Kenya Ports Authority Act³⁰, the Kenya Airports Authority Act³¹, and the Kenya Railways Act.³² Section 62 of the Kenya Ports Authority Act provides for compensation in case any person suffers damage due to acts or omission of the Authority to be agreed on between

²⁸ L. Obura Aloo, and Edmond Kadima Wesonga, “What is there to hide? Privacy and Confidentiality versus Transparency: Government Arbitrations in light of the Constitution of Kenya” 2010, (2015) 3(2) Alternative Dispute Resolution at 18 <<https://bit.ly/2PECTh3> > (accessed on 23rd January 2018).

²⁹ Ibid.

³⁰ Kenya Airports Authority Act, Cap 395, Laws of Kenya.

³¹ Kenya Ports Authority Act, Cap 391, Laws of Kenya.

³² Kenya Railways Authority Act, Cap 397, Laws of Kenya.

the parties, failing which a single arbitrator is to decide the matter. The single arbitrator is appointed by the Chief Justice. This provision is in *pari materia* with Section 33 of the Kenya Airports Authority Act, and Section 83 of the Kenya Railways Act. So stringent are these provisions that a party cannot proceed to court in the first instance without having tried to settle the dispute amicably with the relevant Authority, or failing that the arbitrator having rendered his or her award on the dispute.³³

There are no rules or guidelines to operationalize such statutory arbitrations. There is no mention of privacy; the period within which the Chief Justice should appoint an arbitrator; or the rules that would guide such arbitrations. Thus, the place of privacy in statutory arbitrations is nebulous. The lack of such rules leads to injustice as was held by the High Court in *Beatrice Anyango Okoth v Rift Valley Railways (K) Ltd & KPA*³⁴. The Court stated as follows,

“Where a statute compels parties, without option, to do or engage in a specified legal process, such as arbitration it should also provide clear accessible guidelines or rules for operationalising that process, or for a statute under which that process is to be conducted. That would include under what conditions and manner court supervision is to be sought or effected. In the absence of such a procedure, it is patently unsafe and unjust to compel a party to enter into a system for which there are no procedures or rules, to enable one navigate their legal and procedural rights. On that score, the Kenya Ports Authority provision for arbitration is wanting and would lead to manifest injustice, in that the litigant would not have knowledge or the rules and procedures under which the litigation of arbitration would be conducted. On

³³See *Paul Njogu Mungai & Others v Kenya Airports Authority & Others [2011] eKLR* in which a suit against the Kenya Airports Authority was struck out for being brought to court at first instance without trying amicable solution and arbitration.

For the Kenya Ports Authority, see *Kenya Ports Authority v African Line Transport Co. Ltd [2014] eKLR* in which the court stated that “*the parties could not in the face of the Act providing for compulsory statutory arbitration, contract out of a statute and bring the suit instead.*”

³⁴ *Beatrice Anyango Okoth v Rift Valley Railways (K) Ltd & KPA* Mombasa Civil Case No. 450 of 2011.

account of that undesirable situation, it is questionable whether Section 62 of the Kenya Ports Authority can be judicially supported, until rules of statutory arbitration are put in place for use of litigants.”

Thus, there are no rules as to whether statutory arbitrations should be carried out in the open or in private. That situation is not only unjust but also adds to the murkiness surrounding privacy of arbitrations.

5. Court- ordered arbitrations

Section 59 of the Civil Procedure Act³⁵ provides for court-ordered arbitrations. The provision states that the references to arbitration by an order in a suit are governed as prescribed in the rules.

The Civil Procedure Rules operationalize these court-ordered arbitrations at Order 46. Parties to a suit in court are at liberty to apply for a reference of their case to an arbitrator, and the court is obligated to make orders to facilitate such a reference.³⁶

The Civil Procedure Act and the Rules are silent on the issue of privacy of the proceedings. This issue of privacy especially sticks out in such court-ordered arbitrations as the suit is initially heard in open court. Parties would have to agree on the terms of privacy of the arbitration when applying for the reference.

6. Arbitrations under institutional rules

Some Kenyan arbitration institutions rules expressly provide for the duty of confidentiality. The Nairobi Centre for International Arbitration Act³⁷ establishes the Nairobi Centre for International Arbitration (hereinafter referred to a “Nairobi Centre”).

In as much as section 15 of the Act is clear on the issue of confidentiality, it does not

³⁵ The Civil Procedure Act, Cap 21, Laws of Kenya.

³⁶ Order 46 rules 1 and 20 of the Civil Procedure Rules.

³⁷ Nairobi Centre for International Arbitration Act No. 26 of 2013.

mention privacy. Nevertheless, this situation is clarified by Rule 22 (4) of the Arbitration Rules, 2015 of the Nairobi Centre. The Rule provides that “all meetings and hearings shall be in private unless the parties agree otherwise in writing.” Therefore, the general rule is that non-parties are not to be present during the arbitration. Rule 22 (4) reiterates party autonomy entitling parties to consent on the participants in the arbitration proceedings.

7. Common law

Common law fills in the gaps on privacy left by statute law. This is as per section 3 (1) of the Judicature Act that states a ‘hierarchy of norms’ that is applicable in Kenya. Common law applies in Kenya so long a “*statute does not apply, and so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.*”³⁸

The doctrine of precedent is one of the tenets of common law. It states that decisions of higher courts on disputable issues bind the lower courts. This ensures predictability of the law, and “*liberates courts from considering every disputable issue as if it were being raised for the first time.*”³⁹

Judicial precedent is a source of law in Kenya.⁴⁰ The Court of Appeal in *Dodhia v National & Grindlays Bank Limited and Another*⁴¹ stated that judicial precedent is a

³⁸ Per the Court of Appeal in *David Sironga Ole Tukai v Francis Arap Muge, Samuel Kirui & Johannah Mosonik* Nairobi Civil Appeal No. 76 of 2014. See also section 3 of the Judicature Act, Cap 8, Laws of Kenya.

³⁹ Per the High Court in *Martha Wangari Karua & another v. IEBC & 3 others* Kerugoya Election Petition 2 of 2017.

⁴⁰ The Supreme Court of Kenya has been eloquently clear on that in *Samuel Kamau Macharia & another v KCB Limited and 2 Others* Supreme Court Application No. 2 of 2011 and *In the Matter of the IIEC, Supreme Court, Constitutional Application Number 2 of 2011.*

common law principle that “*provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law...*”

There is a conflict between the court decisions of privacy of arbitration hearings. For instance, the two High Court decisions in the *Senator Johnstone Muthama* case and *Centurion Engineers & Builders Ltd* case stand in sharp contrast. Further, as has been warned by Aloo and Wasonga, privacy of arbitrations may involve questions of fact which can be very unpredictable. Therefore, it would be a tall order to expect uniformity in decisions of the superior courts on the issue of privacy of proceedings.

Moreover, common law is subservient to the Constitution and statutes.⁴² Thus, the judicial precedents have to be constantly looked at in light of constitutional and statutory provisions. Thus, precedents on privacy of proceedings are bound to keep on changing.

8. Conclusion

Privacy in arbitration hearings is informed by party autonomy in arbitration. Privacy essentially means limitations on third parties’ access to arbitration proceedings. Such limitations fly in the face of the constitutionally-enshrined rights to freedom of expression, and the right to a fair hearing - specifically the right to a public trial. The right to a public trial

⁴¹ [1970] EA 195.

⁴² See the Court of Appeal in *Kisumuwalla Oil Industries Limited v Pan Asiatic Commodities Pte Limited and East Africa Shortage Company Ltd* Mombasa Civil Appeal No. 100 of 1995 where the court while interpreting section 3 (1) of the Judicature Act held that “The common law occupies a subordinate position to statute law and its application is subject to statute law.”

can be limited as long as such fetters accord to Article 24 of the Constitution. Such limitations include the right to privacy, and access to information.

The Arbitration Act does not expressly provide for privacy, and such requirement would have to be stated in the arbitration agreement. In addition, lack of statutory rules to guide statutory arbitrations not only causes injustice to parties but also further clouds the issue of privacy of such arbitrations. Parties to court-ordered or court-annexed arbitrations have to agree on the issue of privacy in their Order of reference as the Civil Procedure Act and the Rules are silent.

Institutional rules for arbitrations in Kenya expressly provide for privacy by excluding third parties from the proceedings. It is for the parties to the arbitrations to decide which persons to be present in the proceedings. Judicial precedents on privacy of arbitral proceedings are inconsistent. Also, it does not aid privacy matters that such judicial precedents occupy a rung lower than the Constitution and statutes.

Chapter 4

Confidentiality in arbitration proceedings in Kenya

1. Introduction

In the previous chapter, it was seen that privacy of arbitration proceedings essentially relates to limitations of access by third parties to such proceedings. Privacy was seen as emanating from party autonomy which finds its anchor in the freedom to contract of the parties. A review of the Constitution, statutes, institutional rules, and court decisions showed that privacy of arbitration proceedings is uncertain.

Confidentiality is closely interlinked with privacy. This is because whereas confidentiality “imposes obligations on the participants to the arbitration”, privacy works towards excluding third parties from the arbitration hearings.¹ This chapter will discuss confidentiality during and after the proceedings.

2. Confidentiality during the course of arbitration proceedings

Paulsson and Rawding identify three issues on confidentiality that may arise during the arbitration hearing of a dispute:²

- (a) Can the existence of the dispute, and the resultant arbitration, be disclosed without the accord of both parties?

On this issue, Paulsson and Rawding note that parties may be under a duty to report the existence of the dispute to third parties e.g. regulators, auditors or to an acquirer during a due diligence. Nevertheless, they note that unilateral disclosures tend to be selective and

¹ Michael Pryles, “Confidentiality” in *Leading Arbitrators’ Guide to International Arbitration*, 2nd Edition, 415 at 453 < <https://bit.ly/2Dym2oW> > as accessed on 17 April 2018.

² Paulsson J., and Rawding N., “The Trouble with Confidentiality” [1995] 11 (3) *Arbitration International*, 303 at 304 – 305.

favouring one side of the story. This is so as a party to an arbitration will only be fully aware of its own case and cannot authoritatively comment on the case for the other side.

Pryles also agrees with Paulsson and Rawding that in some instances a party has to publish the existence and details of an arbitration. He gives an example of an insurance policy under which an insured must disclose to its insurer arbitration issues which may be material to the insured risk.³

(b) Can evidence disclosed during an arbitration hearing be disclosed in other proceedings? An absolute rule of confidentiality means that such evidence should not be disclosed. Yet, such evidence may be the core of a case by a third party without which it cannot launch the case.

There are two schools of thought on this issue. One school postulates that there exists an implied obligation on a party to an arbitration not to use them for any purpose than the dispute in which they were obtained. The other school advances the thought that no such obligation exists.

The pro-confidentiality school finds its roots in decisions rendered by the English courts. The leading case on this issue is the case of *Dolling-Baker v. Merrett & another*.⁴ In this case, the first court had ordered that discovery be had for all documents relating to an arbitration to which the some of the defendants were parties. On appeal, the Court found that this order was so wide that it even covered irrelevant documents. That notwithstanding, the court stated that even if the documents were relevant, they would still be covered by confidentiality and would not be available for discovery. In the words of Parker LJ,

³ Pryles *op. cit.*, p. 421.

⁴ [1991] 2 All ER 891.

“What [was] relied upon [was], in effect the essentially private nature of an arbitration, coupled with the implied obligation of a party who obtains documents on discovery not to use them for any purpose other than the dispute in which they were obtained. As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such matter there must . . . be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as it is in the case of the implied obligation of secrecy between banker and customer.”⁵
[Emphasis mine]

This case established the implied obligation of confidentiality i.e. non-disclosure of materials used in the arbitration save with the accord of the other party or through a court order. It is also seen that such an implied obligation stems from the primacy given to party autonomy i.e. court only effects what the parties agreed, and an obligation as to confidentiality is one of the terms impliedly agreed to. This obligation of confidentiality is also seen as being akin to the duty of confidentiality imposed on bankers as established and expounded in *Tournier v National Provincial & Union Bank of England*.⁶

The court did not demarcate the boundaries of such an obligation of confidentiality. The court left such a determination to the other courts to be determined on a rolling basis. The court held that,

“When a question arises as to production of documents or indeed discovery by list or affidavit, the court must, it appears to me, have regard to the existence of the implied obligation, whatever its precise limits may be. If it is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail.”⁷

⁵ [1990] 1 WLR 1205 at 1213

⁶ [1924] 1 KB 461.

⁷ [1990] 1 WLR 1205, 1213-1214.

The obligation of confidentiality is implied not to give “business efficacy” to an arbitration contract but as “a matter of law”. The English Court of Appeal in *Ali Shipping Corporation v. Shipyard Trogir*⁸ stated as follows, as per Potter LJ, with whom the other two justices agreed,

“I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality (whatever its precise limits) arises as an essential corollary of the privacy of arbitration proceedings, the Court is propounding a term which arises "as the nature of the contract itself implicitly requires"

The other school of thought on this issue identifies no obligation on parties to arbitration as to confidentiality. This school is informed by decisions from Australia and United States of America.

In the Australian decision of *Esso Australia Resources Ltd v. Plowman*⁹, the High Court was categorical that no such duty of confidentiality existed unless there was an express agreement between the parties. In the words of the court,

“Despite the view taken in *Dolling-Baker* and subsequently by Colman J in *Hassneh Insurance*, I do not consider that, in Australia, having regard to the various matters to which I have referred, we are justified in concluding that confidentiality is an essential attribute of a private arbitration imposing an obligation on each party not to disclose the proceedings or documents and information provided in and for the purposes of the arbitration.”¹⁰

In *United States v Panhandle Eastern Corporation & 9 others*¹¹, a United States court ruled that there is no confidentiality of documents generated in an arbitration. The case arose after the US government sought discovery of documents concerning an ICC arbitration in Switzerland between a subsidiary of the first respondent and a third party.

⁸ [1999] 1 WLR 314

⁹ [1995] HCA 19.

¹⁰ [1995] 183 CLR 10 at 30.

¹¹ 842 F.2d 685

The court took note that the ICC Rules on confidentiality regulated the ICC Court members but not the parties to arbitration proceedings or the arbitration tribunal.¹² Therefore, such ICC Rules could not be used to extend confidentiality even to parties litigating in the American courts.

(c) During an arbitration hearing can a third party rely on evidence obtained from a separate arbitration?

Paulsson and Rawding suggest that there is no justifiable reason to bar a third party from doing so; that the duty of confidentiality should generally not be imposed on third parties to arbitration.

3. Confidentiality of and after the award

On confidentiality after the award, Paulsson and Rawding pose the question whether an award, material and the record of the arbitration, can be disclosed after the arbitration ends without the authority of the parties. They suggest that if the losing party decides to settle, the issue of confidentiality rarely arises.¹³ This is not the case when there are recognition and enforcement proceedings, or there is an appeal or review of the award. For such subsequent proceedings, the award may be annexed as evidence to the court pleadings which are open to scrutiny by the public as discussed in the previous chapter. Publication in the interests of justice is an exception to the implied confidentiality obligation.

¹² Ibid at 350.

¹³ Paulsson and Rawding *op. cit.*, p. 305.

On the publication of awards, Elina Zlatanska extensively discusses the same in her article “To publish, or Not To Publish Arbitral Awards: That is the Question...”¹⁴ There are several arguments in favour of publishing arbitration awards just like it happens for cases in courts. These pro-publication arguments are that publication:

- (a) Fosters the development of law;
- (b) Enhances certainty and predictability in that “publication of awards will increase the foreseeability of outcomes” thereby enabling parties decide on the best course of action;
- (c) Ensures consistency which fosters uniform application of rules and “promote a better understanding of the process”;
- (d) Nurtures legitimacy by making the arbitration process transparent and the parties are able to see that justice is being done;
- (e) Offers a platform to educate and train arbitrators who unlike litigation advocates who have access to case laws, do not have access to past arbitration decisions;
- (f) Improves quality of arbitral awards in that arbitrators will strive to give coherent reasoning behind their decisions;
- (g) Prevents of conflict of interests (neutrality) especially where in an arbitration you may have an arbitrator and counsel for parties to the arbitration coming from the same law firm;
- (h) Enhances integrity and reputation of arbitrators in that they will act right as they know their awards will be scrutinized; and
- (i) Allows parties to choose the most competent arbitrators or counsel based on their track record and not on any advertising gimmick.¹⁵

Some arguments also militate against publication of awards. These are that publication of such awards:

- a) Erodes arbitration by robbing it of its key attribute: confidentiality. Thus people will be reluctant to conduct arbitration as free as they would. This, also means that technical and business data would be exposed to the whole world which cannot be allowed to be either the intent or a collateral outcome of an arbitration;

¹⁴ Elina Zlatanska, “To publish, or Not To Publish Arbitral Awards: That is the Question...”, (2015) 81(1) ARBITRATION: The International Journal of Arbitration, Mediation and Dispute Management, 25.

¹⁵ Ibid, pp. 27 – 32.

- b) Causes additional costs and delays as the arbitrator has to also consider whether the award is fit for publication. Further, there will be costs incurred in preparing the appropriate award for publication;
- c) Cannot form precedent as an award is directed to the case at hand and for a particular situation. Thus, such award cannot be of any precedential value to any other arbitration proceedings;
- d) May cause harm to the parties' reputation due to the contents of such awards; and
- e) Increases business costs for the arbitral tribunals in keeping such awards, and also parties may choose tribunals which guarantee confidentiality.¹⁶

Flowing from the above, it can be seen that arguments can be had for publishing of awards or the non-publishing thereof. To strike a middle-ground between the two extremes, Elina suggests that an automatic system be developed which enjoins parties to identify the confidential information that they would not like published; the arbitrator then writes two awards: one with confidential information which will be given to the parties, and a redacted version which can be published.¹⁷ Such a mechanism would seem wont to increase the costs of arbitration which the author has identified as a downside of publishing of awards. Examples of such increased costs include costs of development and acquisition of the automatic system, arbitrator's time in writing two awards, the parties' times in identification of the sensitive material that they would like to keep under wraps, court challenges to such identifications especially in matters where transparency is called for such as in arbitrations involving public bodies.

Elina further suggests that a template for uniform awards be developed which template will have 3 parts: (1) description of the facts; (2) procedural issues; and (3) the reasons and the decision.¹⁸ With such a template, it will be quick to point out the sensitive areas in an award and consequently redact them. This suggestion, she acknowledges, may be

¹⁶ Ibid, pp.32 – 34.

¹⁷ Ibid, p.35.

¹⁸ Ibid.

problematic as different arbitrators have different writing styles.¹⁹ In addition, developing such a template may be expensive. Besides, each case has different facts and circumstances which means that one template cannot fit all.

Lastly, Elina suggests that a centralized body in charge of publication be developed but acknowledges that such an institution may run into logistical issues.²⁰ In addition to the noted logistical issues, it is to be noted that arbitral institutions are in competition amongst themselves, and they operate under different rules. It would be a daunting task to prod the arbitral institutions to offer their awards to publication to a central body.

Considering the above, one of the solutions - albeit it may appear escapist - to confidentiality of awards is for each case to be considered by its circumstances. Such circumstances include the rules of the arbitral institution, the parties to the arbitration e.g. if a statutory body or a publicly listed company is a party, and the subject matter of the arbitration e.g. if it involves national security matters, sensitive intellectual property issues. All these circumstances are to be undertaken in light of the principle of party autonomy meaning that the parties are free to define how confidentiality shall be applied to the awards which agreement should be preferably undertaken during the directions stage before an arbitration hearing.

4. Kenyan position

The Kenyan position on confidentiality largely reflects the position on privacy discussed in the previous chapter. This is so largely due to the intertwined nature of those two features of arbitration.

A perusal of the Arbitration Act shows that it is silent on the issue of confidentiality.

Presumably, this issue is for the parties to determine. Such a presumption finds support in

¹⁹ Ibid.

²⁰ Ibid, p.36.

the decision in *Nedermar Technology BV Ltd v KACC & AG*.²¹ The case involved a contract on security installations in Kenya which had been fully performed save for the issue of payment by the Kenyan government to the Applicant. The government had after the completion of the installation entered into a second contract with the Applicant for payment of the contract sums which second contract it breached. The Applicant filed for arbitration against the government at The Hague as provided for in the second contract. While the arbitration proceedings were ongoing, the defunct Kenya Anti-Corruption Commission sought evidence, materials and documents related to the second contract on the basis of investigations into corruption. The Applicant commenced judicial review proceedings against the Kenya Anti-Corruption Commission and the Attorney General. In a ruling on an application for interim orders against the investigations by the Kenya Anti-Corruption Commission – which orders were later granted in the final ruling on the petition - the court had this to say about confidentiality of the proceedings at The Hague:

“The other reason for the suitability of the matters falling within the ambit of the Arbitral Tribunal is the confidentiality of the Arbitral process. The Arbitral process whether international such as in this matter or domestic is absolutely confidential.”²² [Emphasis added]

On appeal, the Court of Appeal in dismissing it in *Kenya Anti-Corruption Commission & another v Nedermar Technology BV Limited* stated as follows:

“I hold the view that matters of genuine National Security call for strict confidentiality, and they override any other public interest concerns. As is indeed the practice world over, the security of a country reposes in the Government of the day, in this case, one of the contracting

²¹ *Milimani High Court Petition No. 390 of 2006*.

²² *Ibid*, p.13.

partners. If the Government's view was that the contract called for confidentiality, then the 1st appellant had no locus to question that classification."²³

Also, Justice Havelock in *Centurion Engineers & Builders Ltd. v Kenya Bureau Of Standards*²⁴ was of the view that arbitration proceedings are confidential. He stated,

"My own view is that the above may be the procedure for arbitration hearings in Northern Carolina but it is certainly not applicable in arbitration practice in Kenya. Although arbitration hearings should be conducted in suitable rooms therefore, they certainly are not open to the public, are confidential to the parties and the *Evidence Act (Cap 80, Laws of Kenya)* does not apply."²⁵

(a) Illegally obtained evidence

A caveat may be put on the reliance in court of evidence, materials and documents generated in an arbitration. This caveat is the one against admission of illegally obtained evidence. Such illegality would come by if a party breaches a confidentiality agreement, implied or express, and such a party or a third party wants to rely on the evidence, materials and documents generated in an arbitration. Would the evidence be admissible in court?

The general rule on illegally obtained evidence based on common law has always been that such evidence is admissible as long as its relevance touches on the matter before the court. If it is relevant, it is immaterial how the litigant came by it. In *Nicholas Ombija v JMVB*²⁶ the court expressed itself as follows regarding the rule,

²³ *Kenya Anti-Corruption Commission & another v Nedermar Technology BV. Limited* [2017] eKLR at paragraph 33.

²⁴ [2014] eKLR.

²⁵ *Ibid*, paragraph 7. But see *Senator Johnstone Muthama v Tanathi Order Services Board & 2 Ors* Nairobi JR Misc. Application No. 374 of 2013 and *Lepapa ole Kisotu v Ntulele Group Ranch & another* [2017] eKLR in which both cases Justice Odunga was of the view that arbitration proceedings are not confidential.

²⁶ Nairobi Civil Appeal No. 281 of 2015 at paragraph 51.

“What does the law state regarding illegally obtained evidence? In the case of *Karuma, Son of Kaniu v. The Queen [1955] AC 197* which was an appeal to the Privy Council on a criminal conviction anchored on an illegally procured evidence, the Privy Council held that “the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained”. In that case, the Privy Council decision was supported by the decision in *Reg. v. Leatham (1861) 8 Cox C.C.C 498* which was referred to in the judgment. In *Re. v. Leatham (supra)*, it was said “it matters not how you get it if you steal it even, it would be admissible in evidence”. In *Olmstead v. United States (1928) 277 US 438* the Supreme Court of the United States of America opined that “the common law did not reject relevant evidence on the ground that it had been obtained illegally.” In *Helliwell v. Piggot-Sims [1980] FSR 356* it was held that “so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning.” [Emphasis added]

The Supreme Court of Kenya in *Njonjo Mue & another v Chairperson IEBC & 3 others*²⁷ relied on the above quotation and held as follows,

The above position applies generally including to election petitions which are matters *sui generis*.²⁸

If matters were left at that common law position, it would appear that evidence, materials and documents generated in an arbitration may be used by a party despite breach of an implied or express confidentiality agreement.

However, the Constitution has modified that common law rule on illegally obtained evidence. Article 50 (4) of the Constitution states that,

“Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.”

²⁷ *Njonjo Mue & another v Chairperson of IEBC and 3 others*, Presidential Election Petition No. 4 of 2017.

²⁸ *Ibid*, paragraph 19.

In the *Njonjo Mue* case, the Supreme Court approved the decision of the High Court in *David Ogolla Okoth v. Chief Magistrate Court, Kibera & 2 others*²⁹ in which Justice Onguto while interpreting the quoted Article held that “*evidence ought to be obtained in accordance with the provisions of both the Constitution and of the law.*”

In the *Njonjo Mue* case, the Applicants had come across internal memos of a constitutional commission which they sought to rely on in their petition against the presidential elections held on 26 October 2017. The said memos had not been provided by, but had been illegally obtained from the Commission. The Supreme Court held that such internal memos could not be relied on by the court as they had been illegally obtained contrary to the laid down procedures of the Access to Information Act, and also because their probative value was questionable. Most importantly, the Supreme Court stated that in deciding whether to admit such evidence, there has to be a balance between the right of access to information, and the right to privacy and protection of property. The Supreme Court stated,

“The Court also has to find a balance between the Petitioners’ rights to access of information as guaranteed under Article 35 of the Constitution, against those of the 1st and 2nd Respondents’ rights to privacy and protection of property also guaranteed under Articles 31 and 40 of the Constitution. If access was in the instance, obtained through the laid down procedure under Section 27 of the Independent Electoral and Boundaries Commission Act, and Section 6(1) of the Access to Information Act, then the rights of both the Petitioners and the Respondents would be protected, by dint of the applicable laws that set out the limitations for access of any such information.”³⁰

The above elucidation by the Supreme Court would apply to civil, commercial or criminal cases where a party seeks to produce arbitration evidence, materials or documents that are bound by an implied or express confidentiality agreement.

²⁹ *David Ogolla Okoth v Chief Magistrate Court, Kibera & The Attorney General & The Director of Public Prosecutions*, Milimani High Court Petition 5 of 2015.

³⁰ *Njonjo Mue & another, op. cit.*, paragraph 25.

(b) Institutional rules

Many arbitral institutions have explicit provisions governing confidentiality. Once parties choose a particular institution, then its rules will be applicable to their dispute. Such provisions and institutions include:

- i) Article 25.4 of the *UNCITRAL Rules 1976* provides that hearings are to be conducted in private, while Article 32.5 requires consent of the parties before publication of an award;
- ii) The *UNCITRAL Rules 2010 and 2013* mirror the *UNCITRAL Rules 1976*. Article 34(5) requires consent of the parties to the publication of the award or “where and to the extent disclosure is required of a party be legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority”;
- iii) Article 22.3 of the *International Chamber of Commerce (ICC) Rules 2012 and 2017* empowers a tribunal to “make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration” and may also take measures to protect trade secrets and confidential information). However, Article 21.3 of the *ICC Rules 1998* provides for the privacy of hearings but contain no further requirements with regard to confidentiality;
- iv) Article 3(13) of the *International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration 2010* provides for the confidentiality of documents disclosed in the arbitration, except and to the extent that disclosure may be required to enable a party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. This obligation of confidentiality is stated to be “without prejudice to all other obligations of confidentiality in the arbitration”.

Article 9(4) entitles the tribunal to make arrangements for the consideration of evidence “subject to suitable confidentiality protection”.

- v) The *London Court of International Arbitration (LCIA) Rules 1998 and 2014* (Article 30) details the obligations of confidentiality, subject to exceptions which are mostly similar to the exceptions recognized in English law;
- vi) Article 46 of the *Stockholm Chamber of Commerce (SCC) Rules* enjoins the SCC Institute and the tribunal to maintain the confidentiality of the arbitration. Nevertheless, it does not impose any obligation on the parties;
- vii) Article 35 of the *Singapore International Arbitration Centre (SIAC) Rules 2010 and 2013* and Article 39 of the *SIAC Rules 2016*, contain detailed provisions preserving the confidentiality of arbitral proceedings, and
- viii) The *World Intellectual Property Organization (WIPO) Rules 2002 and 2013* contain relatively sophisticated confidentiality provisions, including provision for the appointment of a “confidentiality advisor” and related procedures.

In Kenya, section 15 of the *Nairobi Centre for International Arbitration Act*³¹ prohibits publication of the affairs of the Centre by any person unless such disclosure is required under any law, required by a Court of law, or is in performance of the discloser’s duties under the Act.

Rule 34 of the *Nairobi Centre for International Arbitration, Arbitration Rules* provides for confidentiality. A reading of Rule 34 shows that confidentiality of the elements of the arbitration, documents and awards is the rule rather than exception. Further, that parties can agree otherwise in writing. Nevertheless, the rule also provides that confidentiality may be excepted where a legal duty requires.

³¹ Nairobi Centre for International Arbitration Act No. 26 of 2013.

Rule 25 (4) (a) of the *Nairobi Centre for International Arbitration, Arbitration Rules 2015* grants powers to an arbitral tribunal to give orders to the parties on the production and admission of confidential documents, and maintenance of such confidentiality.

5. Conclusion

A party may be enjoined to publicize the existence of a dispute to third parties due to legal obligations. However, such disclosure is lopsided as the party is aware of only one side of the story.

On the parties' obligation to keep the evidence of arbitration confidential, there exists two schools of thought and practice: one which is predominantly English-law based postulates that there is an implied obligation not to disclose the evidence or materials generated in an arbitration. The other school which finds home in the Australian and American jurisprudence takes the position that there is no such implied obligation. Of course both schools are trounced if there is an express written agreement not to disclose the evidence or materials generated in an arbitration. An implied or express obligation has various exceptions such as when there is a court order, or consent is given by the other party to disclose.

There are arguments in favour of, and against, the publication of arbitral awards which is the other limb of confidentiality. Each award has to be looked at according to its own peculiar facts so as to decide whether it may be published or not and if it is to be published which information is to be redacted.

The Arbitration Act does not expressly provide for confidentiality. Nevertheless, much of the Kenyan jurisprudence is pro-confidentiality in that it implies an obligation as to confidentiality on arbitration. However, there exist other cases which liken arbitration to litigation meaning that arbitration hearings are open to all, and confidentiality does not

attach to such proceedings. A perusal of various arbitration institutional rules indicates that they all provide for confidentiality of arbitrations in one way or another.

The silence of the Arbitration Act notwithstanding, evidence, documents or materials obtained in such arbitration hearings contrary to an obligation of confidentiality may be considered illegally obtained evidence. Such evidence will be excluded from admission in courts as long as such admission would infringe an implied or express confidentiality agreement which binds an arbitration.

Chapter 5

Conclusions and recommendations

Kenya enacted a new constitutional order in 2010. The Constitution expanded the Bill of Rights besides providing for national principles and values of governance. The Constitution heralded a new order to which all the existing laws and practices had to conform.

Privacy and confidentiality continue to be fronted as some of the positive attributes that arbitration enjoys over other dispute resolution mechanisms. This study set out to test the strength of such claims in light of the new constitutional dispensation. The study proceeded on two hypotheses, to wit:

- (a) That privacy and confidentiality are central to effective arbitration; and
- (b) That the Constitution has affected the privacy and confidentiality of arbitration proceedings in Kenya.

The study brought out these findings:

1. In Chapter 2, it was found that the Arbitration Act, being the principal Act that governs arbitration in Kenya, does not have express provisions on privacy and confidentiality. Similarly, the Civil Procedure Act and Rules are also silent especially concerning the court-annexed arbitrations. This is unlike the NCIA Act and the Rules thereunder which have express provisions.
2. Further, it was found that the principle of party autonomy is expressly provided for in the legislative and institutional rules governing arbitration in Kenya. Party autonomy enables parties to agree on the rules of engagement including the issue of privacy and confidentiality. Such deference to party autonomy appear to prove the contractual and hybrid theories of arbitration.

3. In Chapter 3 of the study, it was found that privacy in arbitration has been heavily influenced by the Constitution especially by the Bill of Rights. It was seen that as long as privacy means limitation of third parties' access to the arbitration proceedings, then the extent of the privacy will be limited several constitutional rights. These are: the right to a fair hearing, public trial, access to information and the freedom of expression.
4. It was seen that the mentioned constitutional rights can be limited as long as the limitations accord to the Constitution.
5. Moreover, conflicting decisions of the High Court of Kenya were brought out: on one side, some judges are of the view that privacy is not an essential component of arbitration while some judges are of the contrary view.
6. In Chapter 4, it was found that confidentiality concerns the limits of disclosure of the existence, materials, evidence, documents produced in the arbitration proceedings, or the award. Two schools of thought on the confidentiality were found: one that maintains that there is an implied obligation to disclose such materials; and the other school that maintains that in the absence of an express provision or agreement not to disclose, there is no implied obligation on the parties to keep the materials confidential.
7. Even in the silence of the Arbitration Act, it was found that much of the jurisprudence flowing from the courts in Kenya is pro-confidentiality: that there is a duty of confidentiality in arbitration.
8. On the other hand, it was also found that there is jurisprudence from Kenya that holds that arbitration is like litigation. This school of thought finds its strength in the Constitution which lays out the national values of transparency and accountability.

Confidentiality in light of such values is seen as an unnecessary and unjustified clog on the values.

9. Notwithstanding the two schools of thought on jurisprudence, it was found that in Kenya illegally obtained evidence is to be excluded from court proceedings if their admission would make a trial unfair, or infringe the rights of a party. This would mean that any evidence obtained in breach of another party's rights or a confidentiality agreement would not be admissible in Court.

The study has sufficiently met the research objectives set out, as well as answering the research questions as posed, in the research proposal. One of the objectives of the study was to analyse the scope of privacy and confidentiality in arbitration in Kenya, especially in light of the Constitution. This has been done and the scope of privacy and confidentiality pending, during and after arbitration proceedings set out. It has also been seen that the Constitution has greatly shaped the extent and limits of these features of arbitration.

Based on the above findings, the hypothesis that the twin attributes are central to effective arbitration has been disproven. It has been seen that the Constitution due to its supremacy has severely eroded the contours of privacy and confidentiality. This has led some judges to liken arbitration to litigation meaning that privacy and confidentiality are no longer seen as central to arbitration.

The pro-arbitration school of thought cannot be wished away. Much of the jurisprudence shows that privacy and confidentiality are still seen as central to arbitration. However, it is doubtful how further this pro-arbitration school can go on light of the strong Constitution and the differing interpretations. What is not in doubt is that the Constitution shall continue to chip away on the privacy and confidentiality especially due to the

national values of transparency and accountability which even arbitral tribunals are bound to apply.

The study also proceeded on the hypothesis that the Constitution has affected the twin attributes of privacy and confidentiality of arbitration hearings in Kenya. This hypothesis has been proven as laid out above. The Bill of Rights, values, and the principles of governance have narrowed the application of privacy and confidentiality in Kenya.

Some recommendations emerge to try and solve the issues identified in this study.

One of the major issues is the silence of the Arbitration Act on privacy and confidentiality of proceedings carried therein. An overhaul of the Act is called for especially given that it was last amended vide the Arbitration (Amendment) Act No. 11 of 2009 which commenced well before the promulgation of the Constitution. Thus, it is fair to conclude that the amendments were not informed by the constitutional moulding of current arbitration law, practice, and procedure. This can be carried out by the Kenya Law Reform Commission which is the body mandated to review all the laws of Kenya to ensure their systematic development and reform.

Such an overhaul of the Arbitration Act will have to be preceded by further research on whether privacy and confidentiality are some of the attributes that the public look for when choosing arbitration over litigation, mediation, conciliation, or adjudication. If so, then express provisions for privacy and confidentiality should be enacted to shut the gates on different interpretations of the same by the courts. Further, even if there is no such enactment, privacy and confidentiality can be strengthened by underscoring the primacy of party autonomy in arbitration. Nevertheless, all such considerations must accord to the values and principles under Article 10 of the Constitution, and also be reasonable limits to the constitutional rights as provided for under Article 24 of the Constitution.

Justice Mwongo in *Beatrice Anyango Okoth v Rift Valley Railways (K) Ltd & KPA*¹ directly called for parliamentary intervention in enactment of rules to guide statutory arbitrations. That call gets louder and louder especially in light of the primacy to the economy of the statutory corporations which mandate litigants to proceed for statutory arbitrations. It is unfortunate that 6 years afterwards such rules have never been enacted, and that lacuna also affects the privacy and confidentiality of statutory arbitrations. Again, Kenya Law Reform Commission should undertake the preparation of these rules and pass them to Parliament for further discussion and enactment.

In light of the varied jurisprudence from the courts on the issue of privacy and confidentiality, it would appear in order for more public interest cases to be filed to test and rest their limits. Such public interest cases are certainly allowable in light of the relaxed requirements for enforcement of the Bill of Rights by Article 22 of the Constitution. Only through such jurisprudence will we know the limits of the Bill of Rights, the national values and principles of governance, privacy and confidentiality of arbitration proceedings.

Party autonomy has been touted as the basis of most arbitrations, and has been upheld not only by the Acts and Institutional Rules but also by a majority of the case law coming from the courts. It is only appropriate that the public be sensitized on the importance of contractual agreements, and that the courts will uphold their bargains. The sensitization may be carried out in schools, trainings, or online seminars by the Arbitral Institutions with support from the government.

¹ *Beatrice Anyango Okoth v Rift Valley Railways (K) Ltd & KPA* Mombasa Civil Case No. 450 of 2011.

Lastly, arbitrators and legal professionals also need to refresh their knowledge and update their practices on arbitration so as to effectively take care of issues of privacy and confidentiality at the drafting stage of contracts, or at least while taking directions before an arbitrator. This can be done through intensive Continuous Professional Development trainings undertaken by the legal professionals and arbitrators.

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