# PRELIMINARY PROCEEDINGS AND INTERLOCUTORIES: THE BIRTH, TEETHING, IMMUNIZATION AND WEANING OF ARBITRATION PROCEEDINGS*

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## 1.0 INTRODUCTION

This paper aims to introduce matters relating to commencement of arbitration, interlocutory applications in arbitration and preliminary meeting and pleadings. Analogically, and as the title suggests, commencement of arbitration is what gives birth to the arbitration proceedings. Preliminary objections are the teething problems that beset the life of arbitration. Interlocutory applications, and the interim reliefs they yield, are what 'immunize' the arbitration process from succumbing to pre-mature fatalities as a result of dissipation of the subject matter of the arbitration. On their part, preliminary meeting, pleadings and pre-hearing procedures 'wean' the arbitral process for the impeding reality of the arbitration hearing.

The paper shall thus, first, address matters that touch on commencement of an arbitration including reference to arbitration, appointment of arbitrator, challenging the arbitrator. Other matters facilitating the birth of the arbitration such as stay of proceedings and court applications for interim reliefs will, at least in passing, be given due mention. Then, the possible interlocutories available during arbitration where conservatory and protective orders applicable to arbitration will be reviewed. Lastly, the paper will address the agenda of the first meeting and pleading in arbitration proceedings.

It is expected that the paper will exhaust the issues that need attention up till the point where all that is pending is an arbitration hearing. The paper refers to the arbitration Act, 1995

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(hereinafter the Act) as amended by the Arbitration (Amendment) Act 2009 (hereinafter the Amendment Act), Chartered Institute of Arbitrator-Kenya Branch Arbitration Rules (hereinafter the Arbitration Rules) and, to a limited extent, the Arbitration Act 1996 of the United Kingdom.

## 2.0 WHAT ARE INTERLOCUTORY MATTERS?

The Osborn's Concise Law Dictionary defines interlocutory (and by extension preliminary proceedings) as … "one taken during the course of action and incidental to the principal object, namely, the judgment …" In arbitral proceedings, this is the stage from appointment of the arbitral tribunal to the commencement of the arbitration hearing.[2]

## 3.0 APPOINTMENT OF ARBITRAL TRIBUNAL[3]

Arbitration proceedings are commenced by appointment of the arbitral tribunal.[4] The arbitration agreement will likely provide for the mode of appointment and the preferred number of arbitrators.[5] The default number as provided under the Act is a single arbitrator.[6] The parties can agree to appoint either a sole arbitrator; a tribunal of two arbitrators who then appoint a third arbitrator; a tribunal of three arbitrators; or even a tribunal of more than three arbitrators with or without an umpire.[7] The odd number ensures that majority decisions are achievable.[8]

Where the parties have not agreed on appointment modality or there is a breach of the agreement in respect of appointments, one of the parties may request appointment of the

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[2] A. Ali "Interlocutory (Intermediate) Matters" an unpublished paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 20th and 21st August, 2007

[3] See generally Jackie Kamau & Farooq Khan, "Appointment of an Arbitrator" an unpublished paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 11th and 12th of February, 2002

[4] That is, barring pre-arbitration steps such as stay of proceedings which are outside the scope of this paper.

[5] Section 11(1) and 12 (2) of the Act

[6] Section 11 of the Act

[7] For an in-depth discussion of each of the tribunals see Sir Mustill M.J and Boyd S.C (1989) The Law and Practice of Commercial Arbitration in England (Butterworths, London and Edinburgh, 2nd Edition) p. 171-192

[8] On appointment of arbitrators see section see section 12 of the Arbitration Act, 1995 (Kenya) and sections 15-27 of the Arbitration Act, 1996 (UK)

arbitral tribunal by an institution, if any, is designated in the arbitration agreement to undertake the appointment or agreed upon after the dispute. Where each of two parties to an arbitration agreement is to appoint an arbitrator and one party ("the party in default") has indicated that he is unwilling to do so;[9] fails to do so within the time allowed under the arbitration agreement;[10] or fails to do so within a reasonable time (where the arbitration agreement does not limit the time within which an arbitrator must be appointed by a party),[11] the other party, having duly appointed an arbitrator, may give notice in writing to the party in default that he proposes to appoint his arbitrator to act as sole arbitrator.

If the party in default does not, within fourteen days after notice under subsection (3) has been given make the required appointment and notify the other party that he has done so, the other party may appoint his arbitrator as sole arbitrator, and the award of that arbitrator shall be binding on both parties as if he had been so appointed by agreement.[12] Where a sole arbitrator has been appointed under subsection (4), the party in default may, upon notice to the other party, apply to the High Court within fourteen days to have the appointment set aside.[13]

Section 12 of the Arbitration Act 1995 further stipulates the extent of the courts' power in making appointments of arbitral tribunals in Kenya. The jurisdiction to make appointment to arbitral tribunal is vested exclusively in the High Court of Kenya. The High Court may grant an application under subsection (5) only if it is satisfied that there was good cause for the failure or refusal of the party in default to appoint his arbitrator in due time. The High Court, if it grants an application under subsection (5), may, by consent of the parties or on the application of either party, appoint a sole arbitrator. A decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal.[14]

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[9] Sec. 12(3) (a) as amended by the Amending Act

[10] Sec. 12(3) (b), *supra*.

[11] Sec. 12 (3) (c), *supra*.

[12] Sec. 12(4) (a) and (b), *supra*.

[13] Sec. 12(5), *supra*.

[14] Sec. 12 (6), (7) and (8) respectively as amended by the Amending Act.

The High Court is required to consider the qualifications, independence and impartiality of the tribunal. The court is also to take into account the wisdom of appointing an arbitrator other than fellow national of the parties or one of the parties.[15]

## 4.0 OBJECTIONS AGAINST/IN ARBITRATION

In arbitration proceedings, parties are likely to raise a number of objections: objection alleging no binding arbitration agreement between parties, objection on whether the dispute is within the scope of arbitration agreement, objection that reference is time-barred, challenging arbitrators, and challenges to the jurisdiction of the arbitral tribunal.[16] These objections and/or matters are not necessarily preliminary *per se* but the law encourages their disposal as soon as possible.[17] Each of these pertinent issues is addressed here below in turn.

### 4.1 There is no valid arbitration agreement

The Arbitration Act 1995 requires an arbitration agreement as a condition precedent for commencement of arbitration under it. The rationale is that arbitration is mainly a private and contractual arrangement between the parties for resolution of a given dispute or potential dispute(s). The only exceptions where an agreement between the parties is not insisted upon are the limited to arbitration on motion of the court, for example in case stated instances, or when arbitration is a result of a statutory fiat as is the case in statutory arbitration.[18] But even in these instances, parties' agreement is esteemed to the extent that parties are called upon to agree on details of the arbitral process such as venue, procedure, and evidence to be called among others matters.[19] In **Heyman& Another-v-Darwins Ltd**[20] at p. 373 Lord MacMillan stated as follows on arbitration agreement:

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[15] Section 12(9) of the Act. This is for instance requisite in international arbitration where if the arbitrator comes from one party's country, there is likelihood that his/her impartiality will not be guaranteed.

[16] This list is not necessarily exhaustive as parties can, theoretically, raise objection on anything in the arbitration proceedings they find objectionable.

[17] Section 5 of the Act

[18] The New Labour Laws make ADR a condition precedent to accessing the industrial courts and undertaking industrial action.

[19] Ibid.

[20] (1942) AC 356

> "… an arbitration clause in a contract … is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other, but the arbitration clause does not impose on one of the parties an obligation in favour of another. It embodies the agreement of both parties that if any dispute arises with regard to the obligations which either party has undertaken to the other, such disputes shall be settled by a tribunal of their own constitution."

The law requires an arbitration agreement, for validity, to be in writing.[21] An arbitration agreement may take the form of an independent contract or an arbitration clause[22] or even an Alternative Dispute Resolution (ADR) clause.[23] An arbitration agreement will be in writing for purposes of this requirement if signed by parties or involves an exchange of letters, telex, telegram, facsimile, electronic mail or other telecommunication means providing record of the agreement.[24] It seems a party can take a chance with the arbitration process where s/he is not sure of the validity of the arbitration agreement. The Act provides for presumption of arbitration agreement where the same is alleged in the statement of claim and not denied by the other party.[25] But a problem may arise where the other party opts to challenge the jurisdiction or at the point of filling the award as the same ought to be accompanied by the original arbitration agreement or a certified copy.[26] The law also sets out as a ground for application for setting aside the arbitral award if the arbitration agreement was not valid, that is, not in writing.[27]

An arbitration agreement by reference will be sufficient as a basis for reference to arbitration. However, the law requires that the contract making the reference be in writing and the reference is such as to make the clause referred to part of that contract.[28] Even where there is no binding agreement to base an arbitration process on, a party may cajole the other to enter

[21] Section 4(2) of the Act

[22] Section 4(1) of the Act

[23] However, such clause must provide arbitration as one of the proposed methods, whether in alternative or succession, for resolution of the dispute.

[24] Section 4(3) of the Act

[25] *Ibid.*

[26] Section 36(2) of the Act. But it seems from the wording of the requirement for filling the original arbitration agreement in the latter instance above may be waived on application to the High Court.

[27] Section 35(2) (a) (ii) of the Act

[28] Section 4(4) of the Act 1995

into an "ad hoc" agreement to arbitrate the dispute at hand.[29] It is also not a problem that the arbitration agreement or clause was part of an agreement that has been found null and void. The doctrine of separability guarantees an arbitration clause/agreement life and enforceability after the parent agreement has ceased enjoying validity. The doctrine is important here in the sense that it enables the arbitration clause to survive the termination by breach of any contract of which it is part.[30] Even if the underlying contract is void, the parties are presumed to have intended their disputes to be resolved by arbitration.

It is in the arbitration agreement that each party agrees to reference of disputes to arbitration.[31] There is no arbitration unless both parties to a dispute have agreed to arbitration or in other words unless there are 'bilateral rights of reference.' If the arbitration agreement's validity is questioned the arbitral tribunal should endeavour to ascertain the same before proceeding. The logic of this proposal is that even if the arbitration progresses to an award, the same may still be set aside for the invalidity. For instance, if the arbitration agreement may be inconsistent with a law or is incapable of being performed. It may also be invalid for missing the elements outlined above and which are compulsorily required to embody every arbitration agreement for the same to be valid

**4.2 The dispute is not contemplated under the Arbitration Agreement**

The matter of whether or not the instant dispute is contemplated for arbitration under the relevant arbitration agreement may appear rather academic[32] but it usually arises especially where parties had restricted the scope of reference to arbitration to only particular species on their disputes. It is also the case that arbitration does not resolve all disputes under the sun! The broad and practical question that arises when such objection is raised for resolution by the tribunal is whether the anticipated arbitration given the dispute to be arbitrated can be challenged as not being contemplated by the parties for reference to arbitration.

[29] See also section 5 of the Arbitration Act, 1996

[30] Section 17(1) (a) of the Arbitration Act, 1995

[31] Davies LJ in Baron-v-Sunderland Corp [1966] 1 All ER 349 at 351

[32] The philosophical question of what is 'dispute for purposes of arbitration is a vexing one. But that is a discussion for another day!

Arbitration, being a private process, only deals with civil disputes and does not venture into matters of public law.[33] Arbitration is, actually, dedicated to commercial disputes although even political agreement may provide for arbitration.[34] Essentially, the orders made under arbitration and arbitral award are personal and do not seek to bind the whole world, at least until filed, recognized and enforced by the High Court of Kenya.[35] As arbitration is based on agreement by parties, the matters referred to arbitration must pass muster as falling in the class of disputes the parties had agreed or can contract to refer to arbitration. There are matters that *cannot* be arbitrated. These are such as are not civil or at least have a public interest dimension and include divorce,[36] criminal matters,[37] issues of status (e.g. determining a person's sanity) or the liquidation of a company.[38] Thus arbitration of the foregoing matters will be objectionable on the basis that these are matters that cannot be arbitrated.

In addition, the dispute which has arisen must fall within the scope of the Arbitration clause. The draftsmanship in vogue in Kenya today is to have the arbitration clause as wide and comprehensive as possible. However, there are instances where the parties intend that only a limited scope of disputes to be reserved for reference to arbitration. In such an instance, the party opposing the arbitration may argue that the dispute is not covered by the arbitration agreement and therefore the arbitration is baseless.

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[33] See Githinji JA's dissenting judgement in Epco Builders Limited-v-Adam S. Marjan-Arbitrator & Another Civil Appeal No. 248 of 2005

[34] Ford-Kenya dispute was taken to arbitration. The Kenya Football Federation also referred a dispute between its leaders to arbitration

[35] Judicial orders are either *in personam* (applying as between parties e.g. in contracts) or *in rem*, binding and enforceable as against the whole world.

[36] Marriage is an important unit of the society and the state, as well as the society, have an interest in its termination process. As such, the spouses cannot be allowed to private it and deny the public a say.

[37] The state, and not the complainant, is usually the party against the suspect. The prosecution of crimes is done for the benefit of and protection of the public. So that privatization of the process through arbitration may fail to reassure the public whether the state is acting on crime. And the orders given in criminal matters cannot be enforced in private setting!

[38] Company matters the bear public interest aspect where the state seeks to protect creditors from unscrupulous companies and their officers in promotion of commerce and investment. If parties were permitted to arbitrate in liquidation, the resultant award would hardly apply *in rem* as it would only be enforceable against parties to arbitration only.

In ***TM AM Construction Group (Africa) v. Attorney General***[39] one of the issues that arose for determination was whether there was not in fact a dispute in the claim. The defendant claimed that there was a dispute between parties which deserved to be referred to arbitration. The court found that there was failure by the defendant to tender any evidence showing that there was in fact any dispute between the parties. The court was of the view that that meant no basis had been established to show that a dispute in fact existed to justify staying the proceedings and referring the proceedings to arbitration.

**4.3 When the arbitration reference is time-barred**

Parties often place limits in the arbitration agreement on when a party may refer a dispute arising to arbitration. In any event, the Limitation of Action Act applies to arbitrations with the same force it applies to litigation.[40] The issue of limitation of action of the arbitration and the contractual limitation period usually arise as a preliminary point. In ***Barlany Car Hire Services Limited-v-Corporate Insurance Limited***[41], a preliminary point of law was whether the Plaintiff was disentitled to any claim having failed to refer its claim to arbitration within 12 months of the Defendant's disclaimer of liability.

The arbitration agreement provided that if the Defendant company disclaimed liability to the insured for any claim, such claim be referred to arbitration within 12 calendar months from the date of the disclaimer. The Plaintiff had failed to properly institute the arbitration process and more than 12 months lapsed. The defendant therefore argued that the Plaintiff was now too late to arbitrate and indeed even too late to claim at all.

The court held that the Plaintiff was indeed too late to appoint an arbitrator or claim there having been no reference to arbitration within 12 months of the repudiation. The court agreed with the Defendant that the clause imposing the contractual deadline was a condition precedent to a valid claim as was held in the case of ***H. Ford & Co. Limited-v-Compagnie Furness (France)***[42] where a clause to similar effect was upheld. The court quoted the following holding in that case with approval:

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[39] HCCC (Milimani) No. 236 of 2001

[40] Cap. 22 of Laws of Kenya. It is the case that the arbitral tribunal must uphold the law.

[41] HCCC (Milimani) No. 1249 of 2000

[42] [1922] 2 KB 797

> **"Therefore as the jurisdiction of the arbitrator was only given to him by the consent of the parties and the parties agreed that the arbitrator if appointed at all should be appointed within a certain time, it seems to me to follow that as that time has elapsed, neither party had power to appoint an arbitrator unless the other party consented."[43]**

The court therefore upheld the Defendant's argument that there was no longer any cause of action; the matter was time barred and noted that no application had been made to extend the limitation period if that were possible. The court in response to the Plaintiff's suggestion that the matter was governed by section 4 of the Limitation of action Act held that the law of Limitation of Action Act merely gives a maximum time limit within which a suit may be brought. The court quoted the following passage from the Halsbury Laws in support:[44]

> **"The parties to an arbitration agreement may, if they wish, contract that no arbitration proceedings shall be brought after the expiration of some shorter period than that applicable under the statute."**

### 4.4 Challenge of the arbitration tribunal

Parties are free to agree on how to challenge the arbitral tribunal. Where the parties fail so to agree, a party may within 15 days of becoming privy to the appointment of the tribunal or circumstances that merit its challenge write to it stipulating the reasons for the challenge. If the challenged tribunal does not withdraw from office or the other party agrees to the challenge, the tribunal shall decide the matter. If the challenge whether in the manner agreed by the parties or after decision by the tribunal does not succeed, the challenging party may apply to the High Court within 30 days of refusal of the challenge. The decision of the High Court on the challenge shall be final and is not subject to appeal. While such an application is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such an award shall be void if the application is successful.[45] But nevertheless, a stay of the proceedings may be granted by the tribunal.[46]

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[43] *Ibid*. page 810

[44] Halsbury Laws of England, 4th Edition Vol. 2 Para. 515

[45] Section 14 (6), (7) and (8) of the Act as amended by the Amending Act.

[46] Section 14 of the Act

An arbitrator may be challenged on basis of various factors provided for under the Arbitration Act. First, an arbitrator may be challenged if there is reason to justifiably doubt his/her impartiality and independence. The fact that an arbitrator does not possess qualifications agreed to by the parties is also a potent reason for a challenge. However, a party who has appointed an arbitrator may only challenge him on basis of reasons that he becomes seized of after such appointment. The rationale here is to avoid a situation where a party appoints an arbitrator intending to challenge him/her later in the course of the arbitral proceedings as a delaying tactics. Hence the need to be cautious in making arbitrator appointments as the chance to challenge ones appointment is restricted.[47]

In the same vein, an arbitrator's office is to terminate in the event of his/her inability to perform the functions of the office of arbitrator or for any other reason fails to conduct the proceedings properly and with reasonable dispatch. In alternative, where an arbitrator resigns or parties agree to terminate his/her mandate, his office shall terminate.[48] But in the instances where the above grounds are contested, recourse is to be had to the High Court upon application of a party for a decision on the termination. Such decision shall be final and not subject to appeal. Where an arbitrator withdraws after challenge or parties agree to termination that shall not amount to acceptance of the ground cited for the challenge or removal.[49]

In the instance of termination of an arbitrator's mandate, another arbitrator shall be appointed as per the procedure applicable for appointment. The law stipulates instances where proceedings may be held afresh and when the proceedings may be upheld. Generally, orders and ruling of an arbitral tribunal are to be preserved despite change of composition of the tribunal except if successfully challenged by the parties. This is meant to ensure movement in arbitration.[50]

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[47] Section 13 of the Act

[48] Section 15 of the Act

[49] *Ibid.*

[50] Section 16 of the Act

Thus as a general rule, on application challenging an arbitrator or for removal of the same, the court may grant the application or dismiss it. In the former instance, the court will remove the arbitrator against whom the application is made and leave the matter of replacement to be undertaken as per the agreed procedure of appointment. In addition, especially where the issue is raised in the application, the court may declare the arbitrator's entitlement to fees and expenses or otherwise. In the same breath, the High Court may direct repayment and/or restitution by the arbitrator of any fees and/or expenses already disbursed to him/her.[51]

**4.5 Challenging the jurisdiction of the arbitrator(s)**

Generally, the doctrine of "*kompetenz kompetenz*" gives the arbitral tribunal the wherewithal to rule on its own jurisdiction. Such ruling may encompass matters including existence or validity of the arbitration agreement.[52] The fact that a party has appointed or participated in appointing an arbitrator is not a bar to challenging the jurisdiction of the arbitral tribunal.[53]

It is desirable that any challenge to the jurisdiction should be resolved as early as possible The Act requires that a plea of lack of jurisdiction be raised latest at submission of defence.[54] Where the plea is exceeding of jurisdiction, the same should be raised as soon as the matter alleged to be in excess of authority is raised in the proceedings.[55] However, the arbitral tribunal has the discretion to admit a later plea where it considers the delay justified.[56]

The arbitral tribunal has two options open to it when the question of jurisdiction is raised by a party. The arbitral tribunal may rule on the matter as a preliminary question or wait to address it in an arbitral award on the merits.[57] The ruling of the arbitral tribunal in the former instance may be challenged by the aggrieved party by way of an application to the High Court. Such

[51] Section 16A of the Act as amended by the amendment Act.

[52] Section 17 (1) of the Act as amended.

[53] Section 17 (4) of the Act

[54] Section 17 (2) of the Act

[55] Section 17 (3) of the Act

[56] Section 17 (4) of the Act

[57] Section 17 (5) of the Act

application must be made within 30 days of notice of the award[58] and the decision of the High Court shall be final.[59] But while the application is pending before the superior court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the application is decided, and such award shall be void if the application is successful.[60]

The application challenging the jurisdiction of the arbitral tribunal to the High Court shall be made by Originating Summons. The summons should be returnable on a fixed date before a judge in chambers and must be served on all parties to the arbitration and the arbitral tribunal at least 14 days before the return date.[61] Any application resultant of the Originating Summons shall be made in summons in the same cause and served at least seven days before the fixed hearing date fixed for it.[62]

## 5.0 INTERLOCUTORY APPLICATIONS IN ARBITRATION

As a matter of fact, arbitration proceedings witness diverse applications that mainly seek conservatory and protective orders in respect of the subject matter of arbitration. Essentially, these applications address the needs of the parties for immediate and temporary protection of rights and property pending discussion on the merits by the arbitration tribunal.[63] Invariably, the orders seek to protect and/or conserve the subject matter of the arbitration from dissipation. In other instances, for instance in an application for orders of security of costs, the aim is ensure the rights granted at conclusion of the arbitration via arbitral award are not in vain, that is, unenforceable. Basically, the Arbitration Act provides for interlocutory applications, whether before and during arbitration, in section 7 and 18 of the Act. The application for such interim reliefs may be before the arbitral tribunal or the court where the tribunal is yet to convene or be constituted.

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[58] Section 17 (6) of the Act

[59] Section 17 (7) of the Act

[60] Ibid.

[61] Rule 3(1) of the Arbitration Rules, 1997

[62] Rule 3(2) of the Arbitration Rules, 1997

[63] David E. Wagoner, "Interim relief in International Arbitration" (1996) 62 (2) *Arbitration* 131

### 5.1 Interim applications under section 7 of the Act

The courts have wide powers to make orders relating to interim orders for the purpose of preserving the status *quo* pending and during arbitration. Section 7 of the Act limits parties' freedom to contract any arbitration agreement that limits and/or bars seeking interim measures of protection in court. The jurisdiction to make such orders is the preserve of the High Court of Kenya. The courts have jurisdiction to make such orders as preserve the status quo of the subject-matter of the arbitration. The powers could include those of making orders for preservation like attachment before judgment; interim custody or sale of goods (e.g. perishables) the subject matter of the reference or for detention or preserving of any property or thing concerned in the reference, appointing a receiver and interim injunctions.

In ***Forster-v-Hastings Corporation (1903) 87 LT 736*** it was held that the court, in order to preserve the status *quo*, in a case where one of the parties to a contract had given a notice purporting to dismiss the contractors, could restrain the other party from acting on the notice until judgement or further order, or until a reference to arbitration as provided for by the contract.

In ***Don-wood Co. Ltd-v-Kenya Pipeline Ltd***[64] Ojwang J dealt with application for interim injunctive orders pending arbitration. The Defendant in the case had declined arbitration and was doing everything to avoid the obligations under the contract. The judge granting the orders sought found that the jurisdiction to grant the injunctive relief under section 7 of the Arbitration Act was meant to preserve the subject matter of the suit pending determination of the issues between the parties.

However, it is important to note that the law discourages the parties from making parallel applications before the arbitral tribunal and/or the High Court. Section 7 (2) of the Act enjoins the court to adopt any ruling or finding on any relevant matter to the application as conclusive. There is no question that the section applies even where the ruling is final on a matter so as to prevent appeals on arbitral rulings on applications. The rationale here is to prevent multiple applications, situations of delay occasioned by applications, or parties

[64] HCCC No. 104 of 2004

seeking to clog and/or stall arbitral proceedings by making frivolous applications under the section.

**5.2 Interim applications under section 18 of the Act**

Save where the parties otherwise agree, an arbitral tribunal may, on the application of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject- matter of the dispute, with or without an ancillary order requiring the provision of appropriate security in connection with such a measure; or order any party to provide security in respect of any claim or any amount in dispute; or order a claimant to provide security for costs.[65]

The Act gives the High Court power to enforce the peremptory orders of protection given by the arbitral tribunal. In order to enforce such protective measure or generally to exercise the power associated with the interim protective measures, the tribunal or a party with approval of the arbitral tribunal may apply for assistance of the High Court.[66] The High Court has equal powers as possessed by the arbitral tribunal with regard to interim measures of protection under the Act. In particular, the High Court's power shall be equivalent to that which it wields in civil proceedings before it. However, the arbitral proceedings shall continue regardless of the fact that such an application is pending in the High Court except where the parties agree otherwise.[67]

**5.3 Application for security for costs**

Although application for orders for security for costs is provided for under section 18 of the Act (as amended), it is so special an order to merit consideration if only to emphasise its utility and versatility. Given the enormity of costs that, at times, attend arbitration, the law allows the arbitrator on application and, in limited instances, to require security for costs from a party on application by the opposite party. The party applying may specify the preferred form of security whether cash or bond or a guarantee. As in court proceedings, security for costs ensure that enforceability of award of costs in favour of one party is not frustrated by inability to pay on the part of the party against whom they are made.

[65] Sec. 18 (1) (a) (b) and (c) of the Act.

[66] Section 18 (2) of the Act

[67] Section 18 (3) of the Act

In addition to section 18, the Chartered Institute of Arbitrators-Kenya Branch Arbitration Rules 16(C) 9 gives the tribunal jurisdiction to make orders for security of a party's costs. There is nothing that forbids parties from agreeing on the matter of orders for security for costs or even consent to allow the arbitrator to make the orders.

## 6.0 PRELIMINARY MEETING[68]

The arbitral tribunal is appointed to take such procedural power either as parties have agreed upon[69] and failing an agreement under subsection 1, in the manner it considers appropriate, having regard to the desirability of avoiding unnecessary delay or expense while at the same time affording the parties a fair and reasonable opportunity to present their cases.[70]

The aim is to enable it determine the substantive dispute between the parties and make an arbitral award binding and final as against the parties. The arbitration laws require the arbitrator to act fairly. Basically, this implies securing each party's right to fair hearing. In essence, the arbitrator is under an obligation to given all the parties equal and reasonable opportunity to present and ventilate their case.[71] However, even then, the arbitrator is in-charge of the arbitration proceedings and must utilise his discretionary powers to ensure that parties to not abuse the arbitral process or unnecessarily occasion delays. The arbitrator should thus adopt such procedures as limit delays, and by extension, resultant costs of arbitration.[72] Equally, the parties to arbitration shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings.[73]

The arbitrator usually calls for a preliminary meeting with the parties and sends the meeting's agenda to accompany the notice for the meeting. The utility of preliminary meeting is mainly to help clarify and make certain matters arising under the arbitration so as to avoid misunderstandings and delays in future. The preliminary meeting provides a setting for each

[68] See Bernstein *Supra* on "The Preliminary Dialogue" p. 126-130

[69] Section 20(1) of the Act

[70] Section 20(2) of the Act as amended

[71] Section 19 of the Act

[72] A. Ali "Interlocutory (Intermediate) Matters" an unpublished paper presented at Chartered Institute of Arbitrators-Kenya Branch entry course held at Nairobi on 20th and 21st August, 2007

[73] Section 19A of the Act.

party to assess each other's case and an opportunity for them to narrow the dispute to specific issues amenable to a decision by the arbitrator. This meeting gives each party a chance to hear the other's side of the story and, therefore, be able to appraise the strength's and weaknesses of its case in comparison with that of the opposing party. The Arbitrator keeps the minutes of the preliminary meeting. As a matter of procedure, a signed copy of the minutes should be sent to each party for record purposes.[74]

**7.0 ARBITRATOR'S DIRECTIONS**

The arbitrator(s) normally issue directions after preliminary meeting addressing issues of administrative interest that are not addressed fully or at all in the party's agreement. Firstly, directions indicate the time table for the first stage of the arbitration e.g. filing of pleadings, applications, discovery and inspection and seeking further and better particulars. It is also the purpose of directions to set-out matters relating to general conduct of the arbitration. Here, the directions address matters to do with addresses and mode of delivery of notices.

The directions also stipulate the procedures of party communications to the arbitrator. For example, such communications should be copied to the other party and that inter-party correspondences should not be sent to the arbitrator as to avoid entangling the arbitrator in the dispute and cause him/her to lose objectivity. Directions also set-out the form the arbitration will take e.g. oral, documents only or by inspection and the applicable rules of procedure and evidence. The arbitrators also outline limits of recoverable costs of arbitration through directions. A party is at liberty to apply challenging any matter contained in the directions if s/he has a valid point in his/her favour.

Parties are bound to comply with the arbitrators directions failing which the arbitrator must give a notice outlining the default and calling upon the party to remedy the same. In event of failure by the defaulting party to remedy or continuation of default the law gives the arbitrator a number of options. However, the arbitrator must exercise due caution and ensure all reasonable effort is expended to give the defaulting party an opportunity to remedy the state of affairs.[75]

[74] See the Appendix for a complete list of the agenda for the preliminary meeting.

[75] Section 26 of the Act

For instance, the law allows an arbitrator proceed *ex-parte* where a party fails to appear despite grant of adjournments by the arbitrator and notices of hearings being served.[76] Thus where even after such reasonable efforts the party persists in absence or failure to produce, the arbitrator may make an award based on evidence available notwithstanding the absence or the failure by such party.[77] Unless otherwise agreed by the parties, if, without sufficient cause;

- a party fails to comply with any order or direction of the tribunal, the tribunal may make a peremptory order to the same effect, prescribing a time for compliance with the order;[78]

- a party fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim;[79]

- a party fails to comply with any other peremptory order, the tribunal may;[80]
  (i) direct that the party in default shall not be entitled to rely on any allegation or material that was the subject matter of the order;

  (ii) draw such adverse inferences from the non-compliance as the circumstances justify;

  (iii) proceed to an award on the basis of such materials as have been properly provided to it;

  (iv) make such order as it thinks fit as to the payment of costs of the arbitration incurred as a result of the non- compliance.

Thus the tribunal will require the claimant to prove its case as against the respondent and forbids summary awards.

Importantly, 'party's autonomy' permits parties to agree on any matter. Where parties have agreed on a given matter, the arbitrator should not give directions or deviate from the same.

[76] Section 26(c) of the Act.

[77] Section 26(b) of the Act

[78] Section 26 (e)

[79] Section 26 (f)

[80] Section 26 (g)

By way of exclusion agreement, for instance, parties can agree to exclude or regulate certain rights left to their discretion under the Act e.g. right to appeal or apply to court for determination of questions of law. In event of such exclusion agreement, then the parties or their legal representatives draft an exclusion agreement to the effect which the joint sign and serve to the notice of the arbitrator.[81]

## 8.0 PLEADINGS IN ARBITRATION

The term "pleadings" above is used loosely to imply all documents that serve to identify issues in the party's dispute to the arbitrators. The parties, having appointed the arbitrator and agreed on procedure and other matters, need to identify the issues in dispute between them as that is the only way the arbitral tribunal can set out to arbitrate the matter and make a decision. The parties identify issues between them by utilising methods that have been adapted for raising claims and lodging defence against a claim raised.

It is through those methods that parties identify issues between them and articulate their case and the remedies sought against the other party in the arbitration. That way, each party becomes certain of his or her case and that of the other party. Consequently, certainty and finality are injected to the arbitration process as the parties are bound by the issues they raise and cannot deviate from them or amend the case without following due procedure.[82] It would border on chaos if parties were to have had no written statement of their claim and defence as on every turn of evidence likely injurious on ones case, a shift would be expected on his previous claim or defence.

Parties are afforded diverse devices for identifying issues in dispute between them in arbitration. The most popular are pleadings and statement of case. However, parties may also opt to define issues arising for arbitration in a schedule or even have correspondence stand in the place of statement of case.

### 8.1 Pleadings

Pleadings are an inheritance from litigation and court procedure. Generally, the rules of procedure define pleadings as a brief summary of the facts of the claim and defence against claim. Pleadings should not raise matters of evidence. Similarly, parties ought not to plead

[81] A.Ali *Supra*

[82] See below on amendment of pleadings

the law. The main pleadings are statement of claim, statement of defence and/or counterclaim, statement of reply and/or counterclaim.[83] As a rule of thumb, pleadings should as far as possible be rendered in clear, concise and in simple language. Otherwise one risks the opposite party and even the arbitral tribunal failing to grasp the gist of their case. However, pleadings as known to litigation are limited in that they are only amenable to instances where parties have a cause-of-action e.g. a claim for a piece of land or breach of contract.

Section 24(1) of the Act seems to endorse pleadings in that it requires the claimant to state the facts supporting his claim, the points at issue and the relief sought. Similarly, the respondent is directed to state his defence in respect of the particulars contained the statement of claim. However, the parties are free to agree on the contents of both statement of claim and defence.

**8.2 Statement of case (Statement of Truth)**

Pleadings have been criticised for their tendency, especially in the hands of crafty lawyers, to cloud rather than clarify issues. The use of statement of case can help cure this disadvantage. In this case, the claimant delivers to the arbitral tribunal a statement of his/her case setting out in prose and narrative form the material facts he relies on, any evidence he wishes to rely on and any arguments of law that he intends to urge in support of the claim. The statement is delivered within the period stipulated in the tribunal's directions. Then, within the period set out for reply, the respondent party delivers to the tribunal his/her statement of reply to the claimant's claim. The statement of reply/response invariably indicates which facts are accepted and/or disputed, which parts of the claim's legal argument are accepted and/or disputed. The statement of reply may also state the respondent's counterclaim as reply to the claimant's or even outline a right to a set-off.[84]

The main advantage of statement of case is that they encourage flow and are, therefore, easily understandable. By avoiding the format known to pleadings, which has perfected the art of concealing rather than revealing facts to the opponents, statements of case define issues before the tribunal and increase expediency of the process. The practice is to keep the statement of case short and to the point. In fact, the practice is that the tribunal gives

[83] For more details, see Order VII of the Civil Procedure Rules titled "Pleadings generally."

[84] See section 24 (1) and (2) of the Act

directions if it prefers the statement of case to exhaust the issues in the matter or merely the summary and if the parties are required to append their documentary evidence to the statement of case.[85]

### 8.3 Defining issues in a schedule

This method is used mainly in matters like building and construction arbitrations where there are many issues or potential issues for decision. It seems most suited as a supplement to the other methods rather than as a stand-alone method. The claim on each issue, the defence and reply are set out in schedule form for the arbitrator to see them all in one document and maybe one sheet of paper.[86]

### 8.4 Correspondence between parties as Statement of Case

Often, the parties to arbitration will have exchanged correspondence before and after reference to arbitration regarding the matter in dispute in the hope of reaching a settlement. Such correspondence from the claimant may become the statement of claim upon order of the arbitrator pursuant to an application by the claimant. But the letters must be few otherwise adopting them as statement of case may defeat the objective of expediting the arbitral process. If correspondence is adopted as the statement of case only, the defendant is directed to deliver statement of reply to the claim embodied in the correspondence. In other instances, both claim and defence are set-out in the correspondence and all an arbitrator needs to do is to give directions identifying those that outline the claim on the one hand and those that outline defence on the other.[87]

## 9.0 PRE-HEARING STEPS IN ARBITRATION

There are a number of pre-hearing procedures but the most outstanding are seeking further (and better) particulars, discovery (disclosure and inspection) and amendment of pleadings.

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[85] See also section 34(2) (C) of the Arbitration Act, 1996 (UK)

[86] Bernstein R, The Handbook on Arbitration Practice (London: Sweet & Maxwell, 1998) p.132

[87] Bernstein *supra*

### 9.1 Further and better particulars

Further and better particulars are mainly a delicacy for lawyers. They owe their origin to adoption of litigation practices into arbitration as they are regular in the court process. Each party is entitled to request for particulars to elaborate on matters raised in the pleadings. So a party may seek particulars in an instance where the other states that "it was settled between the parties" without indicating the where, when and what of the settlement.

Even where a party responds to the first request for particulars, the other may press for further and better particulars. For instance in the instant case, where the reply is that the settlement was for set-off of the dispute, a request for further and better particulars may be sought on what was the basis of the set-off and what that other party's claim as against the other was so that they could end-up reaching a settlement for set-off. It falls on the arbitrator to give directions on necessity of the particulars after hearing the parties and to keep each from going beyond the original scope of the pleadings or argument on record.

### 9.2 Discovery (disclosure and inspection)

Each party is entitled to know the existence of all documents relevant, whether privileged or not, in possession, custody or power of the other party. This helps limit instances of trial by ambush, one of the draw-backs of the adversarial system. However, a party may only insist on and be allowed to inspect those that are not privileged. The arbitrator is to give directions on discovery and should restrict disclosure to only the relevant documents.[88]

### 9.3 Amendment of pleadings

A party may need to amend pleadings on record. For instance, the need could occur after response to request for particulars to disclose an issue not addressed in the present pleadings. The arbitrator may give leave for amendment of pleadings unless parties have otherwise agreed. Section 24(3) of the Act allows the arbitrator discretion to decline or allow amendments or supplements to pleadings where they are likely to result in delay of the arbitral proceedings.

[88] A. Ali *Supra*

## 10.0 CONCLUSION

The paper has grappled with an exposition of preliminary proceedings and interlocutories. Preliminary proceedings and interlocutories are indispensable as they lay the foundation upon which the arbitration proper proceeds. To advance the analogy of the birth, immunization and weaning of a child adopted at introduction, preliminary proceedings are the childhood of arbitration. If arbitration proceedings were human, preliminary proceedings would embody the childhood, the arbitration hearing the teenage and youth-as this is where growth and much ground is covered and, lastly arbitral award is the adulthood. Thus, if the arbitration proceedings survive the rigours and vagaries of preliminary proceedings, they mature to arbitration hearing and then progress to adulthood-a final and an enforceable award. The parties are, as pointed out, at liberty to make applications to the arbitrator until the termination of the latter's mandate just like a grown up never outgrows childhood. Indeed, the arbitrator allows the parties "the liberty to apply." (These words appear at the end of every order for directions).